

FILED
Court of Appeals
Division II
State of Washington
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No. 53551-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW LABOUNTY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

BRIEF OF APPELLANT
Amended copy

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A. INTRODUCTION.

When the court was imposing Matthew LaBounty's sentence for this case, it sentenced him for other offenses at the same time. As the law requires, the court imposed concurrent terms of imprisonment. In total, the court ordered Mr. LaBounty to serve ten years of confinement and also ordered he serve an additional year of community custody for this case. Because this results in a sentence that lasts 11 years, and exceeds the statutory maximum of five years for this offense, the added term of community custody is unlawful and should be stricken.

The court also erred by failing to set forth the concurrent nature of the sentences imposed on the judgment and sentence.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously imposed a sentence that exceeds the statutory maximum.

2. The court improperly neglected to explain the terms of the sentence on the written judgment and sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The terms of a sentence may not exceed the statutory maximum. The statutory maximum for unlawful possession of a

controlled substance is five years. The court ordered Mr. LaBounty to serve ten years in prison concurrent to his two-year prison term in this case, and also ordered he serve another year of community custody after his release from prison. Is the term of community custody unlawful because Mr. LaBounty is serving a sentence greater than the five-year statutory maximum?

2. The judgment and sentence must explain the terms of a sentence on its face. Here, the court ordered Mr. LaBounty to serve several sentences concurrently as part of a plea bargain and based on sentencing laws requiring concurrent terms, but did not include this information in the judgment and sentence. By omitting any mention of the concurrent, jointly imposed sentences in the formal judgment and sentence, did the court create an impermissible ambiguity that requires remand for clarification and correction?

D. STATEMENT OF THE CASE.

Matthew LaBounty's first and only court appearance in this case occurred on the day he pled guilty and was sentenced. RP 2.¹ He agreed to plead guilty to one count of unlawful

¹ There is one volume of transcripts, referred to as "RP."

possession of a controlled substance, a class C felony, with the understanding that his sentence in this case would be imposed concurrently with the other cases for which he was being sentenced on the same date. RP 2.

The court ordered Mr. LaBounty to serve 10-year terms of imprisonment on several offenses from other cause numbers. RP 15-16.

In the case at bar, the court ordered Mr. LaBounty serve 24-months of prison and 12 months of community custody, concurrently with these other sentences the court was imposing at the same time. RP 17, 19; CP 25. The prosecutor explained this year of community custody would be served after Mr. LaBounty was released from serving his prison sentences. RP 6.

The judgement and sentence entered at the end of the sentencing hearing did not mention the other sentences for which the court imposed concurrent time. CP 22-31.

E. ARGUMENT.

1. The term of community custody must be stricken because it exceeds the statutory maximum.

a. Sentences that exceed the statutory maximum are unlawful, including terms of community custody.

A court's sentencing authority comes from statute. *In re Sentence of Jones*, 129 Wn. App. 626, 630, 120 P.3d 84 (2005). By statute, "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.505(5); *see also* RCW 9.94A.701(9). The Legislature has further instructed that a "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 as provided in RCW 9A.20.021." RCW 9.94A.701(9).

The maximum sentence a court may impose includes the combined term of incarceration as well as any term of community custody. *In re McWilliams*, 182 Wn.2d 213, 216, 340 P.3d 223 (2014). Trial courts must ensure that terms of community custody do not extend the total sentence beyond the

statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

Community custody is a fixed term imposed by the court. *Id.* Its length may not be based on a range of time or something left to the discretion of the Department of Corrections. *See State v. Bruch*, 182 Wn.2d 854, 861-62, 346 P.3d 724 (2015); RCW 9.94A.701. When a standard range term of confinement is combined with community custody, this combined term “shall be reduced by the court” if it exceeds the statutory maximum for the crime. *Id.*

When the court imposes sentences for various offenses that run concurrently, and orders a total term of confinement that exceeds the statutory maximum for one offense, it may not also order community custody to be served after the person is released from serving this excessive sentence. *State v. Nord*, 7 Wn. App. 2d 1021, 2019 WL 296071, *4 (unpublished), *review denied*, 193 Wn.2d 1031 (2019).²

² The Court of Appeals opinion is unpublished. It is cited pursuant to GR 14.1.

In *Nord*, the defendant received two concurrent sentences: a 10 year sentence for unlawful delivery of a controlled substance and a 2-year term for unlawful possession. *Id.* at *3. The possession sentence also included 12 months of community custody. *Id.* This Court ruled this sentence was “unlawful.” *Id.* at *4.

This illegality rested on the impermissible combination of sentencing terms. The Court held the defendant’s “10-year total term of confinement in addition to the 12-month community custody term exceed the 5-year maximum sentence for unlawful possession.” *Id.*

Mr. LaBounty’s sentence contains the same error and is also unlawful.

b. The court sentenced Mr. LaBounty to a combined term of prison and community custody that exceeds the statutory maximum.

Mr. LaBounty was sentenced at the same time for multiple current offenses. As mandated by statute, the court imposed concurrent sentences for each. *See* RCW 9.94A.589(1)(a) (sentences for current offenses “shall be served concurrently”).

All of the other offenses were for class B felonies that have a statutory maximum of 120 months. For several of those offenses, Mr. LaBounty received concurrent sentences of 120 months. RP 15. The court acknowledged this was “the maximum term; there is nothing above that for each of those matters.” *Id.*

The cause numbers and sentences are as follows:³

18-1-00570-14 (COA 53495)	count 1: 120 months count 2: 120 months count 3: 102 months	class B felony same same
18-1-00116-4 (COA 53475)	count 1: 120 months count 2 : 120 months	class B felony same
18-8-00438-4 (COA 53485)	count 1: 102 months	class B felony
19-1-00157-0 (COA 53351)	count 1: 24 months, 12 months community custody	class C felony

As *Nord* explained, the statutory maximum for unlawful possession of a controlled substances is five years. RCW 9A.20.021(1)(c); RCW 69.50.4013(2); CP 8, 12; RP 4. The court ordered Mr. LaBounty serve a standard range sentence of 24 months in prison for this charge, concurrently with the 120-month terms imposed in other current cases. RP 15-17.

³ Each cause number is the subject of a separate, currently pending appeal.

But the court also ordered Mr. LaBounty to serve 120 months in prison concurrently with this 24-month term. RP 15. Then it further ordered Mr. LaBounty to serve an additional term of 12 months of community custody. RP 17.

The prosecution insisted Mr. LaBounty would serve his community custody term after he completed his prison sentences. RP 6. Thus, after serving 10 years in prison, Mr. LaBounty would be subject to another year of community custody.

Community custody begins when Mr. LaBounty completes his decade-long term of confinement. RCW 9.94A.707(1). By the time he is released, he will have already served the concurrent sentence for possession and more than five years will have elapsed. He will also have served the statutory maximum for the Class B felonies for which he was concurrently sentenced.

The court did not enter any notation limiting this one year term of community custody to earned early release time. Given the decade-long concurrent sentence, imposing community custody on the possession conviction exceeds the statutory maximum of five years. It is unlawful. RCW

9.94A.701(9); RCW 9.94A.707(1); *Boyd*, 174 Wn.2d at 473; *see also Nord*, 2019 WL 296071 at *4.

c. The remedy is to strike the erroneously ordered community custody

The remedy is remand to the trial court for a lawful sentence. *Boyd*, 174 Wn.2d at 473; *Nord*, 2019 WL 296071 at *4; *see also State v. Chith*, 200 Wn. App. 1049, 2017 WL 4251815 *2 (2017) (unpublished)⁴ (“Remand for sentencing that complies with RCW 9.94A.701(9) is required when a total sentence of confinement and community custody exceeds the statutory maximum.”). Alternatively, this Court should at least remand with instruction that the trial court delete the term of community custody on the possession conviction. *See State v. McFarland*, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017) (appellate courts should grant sentencing relief to ensure that the Sentencing Reform Act is properly implemented).

⁴ This case is not precedential and is cited only for persuasive authority as this Court deems appropriate. GR 14.1.

2. The judgment and sentence does not expressly state the terms of the sentence, which creates an improper ambiguity. Remand for written clarification should be ordered.

When the court sentences a person for two or more “current offenses,” the sentences imposed “shall be served concurrently.” RCW 9.94A.589(1)(a). Terms may be consecutive only if the exceptional sentence provisions of RCW 9.94A.535 apply. *Id.*; see also RCW 9.94A.589(3).

Here, the court pronounced sentences on four different cause numbers at the same hearing. RP 15-17. It ordered these sentences run concurrently. *Id.* But the judgment and sentence makes no mention of this order. CP 22-31.

The judgment and sentence does not refer to the other concurrently imposed sentences. CP 25. It does not direct the Department of Corrections to treat this sentence as concurrent to these other sentences or mention that the term of confinement imposed will exceed the statutory maximum when viewed in light of the 120 months of incarceration Mr. LaBounty must serve. *Id.*

The court did not notify the Department of Corrections that the sentences are concurrent. There is no guarantee the Department will understand the mandatory concurrent nature of these various terms.

The judgment and sentence should be modified on remand to expressly state that this sentence is imposed concurrently with the other current offenses in other cause numbers sentenced in the same hearing. *See State v. Johnson*, 180 Wn. App. 318, 331, 327 P.3d 704 (2014) (granting trial court “the necessary permission” to correct clerical errors in the judgment and sentence on remand); *see also State v. Trujillo*, 112 Wn. App. 390, 412 n.15, 49 P.3d 935 (2002) (remanding to clarify terms of judgment and sentence).

F. CONCLUSION.

Mr. LaBounty's case should be remanded to correct the illegalities in his sentence.

DATED this 24th day of January 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy Collins". The signature is fluid and cursive, with the first name "Nancy" and the last name "Collins" clearly distinguishable.

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 53551-3-II
)	
MATTHEW LABOUNTY,)	
)	
APPELLANT.)	

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