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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36429-1-III

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STATE OF WASHINGTON, Respondent,

v.

JOSE ARON MADRIGAL, Appellant.

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**APPELLANT'S BRIEF**

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**TABLE OF CONTENTS**

**AUTHORITIES CITED**.....ii

**I. INTRODUCTION**.....1

**II. ASSIGNMENTS OF ERROR**.....1

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** .....2

**IV. STATEMENT OF THE CASE**.....2

**V. ARGUMENT**.....5

1. The trial court violated the real facts doctrine when its sentencing determination was based upon prior uncharged allegations of sexual abuse set forth in the presentence investigation report when Madrigal disputed those facts and the court held no evidentiary hearing .....5

2. To comply with RCW 9.94A.701(9), the trial court must reduce the term of community custody so that the combined term of confinement and community custody does not exceed five years .....7

**VI. CONCLUSION**.....10

**CERTIFICATE OF SERVICE** .....11

**AUTHORITIES CITED**

**Federal Cases**

*North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....2

**State Cases**

*In re Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009).....8

*State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012).....2, 8, 9

*State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993).....5

*State v. Morreira*, 107 Wn. App. 450, 27 P.3d 639 (2001).....5

**Statutes**

RCW 9.68A.090(2).....9

RCW 9.94A.210(1).....5

RCW 9.94A.505(5).....8

RCW 9.94A.530(2).....5, 6, 7

RCW 9.94A.701(9).....1, 2, 7, 8, 9

RCW 9A.20.021(1)(c).....9

**Court Rules**

RAP 2.3(b)(3).....5

## **I. INTRODUCTION**

Jose Madrigal pleaded guilty to second degree assault and communicating with a minor for immoral purposes. Two sentencing errors require correction. First, although Madrigal expressly did not stipulate to facts set forth in a presentence investigation report, the trial court considered the report's description of prior uncharged crimes by Madrigal in imposing a high-end sentence. The process by which the court imposed the sentence violated the real facts doctrine. Second, the trial court's imposition of a combined term of confinement and community custody that exceeded the statutory maximum for the crime of communicating with a minor for immoral purposes violates RCW 9.94A.701(9). Accordingly, the sentence must be vacated and the case remanded for resentencing.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** The trial court violated the real facts doctrine by relying upon facts set forth in the presentence investigation report that Madrigal disputed, without an evidentiary hearing.

**ASSIGNMENT OF ERROR NO. 2:** The trial court erred in imposing a combined term of community custody and confinement that exceeds the

statutory maximum for the crime of communicating with a minor for immoral purposes.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE NO. 1:** Is the process by which the trial court imposed a high end standard range sentence appealable in this case, where it relied upon disputed facts and conducted no evidentiary hearing?

**ISSUE NO. 2:** Did the trial court's reliance upon the presentence investigation report's allegation of multiple prior uncharged offenses in determining Madrigal's sentence violate the real facts doctrine?

**ISSUE NO. 3:** Does the trial court's inclusion of a *Brooks* notation on the judgment and sentence satisfy its obligation to reduce the term of community custody under RCW 9.94A.701(9) and *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012)?

### **IV. STATEMENT OF THE CASE**

By agreement with the State, Jose Madrigal entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) to charges of second degree assault and communicating with a minor for immoral purposes. CP 194, 197-98, 203. The Department of Corrections filed a presentence investigation report

describing a polygraph examination Madrigal had taken as a juvenile in which he allegedly admitted to sexually assaulting multiple minor victims. CP 224-25. However, his acknowledged criminal history included only one prior sex offense, which he committed as a juvenile. CP 202.

Pursuant to the plea agreement, at sentencing, both parties recommended a mid-range sentence of 70 months. RP 15-16, 18. Madrigal advised the court that there were multiple contested statements of fact in the presentence investigation report. RP 27. Nevertheless, the court quoted from the presentence investigation report's discussion of the alleged prior uncharged crimes, stating:

Okay, I'm just looking at the DOC presentence report . . . The Department of Corrections has prepared a rather lengthy report and Mr. Madrigal has been sexually abusing victims since the age of eight years old. He participated in sexual deviancy treatment while incarcerated as a juvenile and while also on parole. He did not qualify for the specialized sex offender and disposition alternative as a sex offense, which categorizes a violent offense. Mr. Madrigal was not assessed for sexual deviancy treatment during that incarceration.

Conclusions, Ms. [sic] Madrigal has been sexually assaulting people for the past twenty-six years . . .

Normally, the Court will agree with joint recommendations for --- to assist the parties in resolving their cases because I know that in a plea bargain situation, the parties work in good faith with each other to come to a joint recommendation. In this case, the joint recommendation is not sufficient to --- to --- for the conduct committed and for

the defendant's long history of re-offending and he's likely to re-offend in the future when he's released.

RP 34-35. Madrigal then reminded the court that he did not stipulate to the facts set forth in the presentence investigation report. The court responded, "Okay, duly noted then." RP 37.

Accordingly, the trial court imposed a high end standard range sentence of 83 months on the assault and 59 months on the communicating with a minor, followed by 18 and 36 months of community custody, respectively. CP 233-34. When the State drew the court's attention to the fact that the combined term of 59 months confinement and 36 months community custody exceeded the statutory maximum for the communicating with a minor charge, the court indicated that it would include a notation on the judgment and sentence stating that the community custody term shall not exceed the statutory maximum. RP 37-39, CP 234. Madrigal now appeals and has been found indigent for that purpose. CP 247, 267.

## V. ARGUMENT

1. The trial court violated the real facts doctrine when its sentencing determination was based upon prior uncharged allegations of sexual abuse set forth in the presentence investigation report when Madrigal disputed those facts and the court held no evidentiary hearing.

In imposing a sentence, “the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.” RCW 9.94A.530(2). This statute is the basis for the “real facts doctrine.” *State v. Morreira*, 107 Wn. App. 450, 458, 27 P.3d 639 (2001). Here, Madrigal entered an *Alford* plea and advised the court that he disputed the facts set forth in the presentence investigation report. Accordingly, the trial court was required to disregard the disputed facts or conduct an evidentiary hearing to establish them.

As a preliminary matter, RCW 9.94A.210(1) generally bars appeal of sentences within the standard range. However, challenges to the process by which a standard range sentence is imposed may be allowed when the sentencing court had a duty to follow a specific procedure required by statute and failed to do so. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Furthermore, under RAP 2.3(b)(3), the Court of

Appeals may accept discretionary review of a trial court proceeding when “[t]he superior court has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court.” Here, the Sentencing Reform Act requires the sentencing court to disregard disputed facts and specifically sets out a procedure for determining relevant facts for sentencing, including holding an evidentiary hearing to establish disputed facts and requiring that the facts be proven by a preponderance of the evidence. RCW 9.94A.530(2). Because the trial court failed to comply with this statutory duty for determining sentencing facts, review is appropriate under *Mail*.

Because Madrigal objected to the factual assertions in the presentence investigation report, the sentencing court was obligated to “either not consider the fact or grant an evidentiary hearing on the point.” RCW 9.94A.530(2). Here, the trial court did neither. Its comments at sentencing clearly indicate that it believed the allegations of prior uncharged conduct to be true, and it considered those allegations grounds to refuse to follow the agreed sentence recommendation of the parties. RP 34-35. Accordingly, it failed to impose a sentence in accord with its duties under RCW 9.94A.530(2).

Moreover, the trial court's comments indicate the sentence probably would have been different had the court not relied on the disputed facts. It cited the allegations about Madrigal's prior uncharged conduct as a history that made him likely to reoffend and warranted more severe punishment than the parties jointly recommended. RP 35. Had the trial court disregarded those facts, as RCW 9.94A.530(2) required, it probably would have imposed a different sentence.

Accordingly, because the trial court failed to comply with the requirements of RCW 9.94A.530(2) to rely only upon real facts at sentencing or to conduct an evidentiary hearing to establish disputed facts, the process by which the sentence was imposed violated the trial court's obligations under the Sentencing Reform Act. Accordingly, the sentence should be reversed and the case remanded for resentencing.

2. To comply with RCW 9.94A.701(9), the trial court must reduce the term of community custody so that the combined term of confinement and community custody does not exceed five years.

In the event this court does not find that resentencing is required under the real facts doctrine, resentencing on the charge of communicating with a minor for immoral purposes is also required. Because the combined term of community custody and confinement exceeds the

statutory maximum and because the trial court did not follow the statutory directive to reduce the term of community custody as required by RCW 9.94A.701(9), the sentence is unlawful and must be vacated. On remand, the trial court should be instructed to either reduce the term of community custody to one month or resentence Madrigal to terms of confinement and community custody that do not collectively exceed 60 months.

This case is governed by *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012). It has been long established that a combined term of community custody and incarceration may not exceed the statutory maximum punishment for the charged offense. *See In re Brooks*, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009); RCW 9.94A.505(5). Before 2009, a notation on the judgment and sentence providing that the total term actually served could not exceed the statutory maximum was sufficient to bring an otherwise overlong sentence into compliance. *Boyd*, 174 Wn.2d at 472. But in 2009, the legislature amended the Sentencing Reform Act and adopted RCW 9.94A.701(9), which reads:

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.

Subsequently, the Washington Supreme Court held that under the new statute, the trial court, rather than the Department of Corrections, is required to reduce the community custody term to avoid exceeding the statutory maximum, rendering the *Brooks* notation ineffective to cure the error. *Boyd*, 174 Wn.2d at 473.

Here, communicating with a minor for immoral purposes is a class C felony with a maximum sentence of five years. RCW 9.68A.090(2); RCW 9A.20.021(1)(c). The sentence of 59 months in prison and 36 months of community custody clearly exceeds this limit. While the sentencing court included a *Brooks* notation on the judgment and sentence, it was required to reduce the community custody term to one month to comport with *Boyd* and RCW 9.94A.701(9).

In *Boyd*, the remedy for the violation was remand with discretion to the trial court to determine whether to resentence or to amend the community custody term. 174 Wn.2d at 473. The same remedy is appropriate here. The sentence should be vacated and the trial court should be instructed on remand to either resentence Madrigal to a shorter term of confinement to accommodate a longer term of community custody, or to reduce the community custody term to the one month remaining in the five year maximum sentence.

**VI. CONCLUSION**

For the foregoing reasons, Madrigal respectfully requests that the court VACATE his sentence and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 30 day of April, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

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 the foregoing 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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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 30 day of April, 2019 in Kennewick, Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

**April 30, 2019 - 11:06 AM**

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