

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 33724-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Appellant,
v.
Scott Montgomery Nicholas, Respondent.

BRIEF OF RESPONDENT

Christopher R. Lanz, WSBA#24220
Attorney for Scott M. Nicholas,
Respondent

Lanz & Trummel, PLLC
1000 East Jewett Boulevard
Post Office Box 1116
White Salmon, Washington 98672
509-493-2921

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I. Responses to Assignments of Error Numbers 1 and 2.

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No. 4 A trial court may impose any sentence within the standard sentence range without review.

II. Statement of the Case

The state's rendition of the Statement of the Case is factually correct.

III. Summary of the Argument

The state is barred from seeking a review as a matter of right as well as a discretionary review, and its appeal should be dismissed.

In the alternative, if the court accepts review, the trial court's decision to modify the original Judgment and Sentence of October 15, 2012 should not be vacated.

IV. Argument

- A. The state's appeal should be dismissed as it is neither entitled to a review as a matter of right nor a discretionary review.

Rule of Appellate Procedure (RAP) 2.2(b) states the following:

Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

- (1) Final Decision, Except Not Guilty. A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).
- (2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.
- (3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.
- (4) New Trial. An order granting a new trial.
- (5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding that:
 - (A) is below the standard range of disposition for the offense,

- (B) the state or local government believes involves a miscalculation of the standard range,
 - (C) includes provisions that are unauthorized by law, or
 - (D) omits a provision that is required by law.
- (6) Sentence in Criminal Case. A sentence in a criminal case that
- (A) is outside the standard range for the offense,
 - (B) the state or local government believes involves a miscalculation of the standard range,
 - (C) includes provisions that are unauthorized by law, or
 - (D) omits a provision that is required by law.

The state is seeking an appeal from the trial court's order amending its original Judgment and Sentence of October 12, 2015. CP65. This order is an order modifying a sentence in a criminal case. The provisions of RAP 2.2(b)(6) are not satisfied as the order does not create a sentence that: (A) is outside the standard range for the offense because the defendant was sentenced to a term of 108 months, which is between the range of 60+ months and 120 months; (B) miscalculates the standard range because the state is alleging no such error; (C) includes provisions that are unauthorized by law because the sentence is a term of months in prison and is within the standard sentence range and imposed at the discretion of the trial judge (see below section IV.C.); or (D) omits some provision that is

required by law because, again, the state is not alleging any such error.

Due to the fact the state is not entitled to a review as a matter of right of the order modifying the original sentence of October 15, 2012, the state may only seek review if the Court grants discretionary review as mandated under RAP 2.3, which in pertinent parts, states the following:

...

(b) Considerations Governing Acceptance of Review. . .

(D)iscretionary review may be accepted only in the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

None of these elements are satisfied, therefore the state should not be granted discretionary review.

As the state is neither entitled to review as a matter of right nor discretionary review, the state's appeal should be dismissed, and the defendant awarded his costs expended in order to respond to the state's appeal.

In the alternative, if the Court should find the state is entitled to its appeal, it should consider the argument below to determine the order modifying the original Judgment and Sentence of October 15, 2012 should not be vacated.

- B. The defendant's oral motion to modify the judgment and sentence was not time-barred because the Judgment and Sentence of October 15, 2012 was not valid on its face.

Revised Code of Washington (RCW) 10.73.090, entitled "Collateral attack - One year time limit," states the following:

- (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.
- (2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
- (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

The state argues in its brief of the petitioner that the defendant's oral motion to modify the term of prison from 120 months to 108 months violates RCW 10.73.090 because he presented his motion more than one year from the entry of the original Judgment and Sentence of October 15, 2012. This argument fails because the original Judgment and Sentence of October 15, 2012 was not valid on its face due to the fact it contained the impermissible and unlawful variable term of community custody. Therefore, the one year period in which to initiate a collateral attack could not have commenced until Judgment and Sentence of October 15, 2012 was corrected by the August 20, 2015 order modifying it. CP65. The defendant's oral motion to modify the term of prison from 120 months to 108 months was timely made on July 20, 2015.

- C. The trial court committed no error when it imposed a sentence of 108 months, plus 12 months of

community custody because it imposed a sentence within the standard range.

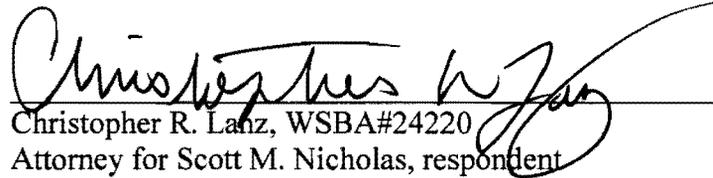
The defendant's standard sentence range is 60+ months to 120 months in prison. VRP 4. On August 17, 2015, after argument by counsel, the trial court imposed a sentence of 108 months, which is within that standard sentence range. VRP 14. There is no error committed when a trial court imposes a sentence within the standard sentence range, and as stated above in Section IV.A., a sentence within the standard sentence range is authorized by law. RCW 9.94A.585(1) states: "A sentence within the standard sentence range, under RCW 9.94A.510 ("Table 1—Sentencing grid.") or 9.94A.517 ("Table 3—Drug offense sentencing grid."), for an offense shall not be appealed." Simply stated, the sentence of 108 months, plus 12 months of community custody is a sentence within the standard sentence range, and the order modifying the original Judgment and Sentence of October 15, 2012 should not be vacated.

V. Conclusion

The state should not be allowed to continue its appeal of the order modifying the original Judgment and Sentence of October 15, 2012 as it is not entitled to a review as a matter of right nor a discretionary review. If the Court finds the state is entitled to its

appeal, the defendant should prevail because its oral motion to modify the original Judgment and Sentence of October 15, 2012 is not time barred and the court imposed a sentence within the standard sentence range.

Respectfully submitted this 26th day of January, 2016,


Christopher R. Lanz, WSBA#24220
Attorney for Scott M. Nicholas, respondent