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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 OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TONYA RENEE KNOX
Appellant.

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

The Honorable Chris Lanese
Cause No. 15-1-00898-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly suspended 334 days of the misdemeanor sentence for theft in the third degree concurrent with the 9 months sentence on the felony charge of burglary in the second degree.

B. STATEMENT OF THE CASE.

On June 26, 2015, Tonya Knox was in the Walmart store in Tumwater, Washington, when she drew the attention of Walmart loss prevention employees. RP 80-82. Walmart employee Kasen Foy observed Knox place multiple items next to her open purse which drew Foy's suspicion that she may be attempting a theft. RP 83. Foy observed Knox proceed to the shoe department and place packages of markers that she had selected in her purse. Id. Knox then proceeded to the checkout lines and attempted to write a check for four items that were in her cart. RP 83, 86. Customer service manager Kimberly Hough declined the check. RP 86.

Hough testified that the particular check appeared to be altered, and noted "people don't usually write checks in Sharpies." RP 105. Hough noticed the check had a male's name on it, and Knox told her that her boss had given it to her for office supplies. RP 106. Hough was not comfortable taking the check as payment and Knox placed it back into her purse. RP 106.

Knox then handed back the four items that she attempted to pay for and proceeded toward the exit doors with the packages of markers still concealed in her purse. RP 87. Loss prevention employees stopped Knox and confronted her about the markers in her purse as she exited the store. RP 88. Foy noticed that Knox had multiple I.D.'s in her purse. RP 92-93. The multiple I.D.s did not appear to all belong to Knox. RP 132.

Knox had previously been trespassed from all Walmart store following a prior incident at the Yelm, Washington store. RP 32, 51, 53-55.

Tumwater Police Officer Steve Barclift responded to the Tumwater Walmart along with Officer Jennifer Kolb. RP 155, 157. Officer Barclift placed Knox into custody and searched her purse. RP 159. Inside the purse, he found a check with the name Jeff Kearin Agency, LLC on it, which was marked as Exhibit 2, and had been identified as the same check that was previously identified by Hough as the one Knox attempted to use. RP 102, 159. There was writing on the back which included a Washington driver's license number. RP 160-161. Barclift also found an identification card for the State of Washington in the name of Barbara Henson, and an expired Washington License in the same name. RP 161.

The driver's license number written on the check was the number on Henson's expired driver's license. RP 165-166. When questioned by Barclift, Knox indicated that she "knew she was wrong about trying to cash that check." RP 170. Knox stated that Barbara Henson was her roommate and Henson did not know that Knox had her I.D. RP 170-171. Henson indicated that the cards had been in her room and nobody was allowed to have them. RP 229, 231. Henson also looked at the check that Knox had used and stated that signature written on it appeared to be her name, but was not her signature. RP 237.

Jeffrey Kearin testified that Jeff Kearin Agency LLC is an American Family Insurance Agency. RP 182. The agency had contracted with T&S Cleaning for light office cleaning. 1 RP 184. Kearin testified that the T&S employee assigned to the office in February of 2015 was Tonya Knox. RP 185-186. Knox cleaned the office for just over two months, terminating on April 13, 2015. RP 186.

Kearin confirmed that the check Knox had attempted to use was from his account. 1 RP 188. He stated that "No one was given permission to write this check." 1 RP 189. Kearin confirmed that the check was the first in a new book that had been on his

desk on top of a stack of bills and had been removed from the checkbook. 1 RP 190.

Knox was charged by way of a First Amended Information with burglary in the second degree, identity theft in the second degree (identification or financial information of Jeff Kearin Agency); identity theft in the second degree (identification of Barbara Henson); forgery and theft in the third degree. CP 81. Following her trial, the jury convicted her of all counts. CP 7, 8, 46, 56, 83.

The trial court sentenced Knox to 9 months on the burglary, 8 months on each of the identity theft charges, 6 months on the forgery charge and 30 days with an additional 334 days suspended for 24 months on condition that Knox pay all court-ordered financial obligations, refrain from committing any new criminal law violations, and not go upon the premises of any Wal-Mart Store. CP 64 -73.

During the sentencing hearing the trial court stated,

“As to the gross misdemeanor and all of the sentences other than the burglary, I will be granting the State’s request and imposing the sentences they have requested, including the probation recommendation regarding the theft in the third degree with 334 days being suspended for 24 months on the conditions requested by the State.”

(06/08/17) RP 14. When asked by the prosecutor for clarification, the trial court stated,

“And I will be adopting the recommendations of the State, so identity theft in the second degree, eight months, forgery, six months, theft in the third, a 364-day sentence with 334 days suspended for 24 months on the conditions I outlined. Again, those run concurrently given the factors in this case.”

(06/08/17) RP 17. The judgment and sentence reflected the trial court’s verbal announcement. CP 67-68.

C. ARGUMENT.

1. The trial court’s sentence was neither illegal nor erroneous and correctly suspended 334 days of the 364 day sentence on the charge of theft in the third degree.

The only issue raised in this appeal is whether the trial court had authority to suspend 334 days of jail time on the theft in the third degree count, where all counts ran concurrently with the 9 months sentence on the burglary charge. Whether a sentencing court imposed an unauthorized sentence is a question of law that is reviewed de novo. State v. Murray, 118 Wn.App.518, 521, 77 P.3d 1188 (2003).

A court’s sentencing authority is statutory. State v. Phelps, 113 Wn.App. 347, 354-55, 57 P.3d 624 (2002). The Sentencing Reform Act governs felony sentencing, but does not govern

misdemeanor sentencing. State v. Whitney, 78 Wn.App. 506, 517, 897 P.2d 374, *review denied*, 128 Wn.2d 1003 (1995). A trial court lacks inherent authority to suspend a sentence. State v. Gibson, 16 Wn.App. 119, 127, 553 P.2d 131 (1976). RCW 9.95.210(1)(a) grants the trial court the authority to suspend the sentence of a criminal defendant, stating:

“The superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.”

The maximum term of sentence refers to the one overall sentence within a single case, regardless of the number of counts that the defendant is convicted of, limiting the probationary period to 24 months. State v. Rice, 180 Wn.App. 308, 314-315, 320 P.3d 723 (2014).

Here, the trial court imposed 30 days in custody and suspended 334 days on count 5 concurrent with the 9 month felony sentence. It is clear that the 30 days in custody and 24 month period of probation is running concurrent to the felony time. There is no basis in law to conclude that the trial court cannot suspend

334 days and run the term of probation concurrent with the jail sentence on another count.

Knox relies upon State v. Gailus, 136, Wn. App. 191, 201, 147 P.3d 1300 (2006). In Gailus, the court imposed a twelve month sentence for felony possession of sexually explicit depictions of minors, and two one year maximum sentences for gross misdemeanors, set to run consecutively with the felony and with each other, for a total of three years in custody. *Id.* Critically, the defendant was given credit for 791 days of time served prior to sentencing. *Id.* The court then purportedly suspended the two misdemeanor sentences, imposing two years of community custody in their stead, even though the defendant had already served the time. *Id.* Noting that no jail time had actually been suspended, the case was remanded with instructions to vacate the community custody requirements. *Id.*

Here the trial court correctly suspended 334 days of jail time. A similar sentence was imposed in State v. Rodriguez, 183 Wn.App. 947, 335 P.3d 448 (2014). In that case, Rodriguez was convicted of felony violation of a no contact order- domestic violence and was sentenced to 14 months total confinement on the felony charge, and 364 days with credit for 50 days time served and

the remaining 314 days suspended for 60 months on a second misdemeanor count. Id. at 951. This court reversed the gross misdemeanor sentence and remanded for resentencing because the 60 month period of suspension exceeded the 24 month limit. Id. at 959. The matter was only remanded “to resentence Rodriguez on the gross misdemeanor conviction by correcting the term of the suspended sentence, community custody, and the no contact order so that it does not exceed the statutory maximum. Id. at 959-960. Importantly, this Court did not indicate that suspending 314 days of the sentence was improper in light of the 14 month sentence on the felony charge.

Unlike Gailus, Knox had not already completed the maximum amount of incarceration for her misdemeanor offense prior to the trial court suspended 334 days of the sentence. The trial court properly suspended the time and unlike Rodriguez, the trial court did not exceed the statutorily imposed limit on the duration of the suspended sentence. There is nothing improper regarding the trial court’s sentencing of Knox.

D. CONCLUSION.

The trial court properly sentenced Knox pursuant to the authority granted to the trial court under RCW chapter 9.94A and

RCW 9.95.210. The State respectfully requests that this Court affirm Knox's sentence in all aspects. It is clear that the trial court intended that 334 days remain suspended as an incentive to ensure Knox's compliance with probationary conditions. If this Court finds that the order is not clear, the matter should be remanded for further clarification as to the trial court's intent.

Respectfully submitted this 10 day of May, 2018.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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

Dated this 11th day of May, 2018, at Olympia, Washington.



JENA GREEN, PARALEGAL

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