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NO. 54070-3-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GABRIEL NORMAN,

Appellant.

RESPONDENT'S BRIEF

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I. FACTS

On August 22, 2019, Gabriel Norman pled guilty to assault in the second degree, domestic violence, for an assault he committed while in the midst of a meth-psychosis. CP 20; RP 8-17. He was originally charged with assault of child in the second degree, domestic violence. CP 9; RP 15.

As a consequence of his high offender score, Norman would not be subject to community custody if he pled to the original charge. RP 15. Norman negotiated a plea to Assault 2, domestic violence, a charge with a standard range of 63-84 months, rather than the 120 months of his original charge. His standard community custody term was 18 months. RP 9. In consideration for this plea, the elected Prosecuting Attorney required the plea include 18 additional months of community custody, for a total of 36 months. RP 15. Norman agreed. RP 17-18.

The parties made an agree recommendation of 72 months in prison. RP 9. The sentencing court imposed a standard range sentence of 78 months, however, it did follow the agreed recommendation for an exceptional term of community custody of 36 months. RP 19. The court explained its decision to increase the sentence within the standard range was justified by Norman's criminal history and the incident itself. RP 19.

Norman now appeals the imposed 78 month, standard range sentence.

II. ISSUES

1. Can a defendant appeal a standard range sentence after pleading guilty to an amended information?
2. Does a sentencing court exceed its authority when it imposes the precise exceptional term of community custody requested by a defendant?

III. ARGUMENT

1. A defendant is not permitted to appeal his sentence because he both agrees to the recommendation and is sentenced within the standard range.

- a. *Norman was sentenced within the standard sentencing range.*

Norman made a knowing and intelligent plea to Assault in the Second degree, domestic violence. Ordinarily, a plea of guilty constitutes a waiver by the defendant of his right to appeal, regardless of the existence of a plea bargain. Even if a defendant agrees to waive his right to appeal, as a function of a plea that right is waived. *State v. Majors*, 94 Wash.2d 354, 356, 616 P.2d 1237 (1980).

Upon that plea, Norman made an agreed recommendation for a standard range sentence. While the sentencing court chose not to follow the recommendation, it still sentenced within the standard range for the crime charged. A sentence within the standard range shall not be appealed. RCW 9.94A.585(1); *State v. Mail*, 121 Wash.2d 707, 854 P.2d 1042 (1993) (refusing to extend procedural challenges to standard range sentences).

Norman was sentenced to 78 months of total confinement, a sentence within the 63-84 months of the standard range. RCW 9.94A.525(8). The court also imposed an exceptional term of community custody of 36 months. RCW9.94A.701(9). The term of actual commitment and the term of community custody are considered separate terms or time periods, and the standard sentence does not include community custody. Standard range sentences set out in RCW 9.94A.510 are expressed in terms of “total confinement,” which is defined under RCW 9.94A.030(52). *In re Pers. Restraint of Caudle*, 71 Wash.App. 679, 680, 863 P.2d 570 (1993).

“Total confinement” means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day...” RCW 9.94A.030(52).

Where RCW 9.94A.030(5) defines “community custody” as:

“that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.”

Community custody refers to a period which begins following the end of actual confinement. *Caudle*, 71 Wash.App. at 680. If convicted as originally charged his range was 120 months, which precluded any term of community custody. RCW 9.94A.525(8); RCW9.94A.701(9). So long as the imposed confinement and community custody do not exceed the statutory maximum, there is no error. *Id.*; *State v. Hagler*, 150 Wash.App.

196, 203-04, 208 P.3d 32 (2009). The sentencing court did not sentence Norman to a sentence outside the standard range.

While the State recognizes a strong public interest in enforcing the terms of plea agreements which are voluntarily and intelligently made, the sentencing court is not bound by that agreement or any other recommendation. RCW 9.94A.090(1) and (2); *In re Breedlove*, 138 Wash.2d 298, 309, 979 P.2d 417 (1999). A trial court's discretion is limited to what is granted by the legislature. *State v. Ammons*, 105 Wash.2d 175, 180, 713 P.2d 719 (1986); *State v. Handley*, 115 Wash.2d 275, 289, 796 P.2d 1266 (1990). In fact, the SRA contemplates discretionary decisions affecting sentences. RCW 9.94A.010.

When the imposed sentence is within the presumptive sentence range the trial court did not abuse its discretion and, consequently, there is no right of appeal. *Ammons*, 105 Wash.2d at 183, 713 P.2d 719. Because Norman was sentenced to a period of total confinement within the standard range, he is unable to appeal this portion of his sentence. RCW 9.94A.585(1).

b. *Norman cannot appeal the exceptional term of community custody because he requested the departure.*

Norman waived his right to appeal the imposition of exceptional community custody. Norman requested and negotiated a plea to a strike offense with a shorter standard range than his original charge. In order to

obtain that recommendation, Norman agreed to an additional term of community custody. Normally, community custody for Assault in the Second Degree, Domestic Violence, is 18 months. RCW9.94A.701(2). Norman agreed to 36 months community. A court is permitted to impose terms of community custody longer or shorter than the amount set by statute. *State v. Hudnall*, 116 Wash.App. 190, 197, 64 P.3d 667 (2003).

By making an explicit, agreed recommendation of an exceptional term of community custody as part of his plea agreement, Norman waives the right to appeal his sentence. *State v. Dillon*, 142 Wash.App. 269, 275, 174 P.3d 1201 (2007). Moreover, Norman cannot challenge his exceptional community custody without also challenging his plea agreement. 142 Wash.App. at 277, 174 P.3d 1201. Norman received the benefit of his bargain, and his exceptional community custody should be upheld simply because he recommended it as part of an intelligent and voluntary plea. *Id.* at 276.

2. The sentencing court did not exceed its authority because it imposed the very exceptional term of community custody Norman negotiated.
 - a. *The sentencing court made findings sufficient to justify the exceptional term of community custody.*

To reverse a sentence outside the standard range, the reviewing court must find: (a) either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those

reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient. RCW 9.94A.535(4).

Neither of the reasons enumerated by RCW 9.94A.535(4) are present in this case. First, Norman did not receive a sentence outside the standard range for his crime. Second, Norman received the exceptional community custody he requested as part of a plea to quasi-reduced charges.

Norman argues that *State v. Gronnert* controls his matter. However, unlike the defendant in *Gronnert*, Norman did not agree to an additional punishment as a condition for pre-sentencing release. 122 Wash.App. 214, 218, 93 P.3d 200 (2004).

In *Gronnert*, despite questioning the wisdom of entering into a plea agreement that included severe consequences for failure to remain clean while on a temporary release, the sentencing court followed the recommendation. However, in following that recommendation, the court failed to enter findings stating the agreement was consistent with the interests of justice. 122 Wash.App. at 218, 93 P.3d 200. The Court distinguished *Gronnert's* matter from other cases, where defendants might enter a plea to an exceptional sentence to avoid a strike offense—a greater benefit to a defendant than a temporary release. *Id.* at 224. *Gronnert* received

his exceptional sentence because of additional, bad behavior, resulting in an excessive sentence for a defendant in his position. *Id.*

Unlike *Gronnert*, Norman agreed to exceptional community custody in order to reduce the duration of his actual sentence, not increase it. The sentencing court entered findings of fact and conclusions of law supporting the departure in the term of his community custody. It held the stipulation was both justified and appropriate for its sentence. RP 19; CP 23, appendix 2.4. While Norman's case is distinguished by the type of departure at issue, his case is more aligned with *Breedlove* and *Dillon*, where the defendants agreed to exceptional sentences in exchange for reduced charges.

In *Breedlove*, the defendant agreed to an exceptional sentence in exchange for reduced charges. 138 Wash.2d at 301-2, 979 P.2d 417. The trial court followed the recommendation, but rather than entering findings of fact and conclusions of law, it interlineated "see stipulated agreement" in the judgment and sentence. *Id.* at 303. The Court determined the agreement was sufficient and compelling, yet remanded for the entry of those findings. *Id.* at 313. In doing so, the *Breedlove* court reasoned that "where the parties agree that an exceptional sentence is justified, the purposes of the SRA are generally served by accepting the agreement as a substantial and compelling reason for imposing an exceptional sentence." *Id.* at 309. Plea agreements

made intelligently and voluntarily, with an understanding of the consequences, are encouraged and enforced. *Id.* at 310. Still, the fact of a stipulation does not relieve the sentencing court's obligation to enter findings of fact and conclusions of law which explain the reasons for the sentence. *Id.* Written findings ensure the reasons for an exceptional sentence are articulated, informing all of the reasons for deviating from the standard range. *Id.*

Similarly, the defendant in *Dillon* agreed to an exceptional sentence in exchange for reduced time. In its discretion, the trial court imposed a exceptional sentence lower than that recommended. 142 Wash.App at 273-74, 174 P.3d 1202. The Court disagreed with the defendant's proposition that his sentence required jury determination of facts, ruling instead that because the defendant made an agreed recommendation of an exceptional sentence the sentencing court was not required to find any additional facts justifying that sentence. 142 Wash.App. at 277. Indeed, the recommendation was sufficient justification. That Court also precluded the defendant from challenging his exceptional sentence without challenging his plea agreement. *Id.*

Here, the sentencing court determined the agreement of the parties for the exceptional term of community custody was appropriate. CP 23, Appendix 2.4. That finding alone satisfies the concerns set out in both

Breedlove and Dillon. Consequently, Norman has not shown the court exceeded its authority by sentencing him to a sentence inconsistent with the purposes of the SRA.

- b. *The remedy for incomplete findings of fact justifying exceptional sentences is to remand to the sentencing court for entry of new findings.*

Even if the sentencing court had failed to enter findings, the remedy Norman requests is inappropriate. The remedy for failure to enter or make Findings of Fact and Conclusions of Law as specific as he requests is remand for entry of the findings. *Breedlove*, 138 Wash.2d at 311, 979 P.2d 417. The failure to enter findings does not justify vacation of the sentence unless there is a fundamental defect which results in a complete miscarriage of justice. *Id.* There is no miscarriage of justice where the sentence imposed is the precise sentence requested by the defendant. *Id.*

While Norman did not receive the precise standard range sentence he agreed to, he did receive the precise exceptional community custody he requested. RP 18. He acknowledged the court was not required to follow the recommendation. CP 4; RP 10. He also acknowledged that as a result of his plea he gave up the right to appeal. CP 21, pg 2. His stipulation and request of the exceptional community custody was intelligent, voluntary, and made with an understanding of its consequences and was a valid waiver of his right to challenge the sentence by appeal. 138 Wash.2d at 312.

Norman has not shown he is entitled to a new sentencing hearing. Confusing the reasons the sentencing court opted to increase his the time imposed under his standard sentencing range with an increase in an exceptional sentence does not change the fact he received the precise exceptional community custody he requested. The record establishes reasons justifying the increased period of community custody, which was neither too lenient nor too excessive. Moreover, he cannot challenge his exceptional community custody without also challenging his plea agreement. Consequently, his appeal fails.

3. Any failure by the sentencing court to enter more specific findings is invited error.

If the Court determines the entered findings were abbreviated and in error, the error was invited. The invited error doctrine prohibits a defendant from setting up any error at trial and then complain of it on appeal. *Breedlove*, 138 Wash.2d at 312, 979 P.2d 417 *citing State v. Wakefield*, 130 Wash.2d 464, 471, 925 P.2d 183 (1996). The doctrine has been applied in cases where defendants were sentenced pursuant to plea agreements and later challenged their agreements. *Id.*

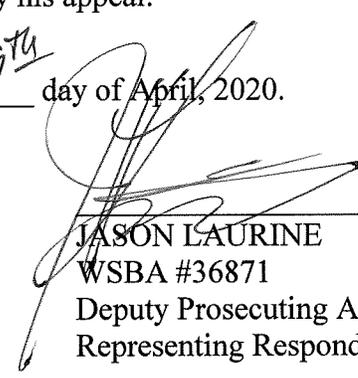
Like the defendant in *Breedlove*, Norman agreed to the imposition of exceptional community custody in exchange for reduced charges and a shorter sentence. He acknowledged this agreement in his colloquy with the

court and that it justified the exceptional community custody. RP 17-18. The Court in Breedlove held such actions invited any error in the sentencing court's failure to enter findings of fact and conclusions of law, which prohibited him from complaining that failure was error. 138 Wash.2d at 313. Consequently, Norman invited any error that may have occurred.

IV. CONCLUSION

The sentencing court did not exceed its authority because it imposed a sentence within the standard sentencing range. It was not error to impose the requested period of community custody. Consequently, Norman has not shown he is entitled to the remedy he requests. Moreover, to provide that remedy would require for him to challenge the entirety of his plea, which he has not done. This court should deny his appeal.

Respectfully submitted this 29th day of April, 2020.



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CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that the opposing counsel listed below was served RESPONDENT'S BRIEF electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 4, 2020.



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