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35976-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAYME ROGERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. On remand for resentencing, was it error for the trial court not to exercise its discretion to consider an anticipated, but not requested exceptional sentence downward?

2. Should this Court remand to the trial court to clarify the community custody condition under § 4.2(C)(2) of the judgment and sentence and limit the gang association to that defined by RCW 9.94A.030(13), as was ordered by this Court on direct review?

3. Is remand appropriate with an order to strike the community custody provision under count 2 of the judgment and sentence, if the combined standard range sentence, firearm enhancement, and the term of community custody exceed the statutory maximum of ten years?

4. Should this Court remand with an order to strike any reference to a 60-month mandatory minimum sentence under § 2.1 of the judgment and sentence if that requirement was invalidated on direct review because it was not supported by a jury finding?

5. Should this Court remand with an order to strike the $200 court costs from the judgment and sentence if the defendant can establish he was indigent at the time of sentencing?

6. If the defendant previously had his DNA collected in 2014 pursuant to a felony judgment and sentence, should this Court remand with

an order to strike the $100 DNA collection fee from the judgment and sentence?

II. STATEMENT OF THE CASE

The defendant was convicted in the Spokane County Superior Court of drive-by shooting, first-degree assault, and conspiracy to commit a first-degree assault (an inchoate crime), with firearm enhancements for the assault and conspiracy charges, and first degree unlawful possession of a firearm for offenses occurring on September 24, 2013. CP 186-87. On direct appeal, this Court vacated the drive-by shooting convictions for insufficiency of the evidence and several community custody provisions, but otherwise affirmed the judgment and sentence and remanded for resentencing. *State v. Weatherwax*, 193 Wn. App. 667, 376 P.3d 1150, *reversed in part*, 188 Wn.2d 139, 392 P.3d 1054 (2017).[1]

The defendants then petitioned for review in the Supreme Court. Our high court accepted review to resolve a conflict between the divisions of the court of appeals as to whether an anticipatory offense had the same seriousness level as a completed crime for sentencing purposes. On May 1, 2017, the Supreme Court remanded to the trial court for resentencing, requiring the lower court to determine whether the completed crime of first

[1] This Court consolidated codefendant, Thomas Weatherwax, No. 32708-6, with Rodgers, No. 32760-4, on direct appeal from the trial and first sentencing.

degree assault or the anticipatory crime of conspiracy to commit first degree assault had the lower offender score and resultant standard range, for calculating consecutive sentences. 188 Wn.2d at 156. The Court stated: "We therefore reverse and remand for resentencing using the approach taken by the Court of Appeals in [*State v.*] *Breaux* [167 Wn. App. 166, 273 P.3d 447 (2012)]." *Id.* at 144.

III. ARGUMENT

A. THE DEFENDANT IS NOT ENTITLED TO REVIEW UNDER RAP 2.5(c)(1) BECAUSE THE TRIAL COURT EXPRESSLY DECLINED TO CONSIDER THE DEFENDANT'S ANTICIPATED, BUT NOT REQUESTED EXCEPTIONAL SENTENCE DOWNWARD. INSTEAD, THE TRIAL COURT MADE ONLY A CORRECTIVE CHANGE TO THE JUDGMENT AND SENTENCE TO COMPLY WITH THE SUPREME COURT'S ORDER.

The defendant first asserts the trial court abused its discretion on remand when it failed to consider his request for an exceptional sentence downward based upon an asserted mitigating factor of youth and multiple offense policy[2] at the time of the commission of the offenses. CP 128-31 (defendant's resentencing brief); RP 19. The defendant's date of birth is June 24, 1991; he was 22-years-old at the time of the commission of the offenses. CP 186. The defendant had not requested the trial court impose an exceptional sentence at the original sentencing.

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[2] *See State v. Graham*, 181 Wn.2d 878, 337 P.3d 319 (2014).

At a presentencing conference, defense counsel expressed that she would be requesting the trial court conduct a full resentencing on remand. RP 5-6. The defense intimated it would be requesting a mitigated sentence based upon youth. RP 5. The trial court opined that the resentencing would be "fairly mechanical [in] that [the court] was to apply the correct seriousness level for anticipatory offenses, [the court] must choose the offense standard range as lower as the starting point, and resentence." RP 6-7.

Ultimately at resentencing, the defense initially requested the trial court rule on whether it would conduct a full resentencing,[3] as the court's decision would determine what sentence the defense would request from the court. RP 24-25. The trial court indicated it had reviewed the relevant caselaw, stating:

> So to go back to my comments, I'm aware of the case law. I'm aware if we had sentenced this case today, we might have different arguments than we had in August of '14. And I'm aware that we might have a different approach on some things, at least would have a different record, because we would talk about different things as least as to that. But my position is the court of appeals looked at this, the Supreme Court looked at it, and ultimately sent me a specific direction

[3] In its resentencing memorandum to the trial court, the defense cited caselaw regarding factors potentially supporting a downward departure from the standard range. CP 126-130.

> and mandate and said, you are to do this. And I think I'm bound by that.

RP 27-28.

The trial court further posited that the defendant had not previously asked it or a higher court to consider his youth or any other mitigating circumstance at sentencing – that the first such request came at the resentencing. RP 28-29.

The court then ruled:

> As of today[,] I'm going to hold -- again to be real clear -- I'm going to follow the mandates and delete the counts that the court of appeals took out and resentence using the correct starting point by the Supreme Court, if that's a simple way to say it.

RP 28-29.

Standard of review.

A trial court's discretion on remand is controlled by the scope of the appellate court's mandate. *State v. Kilgore,* 167 Wn.2d 28, 42, 216 P.3d 393 (2009). In *Kilgore*, the defendant was convicted of several counts of child rape and molestation. The trial court imposed an exceptional sentence based upon several aggravating circumstances. Division Two of this court reversed two counts, but affirmed five and remanded for further proceedings.

On remand in October 2005, Kilgore argued that the trial court had to resentence him under *Blakely*.[4] The trial court declined and signed an order striking the two counts, correcting the judgment and sentence, and correcting his offender score, but "made clear that in correcting the judgment and sentence to reflect the reversed counts, it was not reconsidering the exceptional sentence imposed on each of the remaining counts." *Id.* at 41. The trial court also explicitly ruled that "Kilgore was not entitled to a new sentencing hearing." *Id.* at 34.

The Supreme Court concluded that the trial court did not abuse its discretion by declining to resentence Kilgore. Although the number of his convictions had been reduced, his presumptive sentencing range remained the same. *Id.* at 42–43. The Court held that where a trial court exercises no independent judgment on remand, there is no issue to review on appeal because the original judgment and sentence remains final and intact. *Id.* at 40. The Court reasoned: "'[T]he finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced' is unaffected by the reversal of one or more counts." *Id.* at 37. "Only if the trial court, on remand, exercised its independent judgment, reviewed and

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[4] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (the State must prove to the trier of fact, beyond a reasonable doubt, facts supporting an exceptional sentence).

ruled again on such issue does it become an appealable question." The decision to simply correct a judgment and sentence is not an appealable act of independent judgment by the trial court. In such a case, "it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and term of incarceration." *Id.* at 40–41.

The Court also rejected Kilgore's argument that *Blakely*[5] was an intervening change in law before the trial court took action on remand that revived his right to appeal:

> In essence, he asks us to waive our rules of appellate procedure to allow application of a new rule of law to defendants who have otherwise exhausted their right to appeal as long as there is a possibility of a change to their judgment and sentence. Finality occurs, however, when the "availability of appeal" had been exhausted. The fact that the trial court had discretion to reexamine Kilgore's sentence on remand is not sufficient to revive his right to appeal. Our rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue. We will not waive this rule to make exceptions for defendants where a mere possibility of direct review exists.

Id. at 43 (footnote omitted) (citations omitted). Because the trial court chose not to exercise its discretion, there was no trial court decision for the appellate court to review and the Supreme Court affirmed.

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[5] The Washington Supreme Court affirmed the appellate court on direct review. The mandate became final for purposes of retroactivity analysis on January 5, 2003, before the Supreme Court's opinion in *Blakely*. Kilgore was resentenced in 2005.

Since RAP 2.5(c)(1)[6] deals with a trial court ruling presently before the appellate court, it is "[o]nly if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue [that] it become[s] an appealable question." *Kilgore*, 167 Wn.2d at 50.

Moreover, RAP 2.5(c)(1) permits, but does not mandate review of unremanded matters, in both the trial court and the appellate court. *State v. Barberio,* 121 Wn.2d 48, 49, 846 P.2d 519 (1993). In *Barberio,* the defendant did not challenge his exceptional sentences on appeal. The court of appeals originally reversed one conviction, and remanded leaving in place an exceptional sentence upward. *Id.* at 49. At resentencing and for the first time, Barberio challenged the aggravating factors supporting his original exceptional sentence. *Id.* at 49. The trial court declined to address the issue and imposed the same exceptional sentence as before. *Id.* at 50. The trial court stated it would not consider any issue related to the prior exceptional sentence. *Id.* at 51. The trial court emphasized that neither new

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[6] RAP 2.5(c)(1) states:

> (c) **Law of the Case Doctrine Restricted**. The following provisions apply if the same case is again before the appellate court following a remand:
>
> (1) *Prior Trial Court Action*. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

evidence nor the appellate court's opinion merited reexamination of Barberio's sentence. *Id.* at 51–52.

Our high court found the trial court acted within its discretion to decide whether to revisit an issue that was not the subject of the direct appeal. *Id.* at 51. "Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." *Id.* at 50. The Supreme Court found that it is "discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal. If it does so, RAP 2.5(c)(1) states that the appellate court may review such issue." *Id.* at 51; *see also State v. Parmelee*, 172 Wn. App. 899, 908, 292 P.3d 799, *review denied*, 177 Wn.2d 1027 (2013) (an issue was not properly before the court of appeals where resentencing court allowed defense to make a record and allowed the State to respond but declined to consider the issue).

In this case, the Supreme Court required the trial court to recalculate the defendant's offender score and sentence accordingly. The defense did not request an exceptional sentence at the original sentencing. Given the scope of the Court's mandate, the trial court properly exercised its discretion and declined the defendant's invitation to consider an exceptional sentence. Importantly, the trial court did not forbid defense counsel from requesting an exceptional sentence or making a record in that regard. Rather than

requesting an exceptional sentence (other than filing a sentencing brief in support of an exceptional sentence), defense counsel deferred to the trial court to determine whether it would exercise its discretion and permit a full resentencing. The trial court declined to do so and did not err.

B. THIS COURT SHOULD REMAND COMMUNITY CUSTODY CONDITION § 4.2(C)(2) OF THE JUDGMENT AND SENTENCE WITH INSTRUCTION TO LIMIT THE GANG ASSOCIATION TO THAT DEFINED BY RCW 9.94A.030(13).

On direct appeal, the defendant challenged the condition that "the defendant not be allowed to have any association or contact with known felons or gang members or *their associates*[.]" *Weatherwax*, 193 Wn. App. at 677 (emphasis added). This Court held that the limits on "association" "must be confined to felons, gang members or *gang associates* in the sense defined by RCW 9.94A.030(13), or to other specifically described persons having a direct relation to the circumstances of the crimes." *Id.* at 681.

When the defendant was resentenced and as a part of his community custody, the court directed that "the defendant not be allowed to have any association or contact with known felons or gang members or their associates" under § 4.2(C)(2) of the judgment and sentence. CP 193. That condition does not circumscribe "association" as directed by this Court.

Remand is appropriate to place limits on the term "association" as outlined in this Court's opinion on direct appeal.

C. THE TRIAL COURT ERRED BY IMPOSING A TOTAL SENTENCE OF CONFINEMENT AND COMMUNITY CUSTODY ON COUNT TWO THAT EXCEEDED THE STATUTORY MAXIMUM OF TEN YEARS. REMAND IS APPROPRIATE TO STRIKE THE TERM OF COMMUNITY CUSTODY ON COUNT TWO.

The defendant also argues, and the State concedes, that the defendant's sentence on count two (conspiracy to commit first-degree assault), with the combined 120-months' confinement and 36-months' community custody exceeded the statutory maximum of 120 months.

Standard of Review

An appellate court reviews questions involving a sentencing court's authority de novo. *State v. Mann*, 146 Wn. App. 349, 357, 189 P.3d 843 (2008).

First-degree assault is a class A felony. RCW 9A.56.200(2). A conspiracy to commit a class A felony is a class B felony unless otherwise specified. RCW 9A.28.020(3)(b) (attempt); RCW 9A.28.040(2)(b) (conspiracy to commit a class A felony). The statutory maximum for a class B offense is 120-months. RCW 9A.20.021(b).

Under RCW 9.94A.701(9), the trial court is required to reduce a defendant's term of community custody when the combined term of community custody and the standard range sentence exceed the statutory

maximum sentence. *See State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012); *see also State v. Winborne*, 167 Wn. App. 320, 329, 273 P.3d 454 (2012).

In the present case, under § 4.1(a) of the judgment and sentence, the defendant was sentenced to a standard range sentence of 84 months on count two. CP 190. In addition, the court imposed a 36-month firearm enhancement on count two under § 4.2(A), for a total of 120-months confinement. CP 191. In conjunction, under § 4.2(A), the court imposed 36 months of community custody for that conviction. Remand is appropriate because the trial court sentenced Rodgers to a term of total confinement that is equal to the statutory maximum of 120 months for the offense. The court was, therefore, required under RCW 9.94A.701(9) to reduce his term of community custody to zero under count two. *Boyd*, 174 Wn.2d at 473.

D. THIS COURT SHOULD REMAND WITH AN ORDER TO STRIKE THE IMPLIED MANDATORY 60-MONTH MANDATORY MINIMUM SENTENCE UNDER COUNTS 1, 3, AND 4.

Under § 2.1 of the judgment and sentence, although the requirement is not checked by the court and not discussed during its oral ruling, it lists counts one, three, and four as requiring a 60-month mandatory minimum

term of incarceration per RCW 9.94A.540. That statute prescribes, in relevant part:

> (1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory ...
>
> ....
>
> (b) An offender convicted of the crime of assault in the first degree ... where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

Here, there was no jury finding, beyond the verdict, which was necessary to impose a mandatory five-year minimum sentence on each of the defendant's convictions for first degree assault. *See State v. Dyson*, 189 Wn. App. 215, 228, 360 P.3d 25 (2015), *review denied*, 184 Wn.2d 1038 (2016) (the fact-finder must find the additional facts beyond a reasonable doubt to trigger a mandatory minimum sentence under RCW 9.94A.540). It is unclear from the judgment and sentence whether the five-year minimum sentence was ordered by the court or if it was a scrivener's error. In any event, this Court should remand with instructions to strike the reference from the judgment and sentence.

E. THIS COURT SHOULD REMAND TO THE TRIAL COURT TO STRIKE THE $200 FILING FEE, RCW 36.18.020(2)(h), IF THE DEFENDANT HAS ESTABLISHED HE WAS INDIGENT AT THE TIME OF SENTENCING.

The defendant also complains the trial court erroneously ordered him to pay the $200 superior court filing fee. *See* RCW 36.18.020(h).

The defendant was resentenced on March 30, 2018. CP 198. Before amendment in 2018, that statute required sentencing courts to impose a mandatory $200.00 filing fee. *See State v. Gonzales*, 198 Wn. App. 151, 152, 392 P.3d 1158, *review denied*, 188 Wn.2d 1022 (2017). In 2018, House Bill 1783 amended the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit courts from imposing the $200 filing fee on indigent defendants. Laws of 2018, ch. 269, § 17(2)(h). That bill states:

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

Laws of 2018, ch. 269, § 17(2)(h).

Also, included within that amendment to the statute, the legislature stated:

> Nothing in this act requires the courts to refund or reimburse amounts previously paid towards legal financial obligations or interest on legal financial obligations.

Laws of 2018, ch. 269, § 20.

As of June 7, 2018, trial courts are prohibited from imposing the $200 criminal filing fee on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; Laws of 2018, pg. ii, "Effective Date of Laws."

In *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), our high court addressed the 2018 amendments to RCW 43.43.754 and held that the amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Id.* at 747.

This Court has authority to strike the $200 filing fee if the defendant was indigent at the time of sentencing.

F. IT IS APPROPRIATE TO REMAND WITH AN ORDER TO STRIKE THE $100 DNA FEE AS DEFENDANT'S DNA WAS PREVIOUSLY COLLECTED PURSUANT TO A 2014 FELONY JUDGMENT AND SENTENCE.

The defendant also appeals the imposition of a $100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state because of a prior conviction. In

addition to the previously described legislative amendment regarding court costs, there was also a legislative amendment to RCW 43.43.7541, which also took effect June 7, 2018, requiring imposition of the DNA-collection fee "unless the state has previously collected the offender's DNA as a result of a prior conviction." As discussed above, the amendment applies to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *Ramirez*, 191 Wn.2d at 749.

However, claims of error on direct appeal must be supported by the existing record on review. *See* RAP 9.1. A claim of error based on a factual assertion that the defendant previously submitted a DNA sample necessarily fails on direct appeal if there is nothing in the record to show the defendant submitted a previous DNA sample. *See State v. Thibodeaux*, ___ Wn. App. 2d ___, 430 P.3d 700 (Nov. 26, 2018); *State v. Lewis*, 194 Wn. App. 709, 721, 379 P.3d 129, *review denied*, 186 Wn.2d 1025 (2016); *State v. Thornton*, 188 Wn. App. 371, 374, 353 P.3d 642 (2015). The fact of a prior conviction alone is not enough to show actual submission of a DNA sample. *Thibodeaux*, 430 P.3d at 703.

Nevertheless, the State concedes that remand for a ministerial order striking the $100 DNA-collection fee is appropriate. The State's records show that this appellant's DNA was previously collected prior to sentencing in the present case and is on file with the Washington State Patrol Crime

Lab. *See also* Felony Judgment and Sentence in trial court case number 14-1-00544-1, which was filed and accepted by the Court into the record on appeal. The State requests this Court remand to the superior court for a ministerial order striking the $100 DNA fee. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (when hearing on remand involves only ministerial correction and no discretion, defendant has no constitutional right to be present).

IV. CONCLUSION

The State requests this Court affirm the judgment and sentence other than remand to clarify the community custody condition regarding no contact or association with felons or gang members or associates; to strike the community custody term under count 2 of the judgment and sentence; to strike any reference to a 60-month minimum sentence on counts 1, 3 and 4, under § 2.1 of the judgment and sentence; and finally, order the trial court to strike the collection of the $200 court costs and $100 DNA fee.

Respectfully submitted this 16 day of January, 2019.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. JAYME L. RODGERS, Appellant.	NO. 35976-0-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 16, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jill S. Reuter
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SPOKANE COUNTY PROSECUTOR

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