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DIVISION II

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STATE OF WASHINGTON  
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NO. 37704-7-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**MATTHEW SCOTT PENA,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it entered findings of fact 2, 3, 4, 5 and 6 because they are not supported by substantial evidence.
2. The trial court erred when it granted the state's motion to modify a sentence authorized by law because the motion was untimely.
3. The trial court erred when it imposed community custody conditions that were not authorized by law.

### ***Issues Pertaining to Assignment of Error***

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?
2. Does a trial court err if it grants a state's untimely motion to modify a sentence authorized by law?
3. Does a trial court err if it imposes community custody conditions not authorized by law?

## **STATEMENT OF THE CASE**

By information filed April 4, 2007, the Clark County Prosecutor charged the defendant Matthew Scott Pena with three counts of identity theft, all committed on April 2, 2007. CP 1-2. On May 9, 2007, the defendant pled guilty and was sentenced on count I upon the state's agreement to recommend 22 months in prison on a range of 22 to 29 months and to dismiss Counts II and III. CP 3-15. The written statement of defendant on plea of guilty gives the following as the prosecutor's recommendation:

Upon plea to Count 1, state will move to dismiss Counts 2 & 3, recommend 22 months, CTS 37 days, 9-18 months community custody, VCF \$500, \$700 costs, \$100 DNA, \$500 fine, restitution to be set, no contact with Andrea Holburten for 5 years, no possession of other person's credit/access card.

CP 7.

The written statement of defendant on plea of guilty did include a section indicating that if the defendant was pleading guilty to a "crime against persons as defined by RCW 9.94A.411(2)" he would be subject to community custody at a range of 9 to 18 months or the length of good time, whichever was greater. CP 6. However, the statement of defendant on plea of guilty did not inform the defendant whether or not he was pleading to a "crime against persons as defined by RCW 9.94A.411(2)." CP 3-15.

At the guilty plea hearing, the prosecutor did not exactly follow what the written statement of defendant on plea of guilty indicated would be the

prosecutor's recommendation. RP 1-10. Rather, the prosecutor made the following recommendation, which did not include community custody:

MR. SHANNON: Your Honor, the state's recommendation will be 22 months at DOC with credit for time served of 37 days, along with standard fines, fees and costs and no contact with the victim.

And I believe there's victim impact statements -- in the first file.

RP 6-7.

Following a brief statement by the defendant and his attorney, the court followed this oral recommendation by the state in part and imposed 22 months in prison, credit of 37 days served, standard costs and fines, and a no contact order. RP 9. The court did not impose community custody. *Id.* The court stated:

THE COURT: -- you're going to be spending a lot of time in prison unless you stay clear of this kind of behavior.

Well, I'll follow the recommendations, then, here for 22 months and credit for any time served, also impose the additional conditions there. I'll waive the fine, but require restitution by imposed and impose the other financial obligations. I suspect you probably already have some financial obligations from these other offenses here, so when you get out of prison you're gonna have to start pursuing employment rather than this type of activity.

RP 9.

The written judgement and sentence the court signed contemporary with the oral imposition of this judgement exactly reflects the court's oral statement. CP 17-34. In it, the court hand wrote in 22 months prison with 37

days community custody on page five of the document and crossed out the fine on page four of the document. CP 20-21. The court did not check the box to impose community custody and did not fill in an amount for the community custody range. RP 22. However, the proposed judgment and sentence the prosecutor handed to the court did include the following preprinted community custody conditions with the boxes already checked:

- ☒ Defendant shall undergo an evaluation for treatment for  substance abuse  mental health  anger management treatment and full comply with all recommended treatment.
- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a  substance abuse  mental health  anger management treatment  parenting program as established by the community corrections officer and/or the treatment facility.

CP 24.

Following imposition of this sentence, the court remanded the defendant to the custody of the Department of Corrections to serve his sentence. CP 38.

On April 2, 2008, almost 11 months after the court imposed sentence in this case, the Clark County Prosecutor filed a motion to modify the judgment and sentence to add 9 to 18 months community custody. CP 90-91. The defendant filed a written response in opposition to the motion. CP 61-89. The prosecutor had previously secured an order to transport the defendant from the prison at Monroe to the Clark County Jail. CP 59-60.

The parties then appeared before the court on April 2, 2008. RP 11-28. Following brief argument, the court granted the state's motion. *Id.* Two weeks later, the court entered the following findings of fact, conclusions of law, and order amending judgment and sentence. CP 93-94.

### **FINDINGS OF FACT**

1. On May 9, 2007, the defendant plead guilty to Identity Theft in the Second Degree;
2. That the defendant was informed at the time of entry [of] his plea of the requirement of Community Custody;
3. That RCW 9.94A.715 requires a term of Community Custody for Identity Theft in the Second Degree for a person sentenced to a prison term;
4. That the Court on May 9, 2007, stated the State's recommendation was accepted and followed it in imposing sentence in this case;
5. That the Court in pronouncing the sentence on May 9, 2007, intended to follow the statutes requiring imposition of Community Custody; and
6. That the failure to impose the Community Custody in this case was a clerical error.

### **CONCLUSIONS OF LAW**

1. The court has jurisdiction over the matter
2. The court is required to order community custody pursuant to RCW 9.94A.715.
3. Section 4.6, page 7 shall be corrected to state that the defendant is to be on Community Custody for 9-18 months or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and

(2), whichever is longer.

4. The Clerk shall transmit a copy of this order to the Department of Corrections.

CP 93-94.

Following imposition of this sentence modification, the defendant filed timely notice of appeal. CP 95.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT 2, 3, 4, 5 AND 6 BECAUSE THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the defendant has specifically assigned error to findings of fact 2, 3, 4, 5, and 6. These findings stated as follows:

1. On May 9, 2007, the defendant plead guilty to Identity Theft in the Second Degree;
2. That the defendant was informed at the time of entry [of] his plea of the requirement of Community Custody;
3. That RCW 9.94A.715 requires a term of Community Custody

for Identity Theft in the Second Degree for a person sentenced to a prison term;

4. That the Court on May 9, 2007, stated the State's recommendation was accepted and followed it in imposing sentence in this case;

5. That the Court in pronouncing the sentence on May 9, 2007, intended to follow the statutes requiring imposition of Community Custody; and

6. That the failure to impose the Community Custody in this case was a clerical error.

CP 93-94.

In the second finding, the court claimed that the defendant was informed at the time he entered his plea that community custody was mandatory. In fact, the record does not support this conclusion. As far as counsel can tell, the phrase "community custody" was not even uttered during the guilty plea colloquy and the sentencing. In addition, while the statement of defendant on plea of guilty does have a generic paragraph on community custody, it only tells the defendant that community custody will apply if the defendant has committed a "crime against persons." The guilty plea does not define this phrase and certainly doesn't tell him that he was pleading to one of this class of crimes. Thus, substantial evidence does not support this finding.

The third finding of fact in this case states that "RCW 9.94A.715 requires a term of Community Custody for Identity Theft in the Second

Degree for a person sentenced to a prison term.” This is actually a conclusion of law and has nothing to do with the facts of this case. However, to the extent that this court finds this to be a finding of fact, the defendant assigns error to it. Even as a conclusion of law it is not entirely accurate in that there are alternate sentencing options for the defendant’s crime (an exceptional sentence, for example) that would not compel the use of community custody under RCW 9.94A.715. Thus, this finding is in error.

The fourth finding of fact in this case was that “the Court on May 9, 2007, stated the State’s recommendation was accepted and followed in imposing sentence in this case.” In fact, a review of the record reveals that the court did follow most of the state’s oral recommendation, except the request for a fine, which the court rejected. The court did not follow all of the written recommendations contained in the statement of defendant on plea of guilty. Thus, this finding is unsupported by substantial evidence.

The court’s fifth finding was that “the Court in pronouncing the sentence on May 9, 2007, intended to follow the statutes requiring imposition of Community Custody.” Absolutely nothing within the record supports this conclusion. The court made no such statement at the time of sentencing and its failure to write in a community custody range or check the box requiring community custody, seen in light of the fact that the court did add and subtract other items from the written judgment and sentence, strongly

militates in favor of the opposite conclusion. Thus, this finding is unsupported by substantial evidence in this case.

The sixth finding in this case was that “the failure to impose the Community Custody in this case was a clerical error.” Nothing in the record supports this conclusion. Had the court orally stated that it was going to impose community custody, or had the court actually addressed a community custody requirement, then there might be some evidence from which to conclude that the court made a “clerical error” when it failed to check the box for community custody, failed to write in a community custody term, and when it failed to orally address any community custody conditions. However, these things did not occur in this case. Thus, there is no evidence at all that the trial court simply made a “clerical error” in this case.

## **II. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE’S MOTION TO MODIFY A SENTENCE AUTHORIZED BY LAW BECAUSE THE MOTION WAS UNTIMELY.**

In the case at bar, the defendant concedes that RCW 9.94A.715 requires the imposition of community custody for crimes against persons such as identity theft. The first section of this statute states:

(1) When a court sentences a person to the custody of the department for . . . any crime against persons under RCW 9.94A.411(2), . . . the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. . . .

RCW 9.94A.715.

In fact, in 2006, the legislature specifically amended the definition of “crimes against persons” found in RCW 9.94A.411(2) to include both degrees of identify theft. However, this fact does not mean that the trial court erred in this case when it imposed the original sentence. Rather, what the trial court did by failing to impose community custody under RCW 9.94A.411(2), was to impose an exceptional sentence below the standard range without entering supporting findings. Under RCW 9.94A.535, the court had authority to depart from the requirements of a standard range sentence. The first portion of the first section of this statute states:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

RCW 9.94A.535 (1) (in part).

The imposition of a term of community custody either above or below the term of community custody mandated by RCW 9.94A.715 or any other section of the sentencing reform act is specifically allowed as part of a sentence outside the standard range. For example, in *In re Smith*, 139 Wn.App. 600, 161 P.3d 483 (2007), the sentencing guidelines commission specifically appealed an exceptional sentence that included a term of

community custody outside the range specifically mandated under the sentencing reform act. The commission argued that the court only had the authority to vary from the standard range of incarceration, not from the standard range of community custody. The court of appeals rejected this argument, and held that the trial court did have authority to as part of an exceptional sentence to go outside the standard range of community custody.

In the case at bar, this is precisely what the trial court did. It went outside the term required for community custody and thereby imposed an exceptional sentence. It is true that it did so without entering the required findings in this case. However, this was an error that the state had the right to appeal. Under RCW 9.94A.535(2), the state had the right to appeal this sentence. This section states:

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.

RCW 9.94A.535(2).

Under the rules for appellate procedure, the state had the right to initiate an appeal from the sentence in this case and was required to file a notice of appeal with the superior court clerk to do so. Under RAP 5.2(a), the state had 30 days within which to do this. Since the state never did appeal from the sentence in this case, the state lost the authority to seek review of the

exceptional sentence the trial court imposed. Consequently, the trial court in this case erred when it allowed the state to seek modification of an exceptional sentence specifically allowed under the sentencing reform act. As a result, this court should vacate the trial court's modification of the sentence in this case.

### **III. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS THAT WERE NOT AUTHORIZED BY LAW.**

In Washington, the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant argued that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced

him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims, the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

The same situation exists in the case at bar as existed in *Jones*. In the case at bar, the trial court imposed the following two community custody conditions:

- ☒ Defendant shall undergo an evaluation for treatment for  substance abuse  mental health  anger management treatment and full comply with all recommended treatment.
- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a  substance abuse  mental health  anger management treatment  parenting program as established by the community corrections officer and/or the treatment facility.

CP 24.

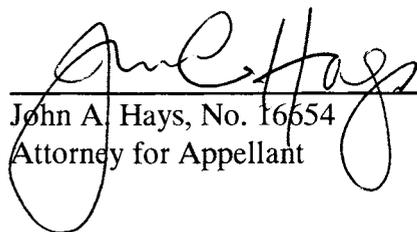
In the case at bar, as in *Jones*, there was nothing inherent in the charge to indicate that anger management treatment would be “reasonably related” to the defendant’s offense. Neither was anything said during the guilty plea colloquy or during the two sentencing hearings to indicate that the defendant even had an anger management problem, much less that it was somehow “reasonably related” to the offense the defendant committed. Indeed, given the total absence of any comments or claims regarding anger management, one is left to wonder whether or not the prosecutor’s legal assistants who prepared the judgement and sentence simply hit an incorrect key and included these two conditions. As a result, this court should remand this case back to the trial court with instructions to vacate these two conditions.

## CONCLUSION

The trial court erred when it modified the sentence imposed in this case and added a requirement of 9 to 18 months community custody. In the alternative, the trial court erred when it imposed community custody conditions not authorized by law.

DATED this 25 day of September, 2008.

Respectfully submitted,



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Attorney for Appellant

## **APPENDIX**

### **RCW 9.94A.535 (in part)**

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

**RCW 9.94A.715(1)**

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, or when a court sentences a person to a term of confinement of one year or less for a violation of RCW 9A.44.130(10)(a) committed on or after June 7, 2006, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

