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Court of Appeals
Division III
State of Washington
4/16/2018 2:15 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35472-5-III

STATE OF WASHINGTON, Respondent,

v.

BRENTEN MICHAEL MULROY, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Brenten Mulroy pleaded guilty to four felony offenses and was sentenced to a prison-based drug offender sentence alternative (“DOSA”) sentence. Three of the four offenses were found to be domestic violence offenses and the trial court imposed a domestic violence penalty assessment based upon that finding, but the information did not allege or set forth the requirements to find that the offenses were crimes of domestic violence. Accordingly, the information was insufficient to fully apprise Mulroy of the nature of the allegations to prepare a defense. Further, the language of the judgment and sentence permits a combined term of incarceration and community custody that exceeds the statutory maximum for the offense. These errors require remand for resentencing.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The information was insufficient to apprise Mulroy of the requirements to find that three of the four offenses were domestic violence offenses.

ASSIGNMENT OF ERROR NO. 2: The judgment and sentence, when read in combination with the prison-based DOSA procedures set forth in former RCW 9.94A.660, allows Mulroy’s combined term of incarceration

and community custody to exceed the statutory maximum in the event of termination.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Is the “domestic violence” allegation an element of the charge that must be included in the charging document when it may result in the imposition of an increased monetary penalty?

ISSUE NO. 2: When the prison-based DOSA sentence for crimes with a statutory maximum term of 60 months provides for 27.75 months in prison and 27.75 months on community custody, with the balance of the sentence plus an additional 9 to 18 months of community custody to be served in the event of termination, must the judgment and sentence include clarifying language that the combined term of incarceration and community custody may not exceed the statutory maximum of 60 months?

IV. STATEMENT OF THE CASE

The State charged Brenton Mulroy with third degree assault, unlawful imprisonment, and two counts of witness tampering arising from a dispute with Jacqueline Sanger, who reported they had been in a significant dating relationship for six months. CP 1, 5. The information did not allege that the offenses were domestic violence offenses nor set out

the requirements to find that the offenses were domestic violence offenses.
CP 5-6.

Pursuant to a plea agreement, Mulroy entered guilty pleas to the four charges. CP 7. With an offender score of 9, the standard range on all four offenses was 51-60 months, together with 9-18 months of community custody. CP 8. The maximum sentence for each count was 5 years. CP 8. As the result of Mulroy's guilty plea, the State agreed to recommend a prison-based DOSA sentence of 27.75 months in custody and 27.75 months on community custody. CP 9-10.

At sentencing, the trial court found that Mulroy's offenses were domestic violence offenses and imposed a \$100 domestic violence assessment. CP 19, 21. It followed the State's recommendation and imposed a prison-based DOSA sentence of 27.75 months in custody and 27.75 months on community custody. CP 24. The judgment and sentence further stated that if Mulroy were terminated from the program, he could be required to serve the remaining balance of the original sentence as well as an additional 9-18 months on community custody following his release. CP 25-26. No language appears in the judgment and sentence to clarify that the combined term of incarceration and community custody cannot exceed the statutory maximum sentence of 60 months for the offenses.

Mulroy now appeals, and has been found indigent for that purpose.
CP 31, 32.

V. ARGUMENT

Two errors require remand for resentencing. First, the information failed to designate the offenses as domestic violence charges and set forth the requirements to find that they were crimes of domestic violence. Because the finding was necessary to impose the domestic violence assessment, the State was required to include the elements in the information to give Mulroy an adequate opportunity to understand the nature of the allegation and prepare a defense. Second, the sentence impose permits a combined term of incarceration and community custody that exceeds the maximum penalty for the offenses. Accordingly, Mulroy requests that the court remand the case to strike the domestic violence assessment and to include language specifying that any term of community custody imposed after termination cannot result in a combined term of incarceration and community custody that exceeds the statutory maximum of 5 years.

This court reviews the sufficiency of a charging document *de novo*. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). Additionally, whether the sentence comports with the requirements of the Sentencing

Reform Act presents a question of statutory interpretation, which the court reviews *de novo*. *State v. Bruch*, 182 Wn.2d 854, 859, 346 P.3d 724 (2015). In general, sentencing errors may be raised for the first time on review. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

1. Because the “domestic violence” finding was necessary to impose the penalty assessment under RCW 10.99.080, the State was required to include the elements of domestic violence in the charging document.

A criminal accused has the right to be informed of the nature and cause of the accusation against him. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. Under this rule, the charging document must allege facts supporting every element of the offense. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (*discussing State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). This requirement is necessary to give the accused adequate notice to prepare a defense to the accusation. *Id.* at 101. Charging documents are construed liberally when they are challenged first on appeal, but the document must include at least some language giving notice of the missing element. *Id.* at 105-06.

Essential elements are those findings that expose the defendant to elevated punishment. *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.

Ct. 2348, 147 L. Ed. 2d 435 (2000). Accordingly, the trial court may not impose additional punishment based on facts beyond those reflected in the jury verdict or admitted by the defendant. *See Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

RCW 10.99.020(5) defines a “domestic violence” offense as a crime committed by one family or household member against another.

RCW 10.99.020(3) defines “family or household members” as:

[S]pouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

Finally, 10.99.080 permits the court, in addition to any other penalty, fines, or costs, to impose a penalty of not more than \$100 upon any adult offender convicted of a crime of domestic violence as defined in the chapter. Consequently, under these statutes, finding that a crime was committed by one household member against another permits the imposition of an increased financial penalty, which would not be

authorized without the finding. Under *Apprendi* and *Blakely*, this makes the “domestic violence” designation an essential element of the charge. Accordingly, it was required to be included in the information.

Two courts have considered whether the “domestic violence” designation is an essential element of the offense that must be included in the charging document and reached a contrary result. In *State v. O.P.*, 103 Wn. App. 889, 891-92, 13 P.3d 1111 (2000), Division One of the Court of Appeals concluded that the domestic violence designation did not create any new offenses or alter the elements of the underlying offense, but simply signaled to the court that the law is to be equitably and vigorously enforced. The court also noted that the defendant was not subject to any increased punishment as the result of the finding. *Id.* at 892. Similarly, in *State v. Goodman*, 108 Wn. App. 355, 358-59, 30 P.3d 516 (2001), Division Two of the Court of Appeals concluded that “domestic violence is not a separate crime with elements that the State must prove.” Both of these cases precede the U.S. Supreme Court’s decision in *Blakely* and are wrongly decided.

As emphasized in *Apprendi* and *Blakely*, it is not the legislature’s designation of a fact as an essential element that controls; it is whether the fact permits the penalty for the crime to be increased beyond the

prescribed statutory maximum. *Blakely*, 542 U.S. at 301. Here, the domestic violence finding resulted in an increased penalty assessment of \$100 that would not have been legally authorized but for the finding. CP 21. The finding was, therefore, an essential element required to be pleaded in the information and admitted or proved to a jury.

Here, the information does not cite chapter 10.99 RCW and does not set forth any of the ways in which the domestic violence designation could be proven, nor does it allege that Mulroy and Sanger were family or household members within the meaning of the statute. CP 5-6. Even under the liberal construction standard, the information does not include language from which the domestic violence allegation or its requirements could be inferred. Moreover, the error here is not harmless. The only factual basis for the allegation is a conclusory statement that Sanger and Mulroy had “been in a significant dating relationship for the last six months,” with no specific information provided about their relationship. CP 1. There is no indication that Mulroy and Sanger married, lived together, or had children in common. Thus, whether their relationship qualified them as “family or household members” depended on whether they had a qualifying “dating relationship,” which considers the length of the relationship, its nature, and the frequency of interaction between them.

RCW 26.50.010. The admitted facts are insufficient to make this determination.

Accordingly, by failing to include the domestic violence designation and the requirements to make the finding, the State failed to include all of the essential elements of the charge in the information and deprived Mulroy of due notice of the accusation against him.

Accordingly, the domestic violence designation should be stricken from his convictions, and the domestic violence penalty assessment should be stricken from the judgment and sentence.

2. The judgment and sentence permits a combined term of incarceration and community custody that exceeds the statutory maximum if Mulroy is terminated from the DOSA program.

The statutory maximum penalty for the crimes of third degree assault, unlawful imprisonment, and witness tampering is five years. RCW 9A.36.031(2); 9A.40.040(2); 9A.72.120(2); 9A.50.021(1)(c). The sentencing court may not impose a sentence of imprisonment or community custody that exceeds the statutory maximum for the crime. RCW 9.94A.505(5). Thus, when a trial court imposes an aggregate term of imprisonment and community custody that might exceed the statutory maximum, it must include a notation clarifying that the total term of

confinement and community custody actually served must not exceed the statutory maximum for the offense. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012) (citing *In re Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009)).¹

Here, Mulroy received a prison-based DOSA sentence of 27.75 months in custody and 27.75 months on community custody. CP 24. However, the judgment and sentence also states that if Mulroy is terminated from the program, he “shall be reclassified to serve the unexpired term of the sentence as ordered by the sentencing judge.” CP 25. Thereafter, following termination, he would be required to serve from 9-18 months on community custody. CP 26. If Mulroy did not receive earned release time, he would serve a total of 55.5 months in prison followed by 9-18 months on community custody. Thus, his sentence potentially exceeds the statutory maximum by 4.5 to 13.5 months.

The remedy for a sentence that has the potential to exceed the statutory maximum “is to remand to the trial court to amend the sentence

¹ At the time of Mulroy’s offenses, the legislature had not yet enacted RCW 9.94A.701(9), which requires the court to reduce the community custody term when, in combination with the term of confinement, it exceeds the statutory maximum. Consequently, the *Brooks* notation must be included in the judgment and sentence, and the Department of Corrections (rather than the court) is charged with adjusting the length of the community custody term. See generally *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011).

and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.” *Brooks*, 166 Wn.2d at 675. Here, the case should be remanded for inclusion of the *Brooks* notation in the judgment and sentence.

3. If Mulroy does not prevail, appellate costs should not be imposed.

Pursuant to this court’s General Court Order dated June 10, 2016 and RAP 14.2, appellate costs should not be imposed herein. Mulroy’s report as to continued indigency is filed contemporaneously with this brief. He was previously found indigent for appeal, and the presumption of indigency continues throughout. RAP 15.2(f). He has fully complied with the General Order and remains unable to pay, having no assets or income and substantial debt. A cost award is, therefore, inappropriate.

VI. CONCLUSION

For the foregoing reasons, Mulroy respectfully requests that the court STRIKE the domestic violence designation and associated penalty enhancement from his judgment and sentence, and REMAND the case for amendment of the judgment and sentence to provide that the combined term of confinement and community custody actually served shall not exceed the statutory maximum term of 60 months.

RESPECTFULLY SUBMITTED this 16 day of April, 2018.

A handwritten signature in blue ink that reads "Andrea Burkhardt". The signature is written in a cursive style with a large initial 'A'.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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And, pursuant to the prior agreement of the parties, by e-mail to the following:

Brian O'Brien, Deputy Prosecuting Attorney
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16 day of April, 2018 in Walla Walla, Washington.



Andrea Burkhart

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April 16, 2018 - 2:15 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Brenton Michael Mulroy
Superior Court Case Number: 07-1-00213-9

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