

No. 84891-2

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 25740-1-III
(consolidated with No. 27524-8-III)

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOEL RODRIGUEZ RAMOS

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT.

II. ISSUES PRESENTED BY REVIEW.

1. Whether the act on remand of expressly stating that the “defendant shall be on 24 months of community placement before the language “[d]efendant shall comply with all the mandatory provisions of RCW 9.94A.120(8)(b) and as many of those in RCW 9.94A.120(8)(c) as deemed appropriate by his/her Community Corrections Officer” requires resentencing or simply a clarification by amending the language?

A. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The act of inserting the language “defendant shall be on 24 months of community placement” is a ministerial act which does not require a “resentencing.”

III. STATEMENT OF THE CASE

The facts regarding the murders can be found in the unpublished case involving the codefendant. *State v. Gaitan*, 1996 Wash. App. LEXIS 1159.

The petitioner was initially charged in Yakima County Juvenile court. CP 40. On August 23, 1993, prior to the commencement of a declination hearing, the petitioner agreed to have the juvenile court

transfer his case to the adult court division of the Yakima County Superior Court. During the hearing to transfer his case, the record shows that the judge engaged in a colloquy with Mr. Ramos concerning his waiver of his right to a declination hearing. The court then found that Mr. Ramos had the capacity to make the decision to waive the declination hearing and that his decision was made knowingly, voluntarily and willingly. The court further made findings relating to the Kent criteria as listed in the findings. (08-23-1993 RP 7; CP 30-32). Mr. Ramos was next arraigned on the charges under an adult cause number and entered a guilty plea and was sentenced. (08-23-1993 RP 8-36; CP 10-16, 6-9).

Upon consideration of this latest collateral attack, the appellate court did grant relief by way of an order "clarifying or amending the judgment and sentence to specifically state the term of community placement consistent with *Broadaway* and its progeny." (*State v. Ramos*, 2010 Wash. App. LEXIS 1338, (June 22, 2010)).

III. ARGUMENT

A. THE TERM OF COMMUNITY PLACEMENT IS A NONDISCRETIONARY PERIOD OF TIME WHICH CAN BE CLARIFIED BY A SIMPLE AMENDMENT OF THE JUDGMENT AND SENTENCE.

All that is required to comport with the court's order on remand is to add the language that the defendant will be on 24 months of community

placement. Whether it's called a clarification or an amendment, there is no need for a complete resentencing. The appellant argues that the Court of Appeals order on remand for the sentence correction regarding the length of the community placement should be a resentencing, rather than a ministerial event of amendment, and that this approach conflicts with several different lines of authority, and thus should be reviewed by this court. (Pet. Rev. Pg. 3-4). This argument fails to recognize differences between what was ordered to be done in those cases and what was ordered done in this case.

In seeking review, the petitioner claims that there is a conflict among the Divisions Courts of Appeals regarding remands for various situations. In *State v. Valentine*, 2010 Wash. App. LEXIS 1373 (June 28, 2010) (63666-9-I), an unpublished case, the defendant had been convicted of assault and attempted murder. The trial court was instructed by the appellate court to vacate the assault conviction due to double jeopardy grounds. In 2002, the appellate court mandated the case to superior court for "further proceedings in accordance with the attached true copy of the decision." No action on the mandate was taken until 2009. In 2009, Valentine moved for a hearing on the mandate and asked the court to resentence him in view of the vacated conviction and the change in the law that occurred with *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct.

2531, 159 L. Ed. 2d 403 (2004). He claimed he could rely on Blakely because his judgment and sentence was not yet final. Valentine took the position that at resentencing, the State should not be permitted to seek an exceptional sentence.

In 2009, the trial court entered an order vacating the assault conviction pursuant to the mandate, but refused to reconsider the sentence, ruling that the case was final as of June 3, 2003. Valentine appealed and the Court of Appeals, Division I, dismissed the appeal, holding that the case was controlled by *State v. Kilgore*, 167 Wn. 2d, 28, 216 P.3d 393 (2009). Valentine argued that that he had a constitutional right to resentencing, citing *State v. Davenport*, 140 Wn. App. 925, 167 P.3d 1221 (2007). The Court of Appeals, Division 1, distinguished *Davenport*, pointing out that the appellate court there reversed and remanded because in the original mandate the court specifically ordered resentencing, due to the fact that Davenport's offender score and presumptive sentencing range had changed, and the defense offered arguments that could affect the imposition of a life sentence. *Davenport*, 140 Wn. App. At 931-32.

In this case what the appellant really wants to do is get a toe hold in court to argue for a reduction of his 80 year sentencing for the murder of the Skelton family. He has been sentenced and he received the mandatory minimum of 20 years for each of the four deaths, to run

consecutive pursuant to statute for a total term of 80 years. (CP 6-9). There is nothing to reargue. The sentencing judge has since retired. The prosecutor who handled the case is no longer with the office. A new sentencing hearing would open old wounds for the victim's family. The appellant is not entitled to reargue the length of his sentence and he should not be allowed to by requiring a "resentencing." *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989) (Absent statutory authority, trial court lacks authority to reduce or modify sentence).

The petitioner cites *State v. Davenport*, supra, for the proposition that "when a defendant is returned for resentencing, the defendant has a right to be present and the court must conduct a full resentencing. In fact, that court ruled that the resentencing court can even consider issues that were not raised earlier." (Pet. Rev. pg. 5). In *Davenport*, supra, the court was dealing with other issues with regard to the standard range because of the outcome of the appeal. *Id.* at 931. Here, the amount of time for community placement is fixed by statute. There is no need for the court to exercise discretion. Thus it would be merely a ministerial act wherein the defendant's presence would be totally unnecessary.

The petitioner also tries to distinguish the case of *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). There, the Supreme Court held that "[t]he trial court's discretion to resentence on remand is limited by the

scope of the appellate court's mandate. *State v. Collicott*, 118 Wn.2d 649, 660, 827 P.2d 263 (1992).” In this case, like *Kilgore*, the only thing that a court would have to do is to insert the minimum amount of community placement, which is 24 months. The statute in effect at the time, RCW 9.94A.150(8)(b) held that:

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, the court shall in addition to other terms of the sentence, sentence the offender to *community placement for two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer.*

In order to make the sentence definite, the court has to sentence the petitioner to a specific term of community placement under RCW 9.94A.150(8)(b). The only specific term is the two years. Therefore the court has no discretion to set a period of time otherwise. Is it that the defendant wants to argue for a longer term of community placement? Will he somehow know what the length of earned early release will be? The answer to both questions is no.

Furthermore, in *State v. Toney*, 149 Wn. App. 787, 792 (2009) the court stated:

We revisited *Kilgore* in *State v. McNeal*, 142 Wn. App. 777, 175 P.3d 1139 (2008), where we permitted the defendant to appeal after the court had vacated his original sentence. *McNeal*, 142 Wn. App. at 787 n.13. We recognized that a conviction is final

when both the conviction and the sentence are final. *McNeal*, 142 Wn. App. at 786 (citing *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 949-50, 162 P.3d 413 (2007)). We explained that the sentence was not final because "the resentencing on remand was an entirely new sentencing proceeding" and noted that had this court merely remanded for amendment of the judgment, the analysis would be different. *McNeal*, 142 Wn. App. at 787 n.13.

Thus, under *Kilgore* and *McNeal*, the defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence. Here, Toney's sentence was not final because our remand did not limit the trial court to making a ministerial correction. Rather, we unequivocally "remand[ed] for resentencing." Toney, 1999 WL 294615, at * 1, 1999 Wash. App. LEXIS 822, at *12.

Toney, not cited by the petitioner, is an opinion out of Division II, the same Division that, according to the petitioner, created a conflict amongst the divisions by its opinion in *Davenport*. The court in *Toney*, does not even cite to *Davenport*. So, according to the petitioner's logic, there appears to be a conflict in Division II also. But even *Davenport* and *Toney* can be read to permit resentencing when issues regarding criminal history or length of sentence are at issue, and an amendment to clarify a fixed statutory time period as the court in *Toney* held.

The petitioner should be prohibited from raising any additional issues since he has had numerous occasions to do so in the past, and has not so. A further collateral attack is prohibited by the one-year time limit

under RCW 10.73.090(1). See also RCW 10.73.140, restricting number of successive personal restraint petitions. This case should be final by an amendment to the Judgment and Sentence which would clarify the length of time of community placement. Not a new opportunity for a new round of appeals. There are sufficient factual differences between *Valentine*, *Kilgore*, *Davenport*, and this case to explain the differences that each appellate court has taken, and thus there is no conflict.

B. THE APPELLANT COURT'S REMEDY DOES NOT REQUIRE THE EXERCISE OF DISCRETION AND THEREFORE DOES NOT CONFLICT WITH ANY RULE.

The Petitioner asserts that the appellate court's proposed remedy conflicts with the rule that a judge must exercise discretion at sentencing, or resentencing. [Pet. Rev. pg. 9]. This argument presumes that the court will engage in a resentencing of the Petitioner. The appellate court did not order that the petitioner be resentenced. The language that the court used was specific that the trial court enter "an order clarifying or amending the judgment and sentence." Nothing more.

In *State v. Toney*, 149 Wn. App. 787, 794, 205 P.3d 944 (2009), the court held that:

We have a duty to correct an erroneous sentence. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 334, 28 P.3d 709 (2001). When a court sentences a defendant to the statutory maximum, and also to community custody, the judgment and sentence should set

forth the statutory maximum and ensure that the term of community custody does not exceed that maximum. *State v. Vant*, 145 Wn. App. 592, 605-06, 186 P.3d 1149 (2008) (citing *State v. Sloan*, 121 Wn App. 220, 221, 87 P.3d 1214 (2004)). Where the judgment and sentence does not so indicate, we remand for clarification of the sentence or resentencing when the combination exceeds the statutory maximum. *State v. Hibdon*, 140 Wn. App. 534, 538, 166 P.3d 826 (2007).

Thus in order to ensure that the term of incarceration and length of community custody did not exceed the statutory maximum, the court in *Toney* required that the trial court clarify in the judgment and sentence that the combination did not exceed the statutory maximum. They only required resentencing when the combined term of incarceration and community custody exceeded the statutory maximum, and the court needs to determine the appropriate period of time for each.

In *Burrell v. United States*, 467 F.3d 160 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 2031 (2007), the court noted that with its mandate, it had directed the district court to undertake a single, nondiscretionary act: to correct the judgment to reflect the dismissal of the conspiracy conviction. *Id.* at 165-66. The court had affirmed Burrell's sentence because the guidelines mandated a life sentence based on the CCE conviction alone. Because the remand was strictly ministerial, Burrell's conviction became final either when the Supreme Court denied his petition for a writ of certiorari or when his time for filing a certiorari petition

expired. *Id.* at 166. Therefore, Burrell's case was final before *Booker* was decided. *Id.* at 167.

As in *Burrell*, this court should recognize that when a matter is remanded to the trial court for entry of "an order clarifying or amending the judgment and sentence to specifically state the term of community placement consistent with *Broadaway* and its progeny," that this language merely requires a ministerial act not involving the exercise of discretion.

C. THE ENTRY OF AN ORDER AMENDING AND CLARIFYING THE JUDGMENT AND SENTENCE PURSUANT TO THE APPELLATE COURT'S ORDER IS NOT A CRITICAL STAGE IN THE PROCEEDINGS REQUIRING THE PRESENCE OF THE DEFENDANT AND HIS COUNSEL.

The petitioner's last argument is that the court's proposed remedy will effect a change in a material term of the sentence without a hearing; without the defendant's presence; without the presence of counsel; without allocution; and without minimal due process. This argument however, fails to recognize the nature of the proceeding. Nothing more than a ministerial act of setting forth in an amendment to the judgment and sentence requiring that the defendant be on community placement for a term of 24 months needs to be done.

Under the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment, a criminal defendant

was the right to be present during all critical states of criminal proceedings. *State v. Wilson*, 141 Wn. App. 597, 603-4, 171 P.3d 501 (2007). Criminal defendants also have the right to be represented by counsel at all critical stages of criminal proceedings. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005).

A critical state is one in which there is a possibility that a defendant is or would be prejudiced in the defense of his case. *Garrison v. Rhay*, 75 Wn.2d 98, 102, 449 P.2d 92 (1968). “[D]ue process requires that a defendant be allowed to be present ‘to the extent that a fair and just hearing would be thwarted by his absence. . . .’” *State v. Rice*, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 108, 54 S. Ct. 330, 78 L.3d. 674 (1934)). This right is limited, however, when the defendant’s “‘presence would be a useless, or the benefit but a shadow.’” *Rice*, 110 Wn.2d at 616 (quoting *Snyder*, 291 U.S. at 106-107). “The core of the constitutional right to be present at all critical stages of the proceedings is the right to be present when evidence is being presented or whenever a defendant’s presence has “‘a relation, reasonably substantial,’ to the fulness [sic] of his opportunity to defend against the charge.” *State v. Corbin*, 79 Wn. App. 446, 449, 903 P.2d 999 (1995) (quoting *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)). Generally, both a defendant’s sentence and resentencing hearings are

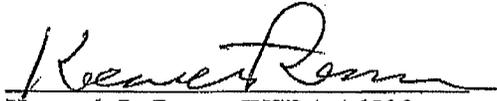
critical states of criminal trials. *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In this case, the appellate court's opinion on remand orders the superior court to "enter an order clarifying or amending the judgment and sentence to specifically state the term of community placement consistent with Broadaway and its progeny." (*State v. Ramos*, Nos. 25740-1-III; No. 27524-8-III; pg. 4). The correction does not change the length of the term of Mr. Ramos's sentence in any way, as the statutory term of community placement was 24 months. See former RCW 9.94A.120(8)(b) (1992). The superior court should do nothing more than follow the instructions of the appellate court on the remand order. The order is specific, limited and leaves nothing to the discretion or judgment of the trial court. Thus, the order on remand is a purely ministerial act. The superior court needs not consider any evidence or argument regarding an increase, decrease, or alteration of Mr. Ramos's sentence.

V. CONCLUSION

Based upon the foregoing argument, this Court should deny the petition for review.

Respectfully submitted this 17th day of December, 2010.

A handwritten signature in cursive script, appearing to read "Kenneth L. Ramm", written over a horizontal line.

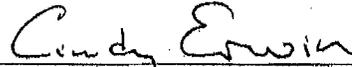
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of December, 2010, a copy of the RESPONSE TO PETITION FOR REVIEW was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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