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Court of Appeals
Division III
State of Washington
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NO. 36271-0-III & 36272-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN HUGHES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable M. Scott Wolfram, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THIS COURT SHOULD REACH THE MERITS OF HUGHES'S APPEAL, WHERE TRIAL COUNSEL DID NOT INVITE THE ERROR AND THE ISSUE IS LIKELY TO RECUR.

Hughes and the State are in agreement on several points. First, the State concedes that residential treatment constitutes confinement. Br. of Resp't, 8. Second, the State agrees the VUCSA and identity theft sentences should have run concurrently, noting "[i]t would have been appropriate to release [Hughes] to a bed date where his treatment would run concurrently with his jail time." Br. of Resp't, 8. This is the interpretation Hughes advocates for in his opening brief. Br. of Appellant, 12-13.

The State also correctly characterizes Hughes's argument—he "claims that there is an error in how the parties interpreted and executed the order – holding him in jail an additional 30+ days rather than releasing him to treatment." Br. of Resp't, 9. The State claims, however, that Hughes's attorney "materially contributed to that interpretation," essentially inviting the error. Br. of Resp't, 9.

The State is incorrect that defense counsel invited the error. Under the invited error doctrine, "a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321

(2009). Invited error “must be the result of an affirmative, knowing, and voluntary act,” rather than simple acquiescence.¹ State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014); accord State v. Hood, 196 Wn. App. 127, 135, 382 P.3d 710 (2016).

At sentencing, defense counsel summarized DOC’s position that non-DOSA sentences must run consecutively to residential DOSAs. RP 9-10. Counsel opposed this position, asserting “[s]entences are presumed to be served concurrent.” RP 10. Counsel proposed instead that the trial court impose an exceptional sentence down on the VUCSA convictions so Hughes could begin his residential treatment immediately. RP 9-10.

Defense counsel was correct that the trial court had discretion to impose an exceptional sentence down. Br. of Appellant, 17. This was one way to avoid the resulting error. Another way, as the State’s concedes, would have been to order Hughes to complete his confinement on the VUCSA offenses while he completed his residential treatment, which also constitutes confinement. Br. of Resp’t, 9.

The trial court rejected defense counsel’s proposed sentence, instead adopting the State’s recommendation and imposing 180 days in jail on the VUCSA offenses, to be completed before Hughes’s residential treatment.

¹ For instance, courts often find invited error when the defense proposes an erroneous jury instruction and then challenges that instruction on appeal. See, e.g., State v. Studd, 137 Wn.2d 533, 547-48, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990).

RP 16-17. Defense counsel's interjection that the sentence "should be concurrent" was simply in line with his correct assertion that consecutive sentences were inappropriate. RP 16.

After the trial court rejected the defense-proposed sentence, the State inquired whether defense counsel was going to suggest converting Hughes's jail sentence to community service hours. RP 19. Counsel stated he was not because "it's just one other thing to follow." RP 19. In other words, after being ordered to complete his VUCSA sentences first, Hughes just wanted to serve his jail time and be done with it, without risking future revocation or sanction. RP 19-20.

Near the end of the hearing, defense counsel noted he could provide the court briefing "[w]ith regard to the consecutive sentencings and finishing out a sentence on one cause or count and then going into treatment." RP 22. Defense counsel correctly identified the error now on review—improper consecutive sentences—again demonstrating he did not invite the error. The State neglects to mention this portion of the record in its brief. And, the trial court essentially told counsel that briefing would be futile, "You can argue that after the fact, but I'm going to hand both of these down for you to review." RP 22.

In sum, defense counsel never advocated for the consecutive sentences that were ultimately imposed, which would have been invited

error. RP 9-11. He did just the opposite, emphasizing concurrent sentences are statutorily mandated. RP 10. He was right, as Hughes and the State now agree on appeal. The fact that defense counsel did not realize residential treatment is confinement or identify the alternative solution does not mean he invited the error. The court still had to impose a sentence that was statutorily authorized. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). The sentence imposed here was not.

Finally, as anticipated, the State argues this Court should not reach the issue because it is moot. Br. of Resp't, 12-13. The State contends drug offense sentence ranges have since changed, making them DOSA-eligible, with a standard range of 6+ to 18 months.² Br. of Resp't, 2-3, 13. But this is the new sentence range only for defendants with an offender score of three to five. RCW 9.94A.517(1). The sentence range for lower offenders scores (zero to two) is still zero to six months, making those sentences non-DOSA eligible. RCW 9.94A.517(1); RCW 9.94A.660(1)(f).

As such, defendants with low offender scores are still at risk of serving extra jail time under the erroneous application of the law as occurred

² The State also mistakenly contends Hughes was actually eligible for a DOSA on the VUCSA convictions, because a 2018 legislative amendment increased the top of the standard range from 12 to 18 months. Br. of Resp't, 4, 8. But the relevant amendment, though passed in 2015, did not take effect until July 1, 2018. Laws of 2015, ch. 291, § 9. Hughes committed his offenses on January 14 and April 2, 2018, before the amendment took effect. 1CP 42; 2CP 35. It is the law in effect at the time a criminal offense is actually committed that controls. State v. Schmidt, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001).

in this case. These are precisely the individuals—those with little criminal history and little experience with incarceration—who are likely to suffer the most because of the additional jail time. A “mere month in jail” is more than enough time to disrupt work, education, and personal relationships. Br. of Resp’t, 13. A definitive decision from this Court would prevent others from enduring unwarranted jail time like Hughes did. Moreover, the parties are essentially in agreement on the legal issue, hopefully making this Court’s job relatively easy.

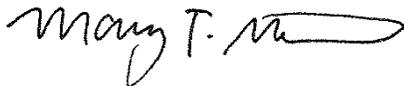
B. CONCLUSION

For the reasons discussed here and in the opening brief, this Court should reach the merits of Hughes’s appeal. This Court should also remand for the \$200 filing fees, costs of collection, and interest to be stricken.

DATED this 15th day of April, 2019.

Respectfully submitted,

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