

No. 41777-4
(consol. with 42017-1)

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

STATE OF WASHINGTON,

Respondent,

v.

JD JONES BARTON,

Appellant.

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

APPELLANT'S SUPPLEMENTAL BRIEF

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory authority in imposing a term of 18 to 36 months community custody for second degree assault.

2. The trial court exceeded its statutory authority in imposing a term of community custody that, when combined with the term of confinement imposed, exceeded the statutory maximum sentence for the crime.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. A sentencing court may impose a term of community custody only as authorized by statute. Did the court exceed its statutory authority in imposing an 18- to 36-month term of community custody for the two second degree assault convictions, where the statute authorized only an 18-month term?

2. A sentencing court may not impose a term of community custody that, when combined with the term of confinement imposed, exceeds the statutory maximum sentence for the crime. Did the court exceed its authority in imposing a term of community custody for the two second degree assault charges that, when combined with the term of confinement imposed, exceeded the ten-year statutory maximum sentence?

C. SUPPLEMENTAL STATEMENT OF THE CASE

On October 31, 2008, JD Barton pled guilty, pursuant to a negotiated plea agreement, to two counts of second degree assault with a firearm (RCW 9A.36.021(1)(c), RCW 9.94A.602, and RCW 9.94A.533(3)) and one count of first degree unlawful possession of a firearm (RCW 9.41.040(1)(a)). CP 12, 17. As part of the plea agreement, the parties agreed the prosecutor would recommend an exceptional sentence of 108 months for each of the assault charges, to be served concurrently. CP 14. When that sentence was added to the two 36-month firearm enhancements, which were to be served consecutively, the total agreed-upon sentence for counts one and two was 180 months. CP 14. The court accepted the parties' stipulation and imposed a total sentence of 180 months for the assault charges. Id.

Mr. Barton filed two separate appeals. In Court of Appeals number 40507-5, Mr. Barton challenged only his sentence. This Court agreed the sentence was illegal because it exceeded the ten-year statutory maximum for second degree assault. CP 22-28. The Court held the total sentence for the two assault charges should be 156 months. CP 25. The proper base sentence for each assault charge was 84 months, which when added to the two 36-

month firearm enhancements, which must be served consecutively, equaled 156 months. Id. The Court remanded for resentencing.

In Mr. Barton's second appeal, Court of Appeals number 41777-4, Mr. Barton contends his guilty plea is involuntary because it is based on the parties' agreement to an illegal sentence. That is, when the parties agreed the prosecutor would recommend a sentence of 180 months, they were agreeing to a sentence in excess of the sentence authorized for the crimes. The parties have filed their briefs in 41777-4 and the case has not yet been set for consideration.

Meanwhile, appeal number 40507-5 (sentence challenge) was remanded to the trial court and a resentencing hearing was held April 20, 2011. As directed by this Court, the trial court imposed a total sentence of 156 months for the two assault charges—an 84-month standard-range sentence plus two consecutive 36-month firearm enhancements.¹ RP 11; CP 35. The court also imposed 18 to 36 months community custody for the assault charges, "or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." CP 36.

¹ The court imposed a concurrent sentence of 102 months for the unlawful possession of a firearm charge. CP 35.

Mr. Barton appealed from the amended judgment and sentence following the resentencing. That appeal has been assigned number 42017-1. On July 13, 2011, this Court entered an order consolidating appeal number 42017-1 with number 41777-4. The Court directed the parties to file supplemental briefs addressing any additional issues raised in appeal number 42017-1.

D. SUPPLEMENTAL ARGUMENT

1. THE TRIAL COURT ERRED IN IMPOSING AN 18- TO 36-MONTH TERM OF COMMUNITY CUSTODY FOR THE SECOND DEGREE ASSAULT CONVICTIONS

At resentencing, the court imposed 18 to 36 months of community custody for the two second degree assault charges. CP 36. The court exceeded its statutory authority in doing so, as the Sentencing Reform Act (SRA) authorizes only a determinate term of 18 months community custody for second degree assault.

"A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

RCW 9.94A.701(2) provides:

A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered

a serious violent offense.

Second degree assault is a "violent offense" within the meaning of RCW 9.94A.701(2). It is a class B felony that is a "violent offense" but not a "serious violent offense." RCW 9A.36.021(2)(a); RCW 9.94A.030(54)(viii).

RCW 9.94A.701(2) took effect July 26, 2009. See Laws 2009, ch. 375, § 5. The law unequivocally applies to Mr. Barton's sentence. See Laws 2009, ch. 375, § 20 ("This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after July 26, 2009."). Therefore, the court was authorized to impose only 18 months of community custody, not 18 to 36 months.

A sentence in excess of statutory authority is subject to challenge, and the person is entitled to be resentenced. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (and cases cited therein). An offender does not waive his right to challenge an illegal sentence by pleading guilty. Id. Because the court exceeded its statutory authority in imposing an 18- to 36-

month term of community custody, the sentence must be reversed and remanded for resentencing.

2. THE TRIAL COURT ERRED IN IMPOSING A COMMUNITY CUSTODY TERM THAT, WHEN COMBINED WITH THE TERM OF CONFINEMENT IMPOSED, EXCEEDED THE STATUTORY MAXIMUM SENTENCE²

The court imposed 18 to 36 months community custody for the two assault charges, "or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." CP 36. The court also imposed a term of confinement for each assault charge of 120 months. CP 35. Thus, the term of confinement when added to the term of community custody exceeded the 120-month statutory maximum sentence for the crime. The sentence is therefore in excess of the court's statutory authority.

As stated, a trial court may impose a sentence only as authorized by law. Carle, 93 Wn.2d at 33.

The SRA provides for an 18-month term of community custody for Mr. Barton's two convictions for second degree assault. RCW 9A.36.021(2)(a); RCW 9.94A.030(54)(viii); RCW 9.94A.701(2). But RCW 9.94A.505(5) provides that "a court may

not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.701(9) specifically directs:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

(emphasis added).

RCW 9.94A.701(8), which took effect July 26, 2009, applies to Mr. Barton's sentence. See Laws 2009, ch. 375, § 20 ("This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after July 26, 2009.").

The statutory maximum sentence for the crime, second degree assault, is 120 months. RCW 9A.20.021(1)(b); RCW 9A.36.021(2)(a). The trial court imposed a term of confinement of 120 months for each charge, which is equal to the statutory

² This issue is currently pending in the Washington Supreme Court in State v. Franklin, No. 84545-0. Oral argument was held in Franklin on June 14, 2011.

maximum sentence. CP 35. Therefore, the court was not authorized to impose *any* term of community custody. RCW 9.94A.505(5); RCW 9.94A.701(9).

The Washington Supreme Court's decision in In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), does not require a different conclusion. As the Brooks court acknowledged, its holding was superseded by Laws 2009, ch. 375, § 5. Id. at 672 & 672 n.4. Brooks is therefore not controlling.

The facts in Brooks are similar to the facts here. Brooks was convicted of three counts of attempted first degree robbery and one count of residential burglary. Brooks, 166 Wn.2d at 666. At sentencing the trial court imposed a standard-range sentence of 120 months confinement, which equaled the statutory maximum, and a term of community custody of either 18 to 36 months, or the period of earned early release awarded, whichever was longer. Id. at 666-67. The Supreme Court upheld the sentence, holding it did not exceed the statutory maximum because the trial court stated on the judgment and sentence that the period of total confinement and community custody together could not exceed the 120-month statutory maximum. Id. at 673.

But in the process, the court recognized its holding would have limited impact due to the recently-enacted amendments to the SRA, which had not yet taken effect. Id. at 672 n.4 (citing Laws 2009, ch. 375, § 5). The court stated, "[h]aving reviewed the upcoming amendments, it appears the legislature has addressed the very questions we are asked to answer in this case." Brooks, 166 Wn.2d at 672 n.4. The court specifically cited Laws 2009, ch. 375, § 5, on which Mr. Barton relies. Id.

Here, similar to Brooks, the trial court stated in boilerplate language on the judgment and sentence that "[n]otwithstanding the length of confinement plus any community custody imposed on any individual charge, in no event will the combined confinement and community custody exceed the statutory maximum for that charge." CP 36. But newly-enacted RCW 9.94A.701(9) renders this language ineffective. That statute provides the term of community custody "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." RCW 9.94A.701(9) (emphasis added). The word "shall" in the statute is a mandatory directive to the trial court. See State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Thus, the trial court

was *required* to reduce the term of community custody at the time of sentencing, to the extent the term of community custody, when combined with the term of confinement, exceeded 120 months.

When the Legislature created RCW 9.94A.701, its intent was "to simplify the supervision provisions" of the SRA and "increase the uniformity of its application." Laws 2009, ch. 375, § 10. To this end, RCW 9.94A.701 requires trial courts to sentence offenders to a fixed term of community custody. And subsection (9) of the statute provides that the fixed term of community custody be reduced to another fixed term when, in combination with the imposed term of confinement, the statutory maximum is exceeded. Thus, the boilerplate language included on Mr. Barton's judgment and sentence does not satisfy the legislative directive that the court impose a fixed term of community custody that, when combined with the term of confinement, not exceed the statutory maximum.

In sum, because the term of confinement in combination with the term of community custody exceeded the ten-year statutory maximum sentence, Mr. Barton's sentence must be reversed and remanded for resentencing.

3. THIS COURT'S HOLDING IN APPEAL NUMBER 40507-5—THAT THE 180-MONTH SENTENCE THE PARTIES AGREED TO WAS ILLEGAL—MAKES CLEAR THE PLEA AGREEMENT WAS BASED ON THE PARTIES' MUTUAL MISTAKE REGARDING THE SENTENCING CONSEQUENCES OF THE PLEA

In pending appeal number 41777-4, Mr. Barton contends he is entitled to withdraw his guilty plea because it is based on the parties' agreement to an illegal sentence. That argument is set forth in Mr. Barton's briefs already filed in the case. This Court's opinion in appeal number 40507-5, which was issued after Mr. Barton filed his opening brief in number 41777-4, demonstrates that the parties indeed agreed to an illegal sentence. As stated, as part of the plea agreement, the parties agreed the prosecutor would recommend a total sentence of 180 months for the two assault charges. CP 14. But in appeal number 40507-5, this Court held that a sentence of 180 months was not statutorily authorized. The Court held the 180-month sentence Mr. Barton originally received—and the parties agreed to—was illegal because it was in excess of the statutory maximum.

Therefore, the Court's holding in appeal number 40507-5 supports Mr. Barton's argument that the plea was involuntary because it was based on the parties' mutual mistake regarding the

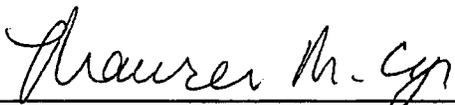
sentencing consequences of the plea. He is entitled to withdraw the plea.

E. CONCLUSION

The 18- to 36-month term of community custody imposed at resentencing for the assault charges exceeded the court's statutory authority. In addition, the community custody term is unlawful because, when combined with the term of confinement imposed, it exceeds the 120-month statutory maximum sentence. Therefore, Mr. Barton must be resentenced.

In addition, this Court's holding in appeal number 40507-5, that the sentence imposed was illegal, supports Mr. Barton's argument that the guilty plea is based on the parties' mutual mistake regarding the sentencing consequences of the plea. For the reasons set forth in the briefs in appeal number 41777-4, he is entitled to withdraw the plea.

Respectfully submitted this 5th day of October 2011.


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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 41777-4-II
v.)	
)	
JD BARTON,)	
)	
Appellant.)	

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