No. 78452-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISMAEL ARMENDARIZ,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

A. ISSUE PRESENTED FOR REVIEW 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT

THE SENTENCING REFORM ACT DOES NOT PROVIDE AUTHORITY FOR A NO-CONTACT ORDER THAT EXCEEDS AN OFFENDER'S TERM OF COMMUNITY PLACEMENT 3

1. The superior court may enter a no-contact order only as authorized by the SRA 4

2. RCW 9.94A.505 is a roadmap statute that does not provide authority to impose a no-contact order independent from terms of community placement 5

3. This Court may not assume the Legislature's omission of the no contact order provisions was inadvertent 8

4. RCW 9.94A.505(8) does not provide authority to impose "crime-related prohibitions" up to the maximum term for the offense 11

5. Mr. Armendariz may raise this issue in this Court 12

D. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Davis v. Dep't of Licensing, 137 Wn.2d 957, 977 P.2d 554 (1999) 9

Kilian v. Atkinson, 147 Wn.2d 16, 50 P.3d 638 (2002) 10

Personal Restraint of LaChapelle, 153 Wn.2d 1, 100 P.3d 805 (2004) 7

Post Sentencing Review of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998) 10

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986), cert. denied, 479 U.S. 930 (1986) 4

State v. Cooper, 156 Wn.2d 475, 128 P.3d 1234 (2006) 9

State v. Delgado, 148 Wn.2d 723, 63 P.3d 792 (2003) 8

State v. Ford, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999) 13

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled in part on other grounds, Recueco v. Washington, 126 S.Ct. 2546 (2006) 4

State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003) 8

State v. Kinneman, 155 Wn.2d 272, 119 P.2d 350 (2005) 13

State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006) 13

State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005) 4

State v. Moses, 145 Wn.2d 370, 37 P.3d 1216 (2002) 9

State v. Punsalan, 156 Wn.2d 875, 133 P.3d 934 (2006) 8

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004) 13

State v. Williams, 149 Wn.2d 143, 65 P.3d 1214 (2003) 13

Washington Court of Appeals Decisions

Personal Restraint of Acron, 122 Wn.App. 886, 95 P.3d 1272 (2004) 8

State v. Jones, 118 Wn.App. 199, 76 P.2d 258 (2003) 7

State v. Law, 110 Wn.App. 36, 38 P.3d 374 (2002) 13

Revised Code of Washington -- Statutes

Former RCW 9.94A.120 ..... 7, 8

RCW 26.50.110(1) 1, 7

RCW 9.94A.010 13

RCW 9.94A.015 9

RCW 9.94A.030 12

RCW 9.94A.505 ..... 4-12, 14

RCW 9.94A.505(1) 4

RCW 9.94A.505(2) 4

RCW 9.94A.505(4) 5

RCW 9.94A.505(7) 5

RCW 9.94A.505(8) 5-7, 11, 12, 14

RCW 9.94A.510 5

RCW 9.94A.545 ..... 5, 6

RCW 9.94A.700 6

RCW 9.94A.712 6

RCW 9.94A.715 6

RCW 9.94A.720 6

RCW 9.94A.740 6

RCW 9.94A.753 7

RCW 9.94A.760 7

RCW 9A.20.021(1)(c) 5

RCW 9A.31.036 ..... 1, 5

Session Laws

Laws of 2000 ch 28 ..... 7, 8, 9

Laws of 2001 ch. 10 §§ 1, 2 9

Laws of 2001, 2nd sp.s., ch 12 9

Laws of 2002, ch 289 9

Laws of 2002, ch. 175 9

Laws of 2002, ch. 290 10

Court Rules

RAP 13.7(b) 13

Other Authorities

1999 Adult Sentencing Guidelines Manual 10

2000 Adult Sentencing Guidelines Manual 10

2001 Adult Sentencing Guidelines Manual 10

2002 Adult Sentencing Guidelines Manual 10

2003 Adult Sentencing Guidelines Manual 10

2004 Adult Sentencing Guidelines Manual 10

2005 Adult Sentencing Guidelines Manual 10

2006 Adult Sentencing Guidelines Manual 10

A. ISSUE PRESENTED FOR REVIEW

Does the Sentencing Reform Act authorize the sentencing court to impose an order prohibiting contact with an individual for the maximum term provided for the offense when the maximum term exceeds the term of confinement plus community custody?

B. STATEMENT OF THE CASE

As a result of an incident on January 3, 2004, Ismael Armendariz was convicted of third degree assault of Seattle Police Officer Jason Chittenden and violating a domestic violence no contact order obtained by Diana Truong. CP 1-2, 30, 54. The court sentenced Mr. Armendariz to 3 months in jail followed by 12 months community custody for the third degree assault, a class C felony. CP 38-39; RP 38-39; RCW 9A.31.036(1)(g). For the gross misdemeanor of violating a no contact order, Mr. Armendariz was given a 12 month sentence suspended on the condition he serve 5 months in jail and be on probation with various conditions, including no contact with Ms. Truong. CP 34; RP 87; RCW 26.50.110(1).

At the sentencing hearing, Ms. Truong asked the court to impose a 2-year no contact order, but the court decided the no-

contact order should extend for five years.[1] RP 88-89. The Judgment and Sentence for the assault includes two separate provisions ordering Mr. Armendariz to have no contact with Ms. Truong: a no contact order is included as a condition of community custody, and a five-year no contact order is listed separately. CP 34, 37.

On appeal, Mr. Armendariz assigned error to the two orders prohibiting contact with Ms. Truong as part of his sentence for assault on a police officer.[2] Brief of Appellant at 1. He argued Ms. Truong was not a victim of the assault on Officer Chittenden and the superior court therefore lacked authority to enter either no contact order. Brief of Appellant at 19-22.

The Court of Appeals disagreed. Slip Op. at 7-8. The Court of Appeals held that RCW 9.94A.700(5)(e) grants the superior court authority to order an offender to comply with any "crime-related prohibition" as a condition of community custody. Slip Op. at 7-8. The court noted the police officer who was assaulted was protecting Ms. Truong from domestic violence and the no contact

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[1] Ms. Truong also asked the court to permit Mr. Armendariz to transfer his community custody to his home state of California. RP 85-86. Her written letter to the court was never filed in the superior court file and thus could not be designated to the appellate courts. RP 83.

[2] The separate assignments of error were mistakenly given the same number.

order was thus directly related to the circumstances of the assault. Id. at 8. The Court of Appeals did not address the 5-year no contact order, stating in a footnote that neither party identified this as an issue. Id. at n.19.

In his petition for review, Mr. Armendariz asked this Court to address both of the no contact orders imposed as part of his sentence for third degree assault. Petition for Review at 1, 5-10. He pointed out the absence of any provision in the Sentencing Reform Act authorizing no contact orders exceeding the term of community supervision. Id. at 8-10. This Court granted review only as to the 5-year no contact order.[3] Order dated December 6, 2006.

C. ARGUMENT

THE SENTENCING REFORM ACT DOES NOT PROVIDE AUTHORITY FOR A NO-CONTACT ORDER THAT EXCEEDS AN OFFENDER'S TERM OF COMMUNITY PLACEMENT

Mr. Armendariz was ordered to have no contact for five years with a witness as part of his sentence for third degree assault even through Mr. Armendariz would only be in jail and on community custody for 15 months. The Sentencing Reform Act

[3] Thus, this Court will not address the no-contact order that is a condition of Mr. Armendariz's community placement for third degree assault. Similarly, the no-contact order entered for the offense of misdemeanor violation of a no-contact order is not before this Court.

provides for no-contact orders as a condition of community custody, but does not authorize a no-contact order for the maximum term possible for the crime. This Court should vacate the portion of Mr. Armendariz's sentence prohibiting him from having contact with the witness for five years.

1. The superior court may enter a no-contact order only as authorized by the SRA. The superior court's authority to sentence an offender is governed by statute. State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005), overruled in part on other grounds, Recueco v. Washington, 126 S.Ct. 2546 (2006); State v. Law, 154 Wn.2d 85, 92, 110 P.3d 717 (2005); State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986), cert. denied, 479 U.S. 930 (1986). The Sentencing Reform Act of 1981(SRA) is the statutory source of sentencing authority in Mr. Armendariz's case.

The starting point for SRA sentencing is RCW 9.94A.505, which requires the court to impose punishment "as provided in this chapter." RCW 9.94A.505(1) (effective until July 1, 2004). RCW 9.94A.505 refers the court to other sentencing provisions, acting as a roadmap for sentencing. In Mr. Armendariz's case, the statute refers to RCW 9.94A.510 and RCW 9.94A.545. RCW 9.94A.505(2)(a)(i), (iv). The standard sentence range is found at

RCW 9.94A.510 and related statutes. RCW 9.94A.545 provides for up to 12 months of community custody when the offender is sentenced to confinement of 12 months or less. RCW 9.94A.505(4) also lists the statutes governing the imposition and collection of the victim penalty assessment ordered by the court, and RCW 9.94A.505(7) points to the SRA provisions that will apply to the future imposition of restitution.

Here, the court imposed the 5-year no-contact order separate from the conditions of Mr. Armendariz's community custody. Five years is the statutory maximum term for third degree assault, but will exceed Mr. Armendariz's term of confinement plus community custody, which totals only 15 months. RCW 9A.20.021(1)(c); RCW 9A.36.031(2); CP 34. There is no provision of the SRA, however, that permits the imposition of such a no contact order.

2. <u>RCW 9.94A.505 is a roadmap statute that does not provide authority to impose a no-contact order independent from terms of community placement</u>. RCW 9.94A.505(8) does not provide independent authority for the superior court to enter a no-contact order that exceeds the term of community custody. The statute provides:

> As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.505(8). (Emphasis added). By referring to crime-related prohibitions and affirmative conduct "as provided in this chapter," the statute references the SRA provisions addressing community custody, community placement, and community supervision. These statutes include specific provisions for no-contact orders as conditions of supervision. RCW 9.94A.700(5)(b); RCW 9.94A.712(6)(a)(i); RCW 9.94A.715(2)(a); RCW 9.94A.720(1)(c). RCW 9.94A.505(8) simply points out that crime-related prohibitions and affirmative conduct requirements may be imposed and enforced as provided elsewhere in the SRA.

In addition, the SRA does not have an enforcement provision that would apply if Mr. Armendariz violated the no-contact order after his term of community placement expired. During Mr. Armendariz's year of community custody, he may be sanctioned by the Department of Corrections for violations occurring during the supervision period. RCW 9.94A.545; RCW 9.94A.715(3); RCW 9.94A.720(1). Similar statutes apply to offenders who have been released from prison. RCW 9.94A.737(1)(c); RCW 9.94A.740. Although specific statues permit collection of legal financial

obligations and restitution after the end of supervision, no statue addresses enforcement of no-contact orders after that time. RCW 9.94A.760(4); RCW 9.94A.753(4). Additionally, RCW 26.50.110(1) criminalizes the violation of no-contact orders entered pursuant to several statutes, but not RCW 9.94A.

The sentencing court may have been relying upon prior versions of the SRA to impose the 5-year no-contact order. See Personal Restraint of LaChapelle, 153 Wn.2d 1, 6-7, 100 P.3d 805 (2004) (noting difficulty in determining an SRA sentence in light of numerous amendments); State v. Jones, 118 Wn.App. 199, 210-12, 76 P.2d 258 (2003). Former RCW 9.94A.120(20) read:

> As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision or community placement.

Former RCW 9.94A.120(20). When the statute was amended, however, RCW 9.94A.120(20) was "reenacted and amended" to eliminate the language concerning no contact orders. Laws of 2000, ch. 28 § 5. The amended statute provides:

> As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

Former RCW 9.94A.120(8); Laws of 2000 ch 28 § 5; Current RCW 9.94A.505(8). The statute was effective as of July 1, 2001. Laws of 2000 ch 28 § 46. Thus, currently and at the time of Mr. Armendariz's 2004 offense, the SRA did not permit no-contact orders beyond the period of confinement and community custody.

3. This Court may not assume the Legislature's omission of the no contact order provisions was inadvertent. Interpretation of statutes is de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). Statutory interpretation requires this Court to give effect to the legislature's intent by looking at the plain language of a statute. Id. at 450. This Court does not interpret an unambiguous statute. Id. "Plain language does not require construction." State v. Punsalan, 156 Wn.2d 875, 879, 133 P.3d 934 (2006), quoting State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Even when a statute is ambiguous, this Court does not add or subtract language, even if the court believes the Legislature intended something different. J.P., 149 Wn.2d at 450; Delgado, 148 Wn.2d at 727; Personal Restraint of Acron, 122 Wn.App. 886, 891, 95 P.3d 1272 (2004). "Where the Legislature omits language

from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted." State v. Cooper, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006), quoting State v. Moses, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002). Instead, this Court assumes the Legislature "means exactly what it says." Delgado, 148 Wn.2d at 727, quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

In its response to Mr. Armendariz's petition for review, the State argues the amendment omitting language concerning no-contact orders was unintentional and need not be granted effect by this Court, citing RCW 9.94A.015. Answer to Petition for Review, page 8. RCW 9.94A.015 states the Legislature did not intend Chapter 28 of the Laws of 2000 as a substantive change in the SRA.

The Legislature, however, has amended RCW 9.94A.505 several times since 2000, and did not add language addressing no contact orders or providing that crime-related provisions may be ordered up to the maximum term for the offense. Laws of 2001 ch. 10 §§ 1, 2 (intended to incorporate 2000 amendments to SRA into reorganization of 9.94A RCW); Laws of 2001, 2nd sp.s., ch 12 § 312; Laws of 2002, ch. 175 § 6; Laws of 2002, ch 289 § 6; Laws of

2002, ch. 290 § 17. See Kilian v. Atkinson, 147 Wn.2d 16, 26, 50 P.3d 638 (2002) (noting Legislature amended 49.60 RCW at least 10 times but never added "age" to list of protected classes).

The State also suggests this Court look to the Sentencing Guidelines Commission for guidance in interpreting the SRA. Answer at 8-9. This Court has looked to the explanations provided by the Sentencing Guidelines Commission in interpreting the SRA. Post Sentencing Review of Charles, 135 Wn.2d 239, 250-51, 955 P.2d 798 (1998). Here, however, the Sentencing Guidelines Commission's manuals from 1999 to date contain the identical paragraph. 1999 Adult Sentencing Guidelines Manual at I-43; 2000 Adult Sentencing Guidelines Manual at I-38; 2001 Adult Sentencing Guidelines Manual at I-40; 2002 Adult Sentencing Guidelines Manual at I-40; 2003 Adult Sentencing Guidelines Manual at I-40; 2004 Adult Sentencing Guidelines Manual at I-40; 2005 Adult Sentencing Guidelines Manual at I-40; 2006 Adult Sentencing Guidelines Manual at I-42. Although the manuals cite first former RCW 9.94A.120 and then RCW 9.94A.505, they never address the change in the statute's wording and thus are of no value to this Court.

RCW 9.94A.505(8) is clear, and its current version does not authorize the imposition of no-contact orders beyond Mr. Armendariz's term of community custody. This Court need not add language to this unambiguous statute. Even if this Court believes the Legislature unintentionally omitted the no-contact order provisions when it amended and re-codified RCW 9.94A.120, this Court must defer to the Legislature to correct any error that may exist.

4. RCW 9.94A.505(8) does not provide authority to impose "crime-related prohibitions" up to the maximum term for the offense. The State may argue that a no-contact order is a "crime-related prohibition" and RCW 9.94A.505(8) authorizes the sentencing court to impose a crime-related prohibition for the maximum term. This argument fails because RCW 9.94A.505(8) provides for crime-related prohibitions "as provided in this chapter" and does not mention extending that authority to the maximum term.

Additionally, the no-contact order is not related to the crime of assaulting a police officer. A "crime related prohibition" must be directly related to the circumstances of the offense for which the defendant is being sentenced. The definition reads:

> "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(13) (Effective until July 1, 2007).[4]

Ms. Truong was not the victim of the third degree assault, and she was already protected by (1) the no-contact order she obtained prior to January 2004, (2) the no-contact order for the misdemeanor offense, and (3) the condition of Mr. Armendariz's community placement prohibiting contact with her. Ex. 8 CP 37, 39. While the State cites Ms. Truong's discussion at the sentencing hearing of her trauma, Ms. Truong was referring to an incident in June and this crime occurred in January 2004. RP 86; CP 1, 31. This Court should not find that the 5-year no-contact order was authorized by the language of RCW 9.94A.505(8) mentioning crime-related prohibitions as authorized in this chapter.

5. Mr. Armendariz may raise this issue in this Court. In its Answer to Mr. Armendariz's petition for review, the State argues the issue is not properly before this Court because it was not raised in

[4] RCW 9.94A.030 has been amended since the assault occurred in January 2004. A 2005 amendment changed the numbering but not the definition of "crime-related prohibition. Laws of 2005, ch. 436, § 1.

the sentencing court or in the Court of Appeals. Answer at 4-5. Mr. Armendariz raised this sentencing issue in his petition for review, the petition was granted, and the issue should be addressed by this Court. RAP 13.7(b); State v. Korum, 157 Wn.2d 614, 624-25, 141 P.3d 13 (2006).

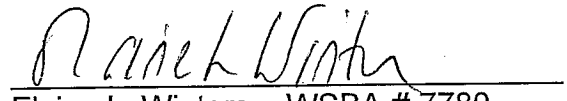
One of the purposes of the SRA is to provide uniformity in sentencing throughout the State, thus providing punishment that is just. RCW 9.94A.010(1), (2), (3); State v. Law, 110 Wn.App. 36, 38 P.3d 374 (2002). Washington courts have consistently addressed the validity of SRA sentences on appeal. State v. Kinneman, 155 Wn.2d 272, 283, 119 P.2d 350 (2005); State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); State v. Williams, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003); State v. Ford, 137 Wn.2d 472, 477-78, 484-85, 973 P.2d 452 (1999) (and cases cited therein). Mr. Armendariz's sentencing issue is properly before this Court.

D. CONCLUSION

RCW 9.94A.505(8) does not provide statutory authority for the imposition of a no-contact order exceeding Mr. Armendariz's terms of confinement and community custody, and such a no-contact order would be unenforceable. Mr. Armendariz respectfully requests this Court vacate the 5-year no-contact order included in his sentence for third degree assault.

DATED this 4th of January, 2007.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
PLAINTIFF,	)	NO. 78452-3
	)	
v.	)	
	)	
ISMAEL ARMENDARIZ,	)	
	)	
DEFENDANT.	)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 4TH DAY OF JANUARY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S SUPPLEMENTAL BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

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