

NO. 41932-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH SULLIVAN, III

Appellant.

11/19/16 PM 4:02
STATE OF WASHINGTON
BY [Signature]

COURT OF APPEALS
DIVISION TWO

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

The Honorable Christine Pomeroy, Judge

OPENING BRIEF OF APPELLANT

ERIC BROMAN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

P.M. 8-9-2011

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A. ASSIGNMENT OF ERROR

The resentencing court erred in imposing a 12-month term of community custody. CP 32.

Issues Related to Assignment of Error

The statutory community custody period for appellant's August 29, 2008, offense was 9-12 months. On resentencing after a successful appeal, the trial court imposed a 12-month term of community custody. This was based on a statutory amendment enacted after the date of the offense.

1. Did the court err in applying the wrong version of the community custody statute?

2. If not, does the 12-month term "exceed" the former 9- to 12-month term, thereby violating the ex post facto clauses of the state and federal constitutions?

B. STATEMENT OF THE CASE

On September 4, 2008, the Thurston County prosecutor charged appellant Joseph Sullivan with two counts: unlawful possession of methamphetamine with intent to deliver (count I), and unlawful possession of marijuana with intent to deliver (count II). The state alleged the offenses occurred August 29, 2008. CP 3.

Sullivan initially pled guilty to the marijuana charge. His plea agreement required cooperation with law enforcement. The state later asserted Sullivan breached the agreement. As a result, the plea was withdrawn, an amended information filed, and Sullivan was convicted on stipulated facts of the original charges as well as bail jumping (count III). CP 5, 18-20; 3RP 3-7.

Based on an offender score of 6,¹ the court imposed standard range sentences of 110 months on count I, 24 months on count II, and 29 months on count III. CP 8; 3RP² 12. The court also imposed a 9- to 12-month period of community custody³ for count I and \$1,000 in various financial obligations. CP 8, 10; 3RP 12-13.

Sullivan appealed. His appellate counsel argued the evidence was insufficient to support the count II marijuana conviction. The state conceded error and this Court agreed. CP 18-20. The count II conviction was stricken and the case remanded for resentencing. CP

¹ The score was based on four prior offenses and two other current offenses. CP 5-6; 3RP 7.

² This brief refers to the transcripts as follows: 1RP – 11/12/08 (bench warrant hearing) and 3/11/11 (resentencing); 2RP – 11/13/08 (preliminary appearance after FTA); 3RP – 7/15/09 (stipulated trial and first sentencing).

27. This Court also addressed and rejected several arguments raised in Sullivan's pro se statement of additional grounds for review. CP 21-26.

The resentencing hearing occurred March 11, 2011. The prosecutor maintained the offender score remained 6, based on four prior felonies, one current felony, and one point for committing the current offenses while on community custody. 1RP 5. The state again recommended a 110-month sentence on count I and 29 months on count III. 1RP 6-7.

The prosecutor asked whether the defense agreed with the offender score calculation. Defense counsel said he had advised Sullivan before court that the score would be five points, but the prosecutor had presented "some evidence to myself that at the time it appears that Mr. Sullivan was on community custody[.]" 1RP 8. Defense counsel said he asked Sullivan about it and there was no dispute about the offender score. 1RP 9.⁴

³ The prosecutor noted the court's obligation to impose 9-12 months of community custody, despite newly enacted amendments to the community custody periods. 3RP 13.

⁴ As part of Sullivan's prior plea agreement, he had stipulated to four prior felony offenses that counted in his criminal history. That stipulation will be designated as a supplemental clerk's paper.

Defense counsel requested a lower sentence than 110 months. In his allocution, Sullivan also requested a lower sentence. He completed a substantial number of classes and programs in the Department of Corrections and received no infractions. He also presented a letter from his counselor. 1RP 11-15.

The court imposed the same 110-month sentence on count I, but “reduced” the concurrent count III sentence from 29 to 22 months.⁵ 1RP 15; CP 32. The Court also ordered a 12-month term of community custody, rather than the initially imposed 9- to 12-month period. CP 32. This appeal timely follows. CP 38.

C. ARGUMENT

THE COMMUNITY CUSTODY TERM IS UNLAWFUL BECAUSE IT IS MORE PUNITIVE THAN PERMITTED WHEN THE OFFENSE WAS COMMITTED.

When imposing a sentence under the Sentencing Reform Act (SRA), a trial court's authority is limited to that granted by statutes in effect at the time the offense was committed. RCW 9.94A.345; State v. Smith, 144 Wn.2d 665, 673-75, 30 P.3d 1245, 39 P.3d 294 (2001). A sentence that exceeds the court's sentencing authority may be

⁵ The word “reduced” is in quotation marks because the court did not reduce the longer count I sentence. When Sullivan asked if the court would consider reducing the sentence, the court said “[n]o.” 1RP 16.

challenged 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). Sentences that violate the constitution also may be challenged for the first time on appeal. RAP 2.5(a)(3).

Count I was committed August 29, 2008. CP 28. At that time the SRA directed the court to impose a 9- to 12-month period of community custody. Former RCW 9.94A.505(2)(a)(ii) (2008); former RCW 9.94A.715(1) (2008); former RCW 9.94A.850(5) (2008); former WAC 437-20-010 (2008).⁶

The trial court initially imposed the 9- to 12-month period. CP 10; RCW 9.94A.345. But between Sullivan's original sentencing and the remand for resentencing, the legislature repealed RCW 9.94A.715 and replaced it with RCW 9.94A.701. The community custody period under the amended statute was 12 months. RCW 9.94A.701(3)(c) (2009).

⁶ A copy of former WAC 437.20.010 (2008) is attached as appendix A.

In repealing the statute, the legislature stated it intended the amendment to apply retroactively. Laws 2009, ch. 375, § 20.⁷ Despite this statement of intent, a law imposing harsher punishment cannot apply retroactively without violating (1) other statements of legislative intent,⁸ and (2) the ex post facto clauses of the state and federal constitutions.

The ex post facto clauses prohibit a court from imposing a more punitive sentence than was authorized at the time the offense was committed. U.S. Const. art. I, § 10 ("No bill of attainder or ex

⁷ "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."

⁸ The legislature recognizes it cannot give retroactive effect to sentencing statutes if such effect violates the constitution. See e.g., Laws 2008, ch. 231, § 55 (emphasis added), which in pertinent part provides:

"(2) Sections 6 through 58 of this act [amending dozens of SRA statutes] also apply to all sentences imposed or reimposed on or after August 1, 2009, for crimes committed prior to the effective date of this section, to the extent that such application is constitutionally permissible.

(3) To the extent that application of sections 6 through 58 of this act is not constitutionally permissible with respect to any offender, the sentence for such offender shall be governed by the law as it existed before the effective date of this section, or on such prior date as may be constitutionally required, notwithstanding any amendment or repeal of provisions of such law."

post facto law shall be passed."); Wash. Const. art. I, § 23 ("No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed."); California Dept. of Corrections v. Morales, 514 U.S. 499, 504, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995); Parker, 132 Wn.2d at 192 n.14.

A 12-month term is harsher than a 9- to 12-month term because a person can complete the 9- to 12-month term in 9 months. The person sentenced to 12 months cannot.⁹

The community custody conditions also are punitive. Sullivan must report to community corrections officers; work at approved employment, education or community service; refrain from consuming or possessing non-prescribed controlled substances; pay supervision fees; and "perform affirmative acts necessary to monitor compliance . . . as required by DOC." CP 33. Any violation of the conditions could subject Sullivan to arrest and the nonjudicial imposition of additional punishment by the DOC. See generally, RCW 9.94A.632, .714, .716, .737.

⁹ See e.g., Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (statute which negatively affected ability to earn early release struck down as violative of ex post facto prohibitions); see also, Morales, 514 U.S. at 505-06 (discussing Weaver).

The 12-month community custody term is barred by ex post facto prohibitions. The trial court either applied the wrong version of the statute or violated the constitution. Either error requires vacation of the 12-month term and remand for imposition of a 9- to 12-month community custody term.

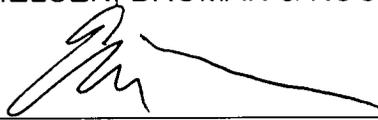
D. CONCLUSION

Whether this Court determines the violation is statutory or constitutional, this Court should vacate the 12-month period of community custody and remand for imposition of a 9- to 12-month period.

DATED this 9th day of August, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC.



ERIC BROMAN, WSBA 18487
OID No. 91051
Attorneys for Appellant

WAC 437-20-010

Wash. Admin. Code **437-20-010**

WASHINGTON ADMINISTRATIVE CODE
TITLE 437. SENTENCING GUIDELINES COMMISSION
CHAPTER 437-20. COMMUNITY CUSTODY RANGES
Current with amendments adopted through January 7, 2009.

437-20-010. Community custody ranges.

community custody ranges

| Offense Type | Community Custody Range |
|--|--------------------------------|
| Sex Offenses (Not sentenced under RCW 9.94A.120(8)) | 36 to 48 months |
| Serious Violent Offenses | 24 to 48 months |
| Violent Offenses | 18 to 36 months |
| Crimes Against Persons (As defined in RCW 9.94A.440(2)) | 9 to 18 months |
| Offenses under chapter 69.50 or 69.52 RCW (Not sentenced under RCW 9.94A.120(6)) | 9 to 12 months |

The ranges specified in this section are not intended to affect or limit the authority to impose exceptional community custody ranges, either above or below the standard community custody range as authorized by RCW 9.94A.120(2) and pursuant to guidelines specified in RCW 9.94A.390. The community custody range for offenders with multiple convictions must be based on the offense that dictates the longest term of community custody. The community custody range for offenders convicted of an offense that falls into more than one of the five categories of offense types listed in this section must be based on the offense type that dictates the longest term of community custody.

Statutory Authority: RCW 9.94A.040(6) (rule-making authority under chapter 34.05 RCW). 00-11-052, S **437-20-010**, filed 5/12/00, effective 7/1/00.

WAC 437 -20 -010 , WA ADC 437 -20 -010
WA ADC 437 -20 -010

END OF DOCUMENT

APPENDIX A, 41932-7-11

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

| | | |
|---------------------|---|--------------------|
| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 41932-7-II |
| |) | |
| JOSEPH SULLIVAN, |) | |
| |) | |
| Appellant. |) | |

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 9TH DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SCOTT JACKSON
THURSTON COUNTY PROSECUTOR'S OFFICE
2000 LAKERIDGE DRIVE SW, BUILDING 2
OLYMPIA, WA 98502-6001

- [X] JOSEPH SULLIVAN
NO. 760962
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

(Handwritten signature)
11 08 11 10 11 AM
COURT REPORTER

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF AUGUST 2011.

x *Patrick Mayovsky*