

No. 28613-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SHAWN M. TAYLOR,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

No. 28613-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

SHAWN M. TAYLOR,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....4

B. STATEMENT OF THE CASE.....4

C. ARGUMENT.....5

 1. The special verdict should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict.....5

 2. The sentence imposed on the drug conviction is invalid because the judgment and sentence does not clearly indicate that the term of community custody is not to extend the total sentence beyond the statutory maximum.....7

D. CONCLUSION.....10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>In re Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009).....	9
<u>State v. Bashaw</u> , Slip Op. No. 81633-6 (July 1, 2010).....	6, 7
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	9
<u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	6, 7
<u>State v. Hibdon</u> , 140 Wn. App. 534, 166 P.3d 826 (2007).....	8
<u>State v. Miller</u> , 156 Wn.2d 23, 123 P.3d 827 (2005).....	7
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	5
<u>State v. Torngren</u> , 147 Wn. App. 556, 196 P.3d 742 (2008).....	8

Constitutional Provisions and Statutes

U.S. Const. art. I, § 21.....	5
RCW 9.94A.505(5).....	8

A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury it had to be unanimous in its answer to the special verdict.

2. The trial court erred in imposing a sentence that exceeded the statutory maximum.

Issues Pertaining to Assignment of Error

1. Should the special verdict be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict?

2. Is the sentence imposed on the drug conviction invalid because the judgment and sentence does not clearly indicate that the term of community custody is not to extend the total sentence beyond the statutory maximum?

B. STATEMENT OF THE CASE

Shawn Taylor was convicted by a jury of possession of a controlled substance, methamphetamine, while armed with a firearm, and two counts of first degree unlawful possession of a firearm. CP 151-54.

The jury was instructed in pertinent part regarding the special verdict for the drug conviction:

If you find the defendant guilty of . . . possession of a controlled substance, methamphetamine, you will complete Special Verdict Form

C. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict. If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant was armed with a firearm at the time he possessed the controlled substance, methamphetamine, it will be your duty to answer Special Verdict Form C, “yes.”

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant was armed with a firearm at the time he possessed the controlled substance, methamphetamine, it will be your duty to answer Special Verdict Form C “no.”

RP 201-03.¹

The jury answered “yes” to the special verdict. CP 152. On the drug conviction, the Court sentenced Mr. Taylor to 60 months confinement including the 18-month firearm enhancement. CP 158. The statutory maximum for the drug conviction was 60 months. CP 157. The Court also ordered 9-12 months community custody on the drug conviction. CP 158. This appeal followed. CP167-68.

C. ARGUMENT

1. The special verdict should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict.

Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304

¹ Citations to the transcript of the trial, held 10/6-10/7/09, will be designated “RP.” Citations to the any other hearings, which were separately numbered, will be designated “RP” preceded by the date, e.g. “3/2/09 RP.”

(1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer “no.” Goldberg, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” Id.

In Goldberg, the jury was given the following special verdict instruction:

In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083.

More recently, in State v. Bashaw, Slip Op. No. 81633-6 (July 1, 2010), the Supreme Court reversed sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts identical to the one in this case except it involved a school bus stop rather than a firearm enhancement. Bashaw, Slip Op. pp 4, 13-18.

In this case as well as in Bashaw, the jury was incorrectly instructed, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Bashaw, Slip Op. p 4, RP 201. Citing Goldberg, the Bashaw court held:

Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, Slip Op. p 16.

The instruction in the present case incorrectly requires jury unanimity for the jury to answer “no” to the special verdict, contrary to Bashaw and Goldberg. Since this instruction misstates the law, the special verdict must be stricken.

2. The sentence imposed on the drug conviction is invalid because the judgment and sentence does not clearly indicate that the term of community custody is not to extend the total sentence beyond the statutory maximum.

Whether a person convicted of a crime was given a lawful sentence is a question of law that is reviewed de novo. State v. Miller, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

The SRA directs that "a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5). Here, the statutory maximum for the drug conviction was 60 months. The Court sentenced Mr. Taylor to 60 months confinement including the 18-month firearm enhancement. The Court also ordered 9-12 months community custody.

In State v. Torngren, 147 Wn. App. 556, 196 P.3d 742 (2008), this Court found that a sentence "is valid when the judgment and sentence 'set[s] forth the statutory maximum and clearly indicate[s] that the term of community [custody] does not extend the total sentence beyond that maximum.'" Id. at 566, 196 P.3d 742 (alterations in original) (quoting State v. Hibdon, 140 Wn. App. 534, 538, 166 P.3d 826 (2007)). The Court concluded that a remand to the trial court for clarification was the proper remedy. Torngren, 147 Wn. App. at 566, 196 P.3d 742. In Hibdon, the Court held that either an amended sentence or a vacation and remand for resentencing are equally appropriate remedies in these circumstances. Hibdon, 140 Wn. App. at 538, 166 P.3d 826.

Similarly, in In re Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), the Supreme Court held that where the sentence specifically directs DOC to ensure that whatever release date it sets, under no circumstances may the offender serve more than the statutory maximum, the sentence does not exceed the statutory maximum. Id. at 673. Where a sentence is insufficiently specific regarding community custody, an amended sentence is the appropriate remedy. Id., citing State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997).

Here, the sentence imposed on the drug conviction is invalid because the judgment and sentence does not clearly indicate that the term of community custody is not to extend the total sentence beyond the statutory maximum. Therefore, the case should be remanded and the judgment and sentence amended accordingly.

D. CONCLUSION

For the reasons stated, the special verdict should be stricken, and the judgment and sentence amended to clearly indicate that the term of community custody is not to extend the total sentence beyond the statutory maximum.

Respectfully submitted July 19, 2010.



David N. Gasch
Attorney for Appellant
WSBA #18270