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No. 63717-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY CHARLES REANIER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON
DIV. 1
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A. ARGUMENT IN REPLY

1. THE APPEAL IS TIMELY

The State contends Mr. Reanier's appeal is not timely, because the notice of appeal was filed more than 30 days after the trial court entered the initial judgment. The State contends Mr. Reanier cannot appeal the trial court's June 1, 2009, order denying his motion to limit the court's authority to supervise him, because that motion itself was untimely. The State characterizes the motion as a "motion for arrest of judgment under CrR 7.4." SRB at 11. Finally, the State argues that although Mr. Reanier may challenge his judgment and sentence as invalid on its face, he may do so only in a personal restraint petition. SRB at 12.

To the contrary, the appeal is timely because it was filed within 30 days after the trial court's order denying Mr. Reanier's motion to limit the court's authority to supervise him. CP 98. That motion is properly characterized as a CrR 7.8(b) motion for relief from judgment, not a CrR 7.4 motion. The CrR 7.8 motion itself was timely, because the judgment and sentence is invalid on its face. Moreover, the court's order denying the CrR 7.8 motion was appealable as a matter of right and Mr. Reanier filed his notice of appeal on time.

Mr. Reanier argued in the trial court that the court did not have statutory authority to impose a ten-year term of commitment, and that he was therefore entitled to relief from the judgment imposing the ten-year term. CP 89-95; 5/29/09RP 4-6. Mr. Reanier argued the sentence exceeded the statutory maximum term of five years and that he was entitled to be resentenced. This is properly characterized as a CrR 7.8(b)(4) motion for relief from judgment.

CrR 7.8(b)(4) provides that "[o]n motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding" on the basis that "[t]he judgment is void."

A "void judgment" for purposes of CrR 7.8(b)(4) is "one entered by a court 'which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved.'" State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005) (quoting Dike v. Dike, 75 Wn.2d 1, 7, 448 P.2d 490 (1968)). A motion attacking a sentencing court's authority to sentence a criminal defendant in excess of the statutory maximum sentence is properly brought under CrR 7.8(b)(4). Id. at 123.

As argued in the opening brief, the trial court's initial "Findings of Fact, Conclusions of Law, Judgment, Order of Acquittal by Reason of Insanity, and Order Committing Defendant for Treatment," CP 30-32, is a criminal "judgment." In re Pers. Restraint of Well, 133 Wn.2d 433, 439-40, 946 P.2d 750 (1997). Further, that order and the trial court's "Findings of Fact and Conclusions of Law for Exceptional Term of Commitment," CP 20-22, imposing the ten-year term of commitment, is a criminal "sentence." Well, 133 Wn.2d at 440-41. Those orders therefore may be attacked through a CrR 7.8(b)(4) motion for relief from judgment on the basis that the term of commitment imposed exceeds the statutory maximum sentence and that the judgment is therefore "void." See Zavala-Reynoso, 127 Wn. App. at 122-23; State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) ("A court has jurisdiction to amend a judgment to correct an erroneous sentence, where justice requires, under CrR 7.8.").

A CrR 7.8(b)(4) motion is a collateral attack that must be made "within a reasonable time," and "is further subject to RCW 10.73.090, .100, .130, and .140." CrR 7.8.

RCW 10.73.090(1) provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be

filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

Because Mr. Reanier did not directly appeal the order of commitment, the order became "final" for purposes of RCW 10.73.090 on the date it was filed with the trial court clerk. RCW 10.73.090(3)(a). That date was May 31, 2005. CP 20-22, 30-32.

Mr. Reanier's motion seeking relief from judgment was filed May 28, 2009, more than one year after the judgment became final. But the one-year statutory time bar for collateral attacks does not apply where the judgment is not "valid on its face." RCW 10.73.090(1). The term "valid on its face" means "'without further elaboration.'" In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000) (quoting State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 (1986)).

A criminal judgment is "invalid on its face" where the total sentence exceeds the statutory maximum term. Zavala-Reynoso, 127 Wn. App. at 124. Here, it is apparent from the face of the judgment that the total term of confinement imposed, ten years, exceeds the statutory maximum term of five years. CP 20-22, 30-32. Because the judgment is invalid on its face, the one-year time

bar for collateral attacks does not apply to Mr. Reanier's motion for relief from judgment. The motion was therefore timely.

Moreover, an order denying a CrR 7.8 motion for relief from an erroneous sentence in a criminal case is appealable as a matter of right. State v. Larranaga, 126 Wn. App. 505, 509, 108 P.3d 833 (2005); RAP 2.2. RAP 2.2 provides that a party may appeal as a matter of right a trial court order denying a motion for amendment of judgment, an order denying a motion for arrest of judgment in a criminal case, or "[a]ny final order made after judgment that affects a substantial right." RAP 2.2(a)(10), (11), (13). It is not the title of the motion, but the relief sought, that determines whether an order denying the motion is appealable as a matter of right. Larranaga, 126 Wn. App. at 509; see also RAP 1.2(a) ("These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."). "[C]orrecting an erroneous sentence amends a judgment." Id. at 508 (citing Hardesty, 129 Wn.2d at 315); see RAP 2.2(a)(10). Therefore, the denial of a motion seeking vacation of a sentence and resentencing in a criminal case is appealable under RAP 2.2, regardless of what the motion is titled. Id. at 508-09. Appellate review is limited to determining

whether the trial court abused its discretion in denying the motion.

Id. at 509.

Here, Mr. Reanier filed a motion seeking relief from his sentence, amendment of the judgment, and resentencing to a five-year term of commitment. CP 89-95. The court's order denying that motion was appealable as a matter of right. Larranaga, 126 Wn. App. at 508-09; RAP 2.2.

Finally, Mr. Reanier had 30 days after entry of the trial court's order to file his notice of appeal. RAP 5.2(a). The trial court's order was entered on June 1, 2009. CP 96-97. The notice of appeal was filed on June 25, 2009. CP 98. Therefore, Mr. Reanier's appeal is timely.

2. THE SENTENCE IS IN EXCESS OF THE COURT'S STATUTORY AUTHORITY

The State contends imposition of consecutive terms of confinement for a person acquitted by reason of insanity of multiple charges is authorized by statute, because the Sentencing Reform Act (SRA) authorizes courts to impose exceptional sentences in the form of consecutive sentences for persons convicted of multiple felonies. SRB at 13. The State recognizes the contrary authority of State v. Harris, 39 Wn. App. 460, 693 P.2d 750 (1985), but argues that case is not binding. To the contrary, Harris remains controlling

authority. Further, this Court has held that the SRA does not come into play when a person pleads not guilty by reason of insanity. State v. Sunich, 76 Wn. App. 202, 206, 884 P.2d 1 (1994). The term of confinement is determined by the NGRI statute, not the SRA. As this Court held in Harris, the NGRI statute does not authorize courts to impose consecutive terms of commitment when there are multiple charges.

As argued in the opening brief, the doctrine of stare decisis requires a clear showing that Harris is incorrect and harmful before this Court may abandon that holding. E.g., Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004). The State fails to make a convincing case that Harris should be overruled.

The State contends that Harris is obsolete, because the Legislature subsequently amended the SRA to provide for exceptional sentences in the form of consecutive sentences. But this Court has held the SRA does not apply to terms of commitment imposed following a not guilty by reason of insanity plea. Sunich, 76 Wn. App. at 206. The NGRI statute provides that the term of commitment for a person acquitted by reason of insanity "cannot exceed the maximum possible penal sentence for any offense *charged* for which the person was . . . acquitted by reason of

insanity." RCW 10.77.025(1) (emphasis added). The statute "does not say the maximum possible sentence upon conviction, but rather 'for any offense charged.' The statute thus directs us to the maximum possible sentence at charging, not upon conviction." Sunich, 76 Wn. App. at 206. The SRA, by contrast, applies only to felony sentences imposed upon conviction. See RCW 9.94A.010 (SRA applies only to the sentencing of "felony offenders").

The "maximum possible penal sentence" under the NGR1 statute is determined by referring to RCW 9A.20.021, not the SRA. It "means the longest sentence authorized by law . . . at the time of charging." Sunich, 76 Wn. App. at 207. The statute does not contemplate the possible sentences that could have been imposed if the person had been convicted of the charged crime. The statute does not authorize the court to speculate whether the acquittee might have received an exceptional sentence upon conviction. The statute only imposes an upper limit on the term of commitment, which is the statutory maximum for the charged offense. In sum, "the SRA, which applies only upon conviction, simply does not come into play under the statute." Id. at 206.

Moreover, as argued in the opening brief, the Legislature amended the commitment statute in 1998, long after the Legislature

had explicitly provided for consecutive sentences as an exceptional sentence in the SRA. Laws 1987, ch. 456, § 5. The Legislature is presumed to be familiar with judicial interpretations of statutes, and absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions. State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000). The Legislature's decision not to change the statutory language indicates its approval of the Harris Court's interpretation of it.

The State also argues that Harris is obsolete because the Washington Supreme Court subsequently held in In re Personal Restraint of Breedlove, 138 Wn.2d 298, 979 P.2d 417 (1999), that a person may stipulate to an exceptional sentence as part of a plea agreement. But that is immaterial. As discussed more fully below and in the opening brief, a person may not stipulate to a sentence in excess of the court's statutory authority. In re Pers. Restraint of West, 154 Wn.2d 204, 215 n.5, 110 P.3d 1122 (2005); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869-74, 50 P.3d 618 (2002). The question in this case is not whether Mr. Reanier could stipulate to a term of commitment as part of a plea agreement, but whether the term imposed exceeded the court's statutory authority.

The State further argues that Harris is distinguishable, because it dealt with a hypothetical term of confinement. SRB at 17-18. See Harris, 39 Wn. App. at 464 (length of commitment "*should be tied into the length of time he would have served if convicted of a felony.*") (quoting February 6, 1974, minutes of the House Judicial Committee) (emphasis in Harris). According to the State, Harris's situation is different from Mr. Reanier's situation, because Reanier "agreed to and received consecutive terms for his two crimes." Id. But it is still speculative to say that Mr. Reanier would have stipulated to and received a ten-year exceptional sentence had he been *convicted* of the charged crimes. Mr. Reanier was not convicted of any crime; he was acquitted by reason of insanity. Any sentence he might have received had he been convicted is purely hypothetical.

As a penal statute, RCW 10.77.025 must be construed strictly and may not be extended by construction to situations not clearly intended by the Legislature. Blanchard Co. v. Ward, 124 Wash. 204, 207, 213 P. 929 (1923). If the statute is ambiguous, under the rule of lenity, this Court must adopt the interpretation that favors the defendant. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). A statute is ambiguous if it is susceptible to two

or more reasonable interpretations. Department of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 12, 43 P.3d 4 (2003).

As Harris concluded, at the least, RCW 10.77.025 is ambiguous. Thus, this Court should conclude the statute does not authorize a trial court to impose consecutive terms of commitment where there are multiple charges.

3. MR. REANIER DID NOT WAIVE HIS RIGHT TO CHALLENGE THE ILLEGAL SENTENCE BY ENTERING A PLEA AGREEMENT WITH THE STATE

The State contends that Mr. Reanier's agreement to the consecutive terms of commitment and his agreement not to appeal his commitment were indivisible parts of the plea agreement, and that he cannot challenge the term of commitment without also challenging the entire plea. SRB at 18. The State argues the remedy for the mutual misunderstanding of the law is either withdrawal of the plea or specific performance. SRB at 19 (citing State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988); State v. Walsh, 143 Wn2d 1, 17 P.3d 591 (2001)). The State recognizes the contrary authority of In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002), but argues Goodwin is distinguishable because it did not involve a plea bargain with the type of explicit waivers found in Reanier's agreement. SRB at 19.

The State instead relies on State v. Ermels, 156 Wn.2d 528, 131 P.3d 299 (2006), in which the Supreme Court held that Ermels could not challenge his exceptional sentence without also challenging his entire guilty plea agreement. SRB at 19-21.

The State's arguments are clearly contrary to a substantial weight of authority. The Supreme Court has consistently held that a person cannot agree to a sentence in excess of statutory authority. Moreover, where a person agrees to a sentence in excess of statutory authority as part of a plea agreement, he is entitled to reversal of the erroneous portion of the sentence without disturbing the other terms of the plea agreement. Whether the defendant agreed to an illegal sentence as part of a plea agreement or explicitly waived his right to appeal the sentence is immaterial. A sentence in excess of statutory authority is a fundamental defect that must be corrected when challenged.

The Supreme Court recently affirmed these principles and the case law establishing them in In re Personal Restraint of West, 154 Wn.2d 204, 206, 110 P.3d 1122 (2005). There, in exchange for a reduction of the charge from first degree robbery to first degree theft, West agreed to an exceptional 10-year sentence. This eliminated the possibility that a conviction would result in her

third strike. As part of her plea bargain, West also signed a waiver in which she agreed to serve the full 10-year sentence and requested that the Department of Corrections not make any calculation or application of earned early release time. Id. The court sentenced West to 10 years, the statutory maximum, and indicated on the judgment and sentence that the Department of Corrections could not grant early release time. Id. at 208. But the statute provides no authority for the court to restrict early release time. Id. at 212-13. Because "[i]mposition of a sentence that is not authorized by statute is a "fundamental defect," West was entitled to relief despite her waivers and plea bargain. Id. at 213 (citing Breedlove, 138 Wn.2d at 304; Goodwin, 146 Wn.2d at 877).

It is well established that waiver may be found (as a result of a plea agreement) where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion, but "waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence." Id. at 213 (quoting Goodwin, 146 Wn.2d at 874). The Supreme Court "has repeatedly held that 'an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law.'" Id. (quoting In re Pers. Restraint of Hinton,

152 Wn.2d 853, 861, 100 P.3d 801 (2004); citing Goodwin, 146 Wn.2d at 870 ("a plea bargaining agreement cannot exceed the statutory authority given to the court") (quoting In re Pers. Restraint of Gardner, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980)); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000) ("[T]he actual sentence imposed pursuant to a plea bargain must be statutorily authorized . . .") (quoting In re Pers. Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)). "A defendant simply 'cannot empower a sentencing court to exceed its statutory authorization.'" West, 154 Wn.2d at 213-14 (quoting State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980)). The fact that a defendant agreed to a particular sentence does not cure a facial defect in the judgment and sentence where the sentencing court acted outside its authority. Id. at 213-14. "Washington courts have held that even where a defendant clearly invited the challenged sentence by participating in a plea agreement, to the extent that he or she 'can show that the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review.'" Id. at 214 (citing State v. Phelps, 113 Wn. App. 347, 354, 57 P.3d 624 (2002) (citing Goodwin, 146 Wn.2d at 872)). Phelps relied on Goodwin, where the court clarified that "a sentence in

excess of statutory authority is subject to collateral attack" and "a defendant cannot agree to punishment in excess of that which the Legislature has established." West, 154 Wn.2d at 873-74 (citing Goodwin, 146 Wn.2d at 873-74). Goodwin allowed collateral review of a post-plea agreement sentence, despite the invited error doctrine. See Goodwin, 146 Wn.2d at 872-74. Therefore, the invited error doctrine does not apply where a sentence is outside the authority of the sentencing court. West, 154 Wn.2d at 214.

In sum, a substantial body of case law establishes that a sentence in excess of statutory authority is a fundamental defect justifying collateral relief. A defendant does not waive the right to challenge the sentence by agreeing to it as part of a plea bargain. West, 154 Wn.2d at 214-15. Moreover, the Supreme Court "has been clear that 'the imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. The error is grounds for reversing only the erroneous portion of the sentence imposed.'" Id. at 215 (quoting Eilts, 94 Wn.2d at 496; citing Goodwin, 146 Wn.2d at 877 ("Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and

valid when imposed."); Phelps, 113 Wn. App. at 358 (reversing only an incorrect notation on a judgment and sentence)).

The law is plain: a person cannot waive his right to challenge a sentence in excess of statutory authority by stipulating to it, by entering a plea agreement, or by explicitly waiving his right to appeal. Moreover, a person who enters a plea agreement is entitled to challenge the erroneous portion of the sentence without challenging any other terms in the plea agreement.

The State relies on State v. Ermels, 156 Wn.2d 528, but that case is distinguishable. The sentence in Ermels was not in excess of the court's statutory authority. As part of his plea agreement, Ermels stipulated to facts supporting an exceptional sentence and that there was a legal basis for the sentence, but then challenged the sentence on appeal. Id. at 31-32. He argued his waiver of his right to appeal the sentence was not knowing and voluntary, because he was not aware at the time that the United States Supreme Court would subsequently hold in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 403 (2004), that he had a right to a jury determination of the facts underlying the exceptional sentence. Ermels, 156 Wn.2d at 539. The Washington Supreme Court held Ermels could not challenge the validity of the waivers

without challenging the entire plea agreement. The Supreme Court found significant that Ermels did not argue his exceptional sentence relied on impermissible Blakely fact finding. Id. at 531, 539.

Indeed, Blakely provides that the State may seek judicial sentence enhancements if the defendant stipulates to the relevant facts.

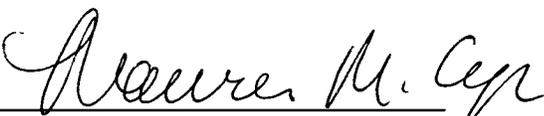
Blakely, 542 U.S. at 310. Because Ermels stipulated to the facts underlying the exceptional sentence, the court did not exceed its statutory authority in imposing the sentence.

Here, by contrast, the court did not have authority to impose the ten-year term of commitment. Mr. Reanier may challenge the erroneous portion of the sentence without challenging the entire plea agreement.

B. CONCLUSION

For the reasons above and in the opening brief, the trial court exceeded its statutory authority in imposing a ten-year term of commitment and the sentence must be vacated. The Court should remand for resentencing to a five-year term of commitment.

Respectfully submitted this 28th day of January 2010.


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DIVISION ONE**

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING THE MANNER INDICATED BELOW:

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