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Court of Appeals
Division II
State of Washington
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No. 50422-7-II

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

STATE OF WASHINGTON, Respondent

v.

TONYA KNOX, Appellant

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY
THE HONORABLE CHRIS LANESE

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

The trial court erred when it imposed the misdemeanor sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err when it ordered the maximum sentence of 364 days for a misdemeanor of which 334 days were suspended conditioned on a 24-month probation, but ordered the sentence to be served concurrently with a nine-month term of imprisonment on a felony?

II. STATEMENT OF FACTS

Thurston County prosecutors charged Tonya Knox with two counts of identity theft in the second degree, RCW 9.35.020(1) and (3), one count of burglary in the second degree, RCW 9A.52.030, one count of forgery, RCW 9A.60.020(1)(b); and one count of theft in the third degree, RCW 9A.56.050, 9A.56.020(1)(a) for events that occurred on June 26, 2015. CP 82.

The matter proceeded to a jury trial, and Ms. Knox was found guilty on all counts. CP 7,8,46,56,83. At sentencing, the court imposed the following: Burglary 2nd degree: 9 months

Identity theft 2nd degree: 8 months; Identity theft 2nd degree: 8 months; Forgery: 6 months; and Theft 3rd degree: 30 days with 334 days suspended on condition of 24 months of probation. CP 67. The court set the sentences to run concurrently with one another. CP 68. Ms. Knox makes this timely appeal. CP 63.

III. ARGUMENT

The Trial Court Erred When It Incorrectly Suspended 334 Days Of The Misdemeanor Sentence Conditioned On Probation When It Sentenced Appellant To Serve The Misdemeanor Concurrent With A 9 Month Felony Sentence.

Whether a sentencing court has imposed an unauthorized sentence is a question of law, which is reviewed de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The maximum sentence for a gross misdemeanor is 364 days. RCW 9A.20.021(2). A trial court is authorized to suspend the imposition or the execution of the sentence and may direct that the suspension may continue under such conditions and for such a time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer. RCW 9.95.210(1)(a).

But if a court imposes a maximum sentence of confinement and suspends none of it, the court lacks the authority to impose probation. *State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009).

Here, Count 5, theft in the third degree, is a gross misdemeanor offense and punishable for a maximum term of not more than 364 days of imprisonment. RCW 9A.20.021(2). The judgment and sentence, section 4.1, shows the court ordered 30 days of confinement for Count 5. The court conditioned the suspended part of the sentence, 334 days, on completion of 24 months of probation. CP 96. For the felony counts, the court imposed a total confinement of 9 months, to run concurrent, which included the 30 days for the gross misdemeanor concurrent. CP 95.

In *Gailus*, the trial court sentenced the defendant to 12 months for his felony convictions and a maximum of one year for each of the two gross misdemeanors. *Gailus*, 136 Wn.App. at 200-201. The court ordered the gross misdemeanor sentences to run consecutive to one another and consecutive to the felony convictions. As a part of its order, the court suspended the two 12-

month gross misdemeanor sentences on the condition that the defendant serve 24 months in custody and complete 48 months of probation. *Id.* at 136 Wn. App. at 201.

On review, the Court vacated the sentence because the suspension of the two 12 month sentences conditioned upon 24 months in custody “did not actually suspend any jail time.” *Id.* The court’s authority to impose the probation was conditioned on the suspended time. Where the sentencing court orders the defendant to serve the maximum sentence for his conviction, it does not suspend any jail time. The Court held that a sentencing court cannot order probation if it does not suspend any jail time. *Id.*

This case represents a similar dilemma as *Galius*. The court ordered the misdemeanor count to be served concurrently with the 9- month felony sentence. The ordered misdemeanor sentence does *not* suspend 334 days: it only suspended three months on the misdemeanor sentence, as nine months has already been served.

Because the sentence inaccurately suspends 334 days, this matter should be remanded for correction to a 90-day suspension.

IV. CONCLUSION

Based on the foregoing facts and authorities, this matter should be remanded to the trial court for correction.

Respectfully submitted March 12, 2018.

Marie Trombley

Marie Trombley/WSBA 41410
Attorney for Tonya Knox

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Tonya Knox, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on March 12, 2018 to:

Tonya Knox
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And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Thurston County Prosecuting Attorney (at paoappeals@co.thurston.wa.us).

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