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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON NO. 38112-5-II

BY  DEPUTY

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

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STATE OF WASHINGTON,

Respondent,

v.

MARTIN ERNEST CURRY,

Appellant.

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

The Honorable Diane Woolard, Judge

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BRIEF OF APPELLANT

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P.M. 2-9-09

**TABLE OF CONTENTS**

	Page
<b>A. ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>1. THE TRIAL COURT ERRED IN IMPOSING A 60-MONTH NO-CONTACT CONDITION ON 24-MONTH SUSPENDED MISDEMEANOR SENTENCE. ....</b>	<b>1</b>
<b>2. THE TRIAL COURT ERRED BY IMPOSING 24-MONTH SENTENCES ON TWO THIRD DEGREE ASSAULTS EACH WITH A 4-12 MONTH STANDARD RANGE SENTENCE ENHANCED BY A 6 MONTH WEAPON ENHANCEMENT. ....</b>	<b>1</b>
<b>B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>1. THE TRIAL COURT SENTENCED MR. CURRY TO A 24-MONTH SUSPENDED SENTENCE WITH CERTAIN PROBATION CONDITIONS. ONE OF THE CONDITIONS, A NO CONTACT PROVISION, REQUIRED MR. CURRY TO HAVE NO CONTACT WITH HIS EX-WIFE FOR 60 MONTHS. CAN THE TRIAL COURT IMPOSE A PROBATION THAT EXCEEDS THE LENGTH OF THE SUSPENDED SENTENCE? 1</b>	
<b>2. BASED ON HIS CURRENT CONVICTIONS AND CRIMINAL HISTORY, MR. CURRY'S STANDARD RANGE SENTENCE ON BOTH OF HIS THIRD DEGREE ASSAULT CONVICTIONS IS 4-12 MONTHS PLUS AN ADDITIONAL 6 MONTHS EACH FOR A WEAPON ENHANCEMENT. YET, THE TRIAL COURT IMPOSED A 24-MONTH SENTENCE ON EACH COUNT. ARE THE 24-MONTH SENTENCES ERRONEOUS?.....</b>	<b>2</b>
<b>C. STATEMENT OF THE CASE.....</b>	<b>2</b>

**D. ARGUMENT .....4**

**1. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY IMPOSING A 60-MONTH SENTENCING CONDITION ON A 24-MONTH MISDEMEANOR SUSPENDED SENTENCE.....4**

**2. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT GAVE MR. CURRY SENTENCES THAT ARE 6 MONTHS TOO LONG.....6**

**E. CONCLUSION .....7**

**TABLE OF AUTHORITIES**

Page

**Cases**

*In Re Person Restraint Petition of Fleming*, 129 Wn.2d 529, 919 P.2d 66 (1996) .....6

*In re Restraint of Cadwallader*, 155 Wn.2d 867, 123 P.3d 456 (2005) .....5

*State v. Parker*, 132 Wn.2d 182, 937 P.2d 575 (1997).....5

*State v. Wiley*, 124 Wn.2d 679, 880 P.2d 983 (1994).....6

**Statutes**

RCW 3.50.330 .....5

RCW 9.94A .....6

**Other Authorities**

Sentencing Reform Act of 1981 (SRA) .....6

**A. ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT ERRED IN IMPOSING A 60-MONTH NO-CONTACT CONDITION ON 24-MONTH SUSPENDED MISDEMEANOR SENTENCE.**
- 2. THE TRIAL COURT ERRED BY IMPOSING 24-MONTH SENTENCES ON TWO THIRD DEGREE ASSAULTS EACH WITH A 4-12 MONTH STANDARD RANGE SENTENCE ENHANCED BY A 6 MONTH WEAPON ENHANCEMENT.**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT SENTENCED MR. CURRY TO A 24-MONTH SUSPENDED SENTENCE WITH CERTAIN PROBATION CONDITIONS. ONE OF THE CONDITIONS, A NO CONTACT PROVISION, REQUIRED MR. CURRY TO HAVE NO CONTACT WITH HIS EX-WIFE FOR 60 MONTHS. CAN THE TRIAL COURT IMPOSE A PROBATION THAT EXCEEDS THE LENGTH OF THE SUSPENDED SENTENCE?**
- 2. BASED ON HIS CURRENT CONVICTIONS AND CRIMINAL HISTORY, MR. CURRY'S STANDARD**

**RANGE SENTENCE ON BOTH OF HIS THIRD DEGREE ASSAULT CONVICTIONS IS 4-12 MONTHS PLUS AN ADDITIONAL 6 MONTHS EACH FOR A WEAPON ENHANCEMENT. YET, THE TRIAL COURT IMPOSED A 24-MONTH SENTENCE ON EACH COUNT. ARE THE 24-MONTH SENTENCES ERRONEOUS?**

**C. STATEMENT OF THE CASE**

A Clark County jury convicted Martin Curry of two counts of third degree assault on police officers and one count of resisting arrest. CP 5-6, 43-45. Both of the assault charges included findings that Mr. Curry was armed with a deadly weapon. CP 48-49. The same jury could not reach a unanimous verdict on a second degree assault, domestic violence, charge. 4RP 348; CP 5-6. A mistrial was declared on that charge by agreement of the parties. 4RP 349.

Prior to sentencing, Mr. Curry and the prosecutor struck a deal: Mr. Curry would agree to the entry of a domestic violence no-contact order with his wife; in exchange, the prosecutor would not re-file the second degree assault charge. 5RP 366. Melinda Curry,

Mr. Curry's wife, was the named victim of the second degree assault. CP 5-6.

At sentencing, Mr. Curry faced a 4-12 month standard range on each third degree assault charge. 5RP 360-61. Mr. Curry also faced an additional 6 month sentence on each charge based on each weapon enhancement. 5RP 361. Accordingly, Mr. Curry's maximum sentence on each count was 10-18 months. At the prosecutor's urging, the court imposed the high end, 12 months, on each standard range. 5RP 362, 378. With the enhancement time added to each count, the accurate sentence was 18 months on each count. However, the felony judgment and sentence reflects that Mr. Curry received 24 months on each count. CP 64. The court also entered a 5-year domestic violence no contact order prohibiting Mr. Curry from having contact with Melinda Curry. CP 74-75. Finally, the court ordered Mr. Curry to be on community custody with the state Department of Corrections (DOC) for 9-18 months. CP 65.

On the resisting arrest, the court also imposed the maximum sentence, 90 days, with no credit for time served and all 90 days suspended for 24 months. CP 51, 52. The court also required that Mr. Curry be on probation with DOC for 24 months and to abide by

certain conditions. CP 52, 55-58. One of those conditions was to have no contact with Melinda Curry for 60-months. CP 57.

Mr. Curry did not object to any part of his felony or misdemeanor judgment and sentence.

Mr. Curry appeals all parts of his judgment and sentence. CP 76-99.

**D. ARGUMENT**

**1. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY IMPOSING A 60-MONTH SENTENCING CONDITION ON A 24-MONTH MISDEMEANOR SUSPENDED SENTENCE.**

The trial court erred by imposing a 60-month probation condition on a 24-month suspended sentence. As such, Mr. Curry is entitled to remand to shorten the no-contact provision to 24 months in keeping with the length of his suspended sentence and the authority of the court.

Mr. Curry did not object to the 60-month no contact condition on his 24-month suspended sentence. However, where a sentence exceeds the court's sentencing authority, the error may be raised

for the first time on appeal. *In re Restraint of Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005); *State v. Parker*, 132 Wn.2d 182, 188-89, 937 P.2d 575 (1997). A suspended sentence on a simple misdemeanor cannot exceed two years. RCW 3.50.330. As such, conditions that a defendant must abide by during the period of suspension, cannot exceed the period of suspension.

In Mr. Curry's case, the trial court imposed a 24-month suspended sentence on his resisting arrest simple misdemeanor conviction. As a condition of the suspended sentence, the court placed Mr. Curry on 24-months of state DOC supervised probation and ordered compliance with certain conditions as set out in Appendix A of the misdemeanor judgment and sentence. CP 55-58. One of the conditions of the suspended sentence was that he could not have contact with his wife, Melinda Curry, for 60 months. But the 60-month condition exceeds the trial court's jurisdiction over the sentence by 36-months. The extra 36 months on the non-contact condition is error. Mr. Curry is entitled to remand to have his misdemeanor sentence corrected to reflect that the no-contact provision cannot exceed 24 months.

**2. THE TRIAL COURT EXCEEDED ITS SENTENCING  
AUTHORITY WHEN IT GAVE MR. CURRY  
SENTENCES THAT ARE 6 MONTHS TOO LONG.**

The maximum sentence Mr. Curry could receive on each of his third degree assault convictions was 18 months. Yet the trial court imposed 24-month sentences on each count. Mr. Curry is entitled to remand to correct the sentencing error.

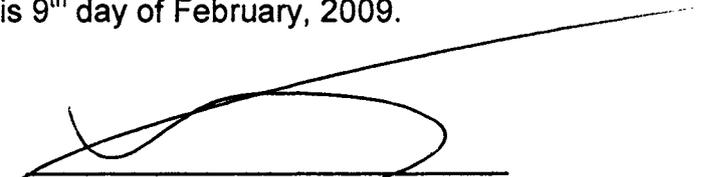
Illegal or erroneous sentences may be challenged for the first time on appeal. *In Re Person Restraint Petition of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996). Here, the trial court imposed an erroneous sentence on both of Mr. Curry's third degree assault convictions. The Sentencing Reform Act of 1981 (SRA), RCW 9.94A, creates a grid of standard sentencing ranges based on the defendant's offender score and the seriousness level of the current offense. *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). The trial court calculates a defendant's offender score by combining any prior convictions with any current convictions and adding any time imposed for a sentencing enhancement. In Mr. Curry's case, there is no disagreement as to his offender score calculation: he has one prior offense, one current offense, and a 6-month sentence enhancement on both of his third degree assault

convictions. His pre-enhancement standard range on each count is 4-12 months. The respective 6-month weapon enhancement on each charge brings his maximum sentence on each count to 10-18 months. The court imposed 12 months plus the 6 month enhancement on each charge for a total of 18 months per charge. Yet, on Mr. Curry's judgment and sentence, the trial court erroneously lists his standard range on each count as 24 months. It was error to do so. Mr. Curry is entitled to a remand to clarify his judgment and sentence.

**E. CONCLUSION**

Mr. Curry's sentences should be remanded and corrected.

Respectfully submitted this 9<sup>th</sup> day of February, 2009.



LISA E. TABBUT/MSBA #21344  
Attorney for Appellant

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STATE OF WASHINGTON,

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MARTIN ERNEST CURRY,

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) Court of Appeals No. 38112-5-II

) CERTIFICATE OF MAILING

I, Lisa E. Tabbut, certify and declare:

That on the 9<sup>th</sup> day of February 2009, I deposited into the mails of the United States Postal Service, a properly stamped and addressed envelope, containing the Brief of Appellant and Certificate of Mailing (prosecutor only) addressed to the following parties:

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CERTIFICATE OF MAILING - 1 -

LISA E. TABBUT

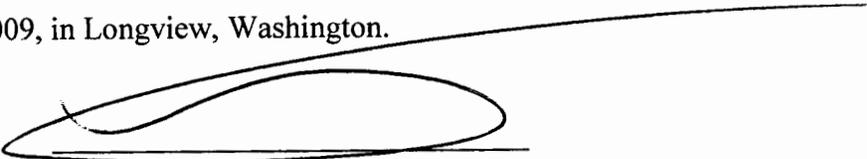
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I certify under penalty of perjury pursuant to the laws of the State of Washington  
that the foregoing is true and correct.

Dated this 9th day of February 2009, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Appellant