

FILED

NOV 15, 2013

Court of Appeals
Division III
State of Washington

No. 31643-2

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JESUS TORRES, Appellant

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
509.939.3038

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I. Assignments Of Error

- A. The Sentencing Court Erred When It Imposed A Sentence That Exceeded The Statutory Maximum Term.
- B. The Sentencing Court Erred When It Imposed A \$250 Jury Demand Fee.

Issue Related To Assignment Of Error

- A. Did the sentencing court err when it imposed a sentence that exceeded the statutory maximum term?
- B. Did the trial court err when it imposed a \$250 jury demand fee?

II. Statement of Facts

Mr. Torres pleaded guilty to possession of a controlled substance under RCW 69.50.4013(1) and tampering with a witness under RCW 9A.72.120(1)(a). CP 49. As part of the guilty plea bargain, Mr. Torres also pleaded guilty to charges ending in cause number 493-9. (2/19/13 RP 17-20; CP 49-57).

On April 24, 2013, he was sentenced in accord with the plea bargain. He was also separately sentenced on cause number, ending in 1248-6; Mr. Torres had been found guilty in a jury trial in that cause. (4/24/13 RP 3-4). Each sentence, from the three cause numbers, was to run concurrent up to 60 months, based on

the statutory maximum. CP 73; 76. The court imposed an 8-month sentence for driving with a suspended license, to be served consecutive. (4/24/13 RP 4). In addition to the 60 months, the court ordered a term of community custody for count one, possession of a controlled substance, as follows:

(A) The defendant shall be on community placement or community custody for the longer of:

(1) The period of early release RCW 9.94A.728(1)(2); or

(2) The period imposed by the court, as follows:

Count 1 for 12 months. CP 76.

The cost bill, attached to the judgment and sentence included a jury demand fee of \$250, for 2/19/13, the day Mr. Torres entered his guilty plea. CP 80.

Mr. Torres makes this appeal. CP 82.

III. Argument

A. Mr. Torres' Sentence Exceeded The Statutory Maximum Term.

In the context of sentencing, an illegal or erroneous sentence may be challenged for the first time on appeal. *In re Call*, 144 Wn.2d 315, 331, 28 P.3d 709 (2001). Whether a sentence is legally erroneous is reviewed *de novo*. *State v. Jacobs*, 154 Wn.2d 596, 600. 115 P.3d 281 (2005). A trial court only possesses the

power to impose sentences provided by law. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33 604 P.2d 1293 (1980).

By statute, the two crimes to which Mr. Torres pleaded guilty, possession of a controlled substance and witness tampering are both class C felonies. RCW 69.50.4013(1)(2); RCW 9A.72.120(2). The statutory maximum for a class C felony is 60 months. RCW 9A.20.021(c). Based on his offender score, the standard range on count I was 12-24 months, and 51-68 on Count 2. The statutory maximum for an offense sets the ceiling of punishment that may be imposed by the court. RCW 9A.20.021; *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). Here, the sentencing court imposed a 60-month concurrent sentence, the statutory maximum.

Under RCW 9.94A.701(9), a term of community custody may not exceed the statutory maximum when combined with the imposed term of confinement.¹ With the imposition of the 12-month community custody, the net result of the imposed sentence here was a 72 month term.

¹ RCW 9.94A.701(9): The term of community custody specified by this section 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) requires a sentencing court to reduce the defendant's term of community custody where the defendant's total term of confinement and community custody may exceed the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012). A court commits reversible error when it exceeds its sentencing authority under the SRA. *State v. Winborne*, 167 Wn.App. 320, 330, 273 P.3d 454 (2012)(internal citations omitted).

Courts have the duty and power to correct an erroneous sentence upon its discovery, even where the parties not only failed to object but also agreed with the sentencing judge. *State v. Loux*, 69 Wn.2d 855, 858, 420 P.2d 693 (1966), *overruled on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996). The appropriate remedy here is remand for resentencing, in accordance with RCW 9.94A.701(9).

B. The Trial Court Lacked Authority To Impose A "Jury Demand Fee" When Mr. Torres Pleaded Guilty.

As part of the judgment and sentence the court ordered Mr. Torres to pay a "jury demand fee" of \$250. CP 80. RCW 10.01.160(1)(2) provides that costs may be imposed on a criminal defendant that are expenses specially incurred by the state in

prosecuting and convicting the defendant. A superior court may impose a jury fee up to \$250 for a 12-person jury. *State v. Hathaway*, 161 Wn.App. 634, 653, 251 P.3d 253 (2011). Here, however, Mr. Torres pled guilty on February 19, 2013, without summoning a jury. The state did not specially incur a jury demand fee in obtaining Mr. Torres' convictions. The imposition of the fee was mistakenly added to the legal financial obligations.

Although there seems to be some confusion in the Courts as to whether an appeal of an erroneous legal financial obligation may be appealed as a matter of right, case law falls squarely on the side of review in order to serve the ends of justice. RAP 1.2(c), 2.5; See *State v. Hathaway*, 161 Wn. App. 634, 251 P.3d 253 (2011)(imposition of jury demand fee in excess of statutory authority reviewed as a purely legal question, and review facilitated justice and conservation of future judicial resources); *State v. Hunter*, 102 Wn.App. 630, 633-34, 9 P.3d 872 (2000)(challenge to sentencing court's imposition of a drug fund contribution, which constituted a legal financial obligation, held reviewable for first time on appeal); *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)(in the context of sentencing, case law holds that illegal or erroneous sentences may be challenged for the first time on appeal

and a sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional). Mr. Torres respectfully asks this Court to exercise its discretion and consider the merits of his argument under RAP 1.2(c), as it would facilitate justice and likely conserve future judicial resources.

When a trial court exceeds its sentencing authority under the SRA, it commits reversible error. The appropriate remedy is reversal of the erroneous, void portion of the sentence.

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Torres respectfully asks this Court to remand for resentencing consistent with the arguments presented herein.

Dated this 15th day of November 2013.

Respectfully submitted,

s/ Marie J. Trombley WSBA 41410
Attorney for Jesus Torres
PO Box 829
Graham, WA 98338
509-939-3038
Fax: 253-268-0477
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid, on November 15, 2013 to Jesus Torres,# 825222, Coyote Ridge Correctional Center, PO Box 769, Connell, WA 99326; and by electronic service, per agreement between the parties to:

Email:prosecuting@co.benton.wa.us

Andrew K. Miller
Benton County Prosecuting Attorney
7122 W. Okanogan Pl. Bldg. A
Kennewick, WA 99336-2359

s/ Marie J. Trombley
WSBA 41410
PO Box 829
Graham, WA 98338
509-939-3038
FAX: 253-268-0477
marietrombley@comcast.net