

NO. 65375-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

KERRY PARENT,

Appellant.

REC'D
SEP 20 2010
King County Prosecutor
Appellate Unit

2010 SEP 20 PM 4:22
COURT OF APPEALS
DIVISION ONE
CLERK

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

The Honorable Deborah Fleck, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court exceeded its sentencing authority when it imposed a suspended sentence probation term in excess of that which was statutorily permitted.

Issues Pertaining to Assignments of Error

1. RCW 9.95.210 permits a trial court to impose a suspended sentence probation period “not exceeding the maximum term of sentence or two years.” Here, appellant pled guilty to two fourth degree assault charges. The trial court sentenced him to a term of 12 months on each and ran them consecutively for a maximum sentencing term of 24 months. The trial court then imposed 48 months of probation – 24 months beyond what is permitted under RCW 9.95.210. Did the trial court exceed its statutory authority?¹

2. If the issue becomes moot throughout the course of this appellate process, is there a public interest in having this Court review the issue anyway?

B. STATEMENT OF THE CASE

On July 13, 2009, the King County prosecutor charged appellant Kerry Parent with one count of third degree assault and

one count of fourth degree assault. CP 1-5. On November 19, 2009, Parent pled guilty to two counts of fourth degree assault, with the prosecutor agreeing to recommend a suspended sentence. CP 6-23.

On December 4, 2009, the trial court sentenced Parent to two 12-month maximum sentencing terms, running them consecutively for a total of 24 months. CP 27. It suspended and sentence, requiring Parent to serve 8 months. CP 27. It then ordered Parent to serve two 24-month probation terms consecutively, for a total of 48 months probation. CP 28. The defense objected to the probation term, and the trial court offered to hear more on the matter in a motion for reconsideration. RP (12-4-09) 14-15.

On March 17, 2010, the defense moved for reconsideration. CP 31-38. At the hearing, defense counsel referenced State v. Shaw,² an unpublished appellate case from Division II directly on point, arguing RCW 9.95.210 only permitted the trial court to

¹ There is currently no published opinion addressing this issue.

² State v. Shaw, 103 Wash. App. 1054, 2000 WL 1867601, Wash. App., Div. 2. Parent does not cite this unpublished case as authority, but to give the court context to defense counsel's argument and the court's ruling. See GR 14.1(a)

impose 24 months probation. RP 2-6.³ The trial court said it was not bound by the unpublished case and denied the motion, ruling that it could impose consecutive statutory periods under RCW 9.95.210, because it had imposed separate sentencing terms for each count and ran them consecutively. CP 39. Parent appeals. CP 40.

C. ARGUMENT

I. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY.

Parent's suspended sentence probationary period exceeds the limits set forth in RCW 9.95.210(1). His sentence, therefore, requires remand for resentencing within the statutory limitations.

The trial court lacks inherent authority to suspend a sentence. State v. Gibson, 16 Wn. App. 119, 127-28, 553 P.2d 131 (1976). The power to suspend a sentence must be granted by the legislature. State v. Butterfield, 12 Wn. App. 745, 747, 529 P.2d 901 (1974). Under RCW 9.92.060 and RCW 9.95.210, the trial court has discretionary authority to suspend a defendant's sentence and place the defendant on probation within certain parameters.

³ Unless otherwise noted, all citation to the record made herein refer to the transcript for the April 22, 2010 hearing.

Regarding suspended sentence probation, RCW 9.95.210(1)

states:

In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, **not exceeding the maximum term of sentence or two years, whichever is longer.**

Emphasis added. Because Parent's maximum term of sentence was 24 months, under either provision, the trial court was only authorized to impose two years probation. Hence, the trial court exceeded its statutory authority when it imposed four years probation.

The State may argue, as it did below, that RCW 9.95.210 authorizes a trial court to consecutively run 24-month suspended sentencing probation terms for each count because a trial court has discretion to order consecutive sentence terms. RP 7-8. However, the State is confusing the stacking up of maximum sentencing terms (which is authorized under 9.92.080) with the stacking up of the 24-month suspended sentence probation terms (which is not authorized under RCW 9.95.210).

This confusion is revealed in the State's policy argument made below. The State suggests that under appellant's reading of

the statute, a trial court could only sentence a person convicted of ten different misdemeanor counts to 24 months suspended sentence probation. RP 8. This is not so. If a defendant were convicted of ten misdemeanor counts, even under defendant's reading of the statute, RCW 9.95.210 would not limit the trial court from sentencing that person to 10 separate 12-month sentencing terms, running them consecutively, and then suspending the sentence with a probationary period of 120 months (the maximum term of sentence). The difference here, of course, is Parent was not convicted ten misdemeanors – he was convicted of only two, making his maximum sentencing term 24 months.

For the reasons explained above, it is appellant's position that RCW 9.95.210 unambiguously prohibits the trial court from imposing on him consecutive 24-month probation periods in this case. If, however, this Court finds the State's reading of the statute is also reasonable, then the rule of lenity applies. Under that rule, appellate courts must strictly construe ambiguous statutes in favor of the defendant. In re Personal Restraint of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994). Applying the rule here, Parent should only have been sentenced to 24 months of probation.

For the reasons statute above, this Court should remand with instructions for the trial court to re-sentence Parent within the statutory limitations.

II. DESPITE ANY POTENTIAL FOR MOOTNESS, THIS COURT SHOULD REACH THE ISSUE.

Given the possibility that a suspended sentence can be revoked under certain conditions, the underlying facts and sentence presented here may change, calling into question the reviewability of the issue raised here. Even if the issue becomes moot, however, appellate review is still appropriate.

Appellate courts consider moot issues where the issue involves a substantial public interest that will likely recur and requires an authoritative determination to provide future guidance. In re Dependency of A.K., 162 Wn.2d 632, 635, 174 P.3d 11 (2007).

As noted above, there is no published authority addressing this issue. The trial court's authority to sentence criminal defendants is an issue of substantial public interest. Suspended sentences will continue to be issued. An authoritative decision providing guidance is needed to insure fair and equal application of this law. In fact, the trial court acknowledged this on the record

when it ruled that the one unpublished appellate case addressing this issue, while favorable to Parent, was not binding and that hopefully this case would result in a published case to provide needed clarity and guidance. RP 12.

For the reasons, appellate review is appropriate even if the issue becomes moot during the appeals process.

D. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to remand for re-sentencing within the statutory limits.

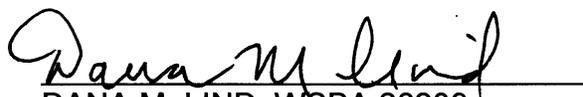
Dated this 20th day of September, 2010.

Respectfully submitted

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COA NO. 65375-0-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF SEPTEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KERRY PARENT
NO. 210016372
REGIONAL JUSTICE CENTER
620 W. JAMES STREET
KENT, WA 98032

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF SEPTEMBER, 2010.

x Patrick Mayovsky

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