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NO. 65375-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KERRY PARENT,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH F. FLECK

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. When granting probation under RCW 9.95.210(1), the trial court may impose a probation term "not exceeding the maximum term of sentence or two years, whichever is longer." Parent pled guilty to two counts of Assault in the Fourth Degree – Domestic Violence. The court imposed two consecutive 24-month probation terms. Has Parent failed to show that the court exceeded its statutory authority by imposing 48 months total probation?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Kerry Parent with Assault in the Third Degree – Domestic Violence and Assault in the Fourth Degree – Domestic Violence. CP 1-2. The State amended the information to charge two counts of Assault in the Fourth Degree – Domestic Violence. CP 14-15. Parent pled guilty as charged. CP 6-13; 1RP 2-13.<sup>1</sup>

At sentencing, the trial court imposed two consecutive 12-month jail terms. CP 27-30; 2RP 13. The court suspended the

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<sup>1</sup>The Verbatim Report of Proceedings consists of three volumes with the State adopting the following reference system: 1RP (11/19/09), 2RP (12/4/09), and 3RP (4/22/10).

jail time on each count with the exception of eight months on count one, giving Parent credit for jail time previously served. CP 27-30; 2RP 13. Additionally, the trial court imposed two consecutive 24-month probation terms resulting in 48 months total probation. CP 27-30; 2RP 13.

## **2. SUBSTANTIVE FACTS**

On July 6, 2009, Parent and his wife, Sherri Wade, started arguing about a cell phone. CP 3.<sup>2</sup> Although the parties dispute what happened next, Wade alleged that Parent escalated from verbally arguing with her to punching a bedroom door and ultimately burning her leg with a cigarette. CP 3. Although Parent tried to intimidate Wade with a knife during the fight, Wade managed to get the knife away from Parent and suffered a cut thumb in the process. CP 3. Wade did not report the incident until three days later. CP 3.

On July 9, 2009, Wade confronted Parent about growing and selling marijuana around her children. CP 3. Parent told Wade to

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<sup>2</sup> As part of the plea agreement, Parent agreed that the facts set forth in the Certification of Probable Cause are real and material facts for purposes of sentencing. CP 23. Consequently, the State relies on the Certification of Probable Cause for the substantive facts.

“Shut the fuck up” and Wade demanded that Parent leave. CP 3. In response, Parent grabbed Wade’s neck and threw her over a couch, causing Wade severe pain. CP 3. Although Parent balled up his fists and threatened to knock out Wade, Parent relented when Wade’s mother intervened and told him to stop. CP 3. Deputies responded to a 911 call from the house, but Parent had already left by the time they arrived. CP 3.

One of the responding deputies noted bruising on both sides of Wade’s neck. CP 3. Wade told deputies that Parent scared her and removed the license plates from her car to prevent her from leaving the house. CP 4. Wade also told deputies that Parent was involved with people who she believed would kill her for calling the police. CP 4.

Parent later admitted to pushing Wade against the couch on the night of July 9, 2009. CP 4. Wade insisted, however, that he pushed Wade after Wade hit him in the head with the computer while he was trying to leave. CP 4. Although Parent showed the arresting deputy where Wade hit him with the computer, the deputy did not see any redness, bumps, or swelling in the area Parent indicated. CP 4. Parent did not explain how Wade received a cigarette burn or cut thumb. CP 4.

At sentencing, Parent strongly disputed the facts alleged by Wade and suggested that Parent pled guilty only to avoid serving a prison sentence. 2RP 3-6, 10. With eight prior felony convictions, Parent had faced a possible prison sentence of 43 to 57 months on the original assault charge. CP 19-20. Although the trial court acknowledged the parties' conflicting view of events, the trial court ultimately imposed two consecutive terms of 24 months probation. 2RP 13-14. Defense counsel objected to the consecutive terms of probation and later filed a motion for reconsideration. CP 31-33. The trial court denied the reconsideration motion and Parent timely appealed. CP 39-40; 3RP 9-11.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO SENTENCE PARENT TO CONSECUTIVE PROBATION TERMS.**

Recognizing the lack of published authority on this issue, Parent argues that RCW 9.95.210(1) prohibits trial courts from imposing two-year, consecutive probation terms. *App. Br.* at 2, n.2. Parent contends that the statutory reference to "maximum term of

sentence" means the aggregate amount of time faced by the defendant on every count. Parent's argument fails, however, based on the plain language of the statute, which is consistent with the broad discretion conferred on trial courts to sentence misdemeanors. Contrary to Parent's claim, "maximum term of sentence" means the maximum amount of time faced by the defendant on each count. Consequently, the trial court properly imposed two consecutive 24-month probation terms for Parent's two domestic violence assault convictions.

The trial court has broad discretion to impose misdemeanor and gross misdemeanor sentences within statutory limits. State v. Anderson, 151 Wn. App. 396, 402, 212 P.3d 591 (2009). The court may suspend or defer misdemeanor sentences, impose consecutive sentences, and even exceed the standard range sentence for a comparable felony. Id. There is no legislation limiting the trial court's discretion to sentence misdemeanors comparable to the strict limitations of the Sentencing Reform Act of 1981 (SRA) as to felonies. Id.

The court imposed probation based on RCW 9.95.210,<sup>3</sup>  
which provides in relevant part:

**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); CP 27. Based on this provision, the trial court imposed 24 months probation on each count of assault and ordered that Parent serve the terms consecutively. CP 27; 2RP 13.

Issues of statutory construction are reviewed *de novo*. Welch v. Southland Corp., 134 Wn.2d 629, 632, 952 P.2d 162 (1998). On appeal, courts assume that "the Legislature meant exactly what it said" and "give the plain language of a statute its full effect." Geschwind v. Flanagan, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993). Courts only avoid a literal reading of a statute if it results in unlikely, absurd, or strained results. Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

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<sup>3</sup> Although not relied upon by the trial court, RCW 9.92.060 also provides authority for imposing probation on misdemeanors in superior court. The statute, however, sheds little light here because it is focused primarily on who may supervise probation rather than the maximum length of a probation term.

"Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). Statutes are interpreted and construed "so that all the language used is given effect, with no portion rendered meaningless or superfluous." Whatcom County v. Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Undefined statutory terms are afforded their usual and ordinary meaning. Christensen, 162 Wn.2d at 373.

A statute is ambiguous when it is susceptible to more than one reasonable interpretation. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d (2001). When construing an ambiguous statute, courts rely on statutory construction, legislative history, and relevant case law to determine legislative intent. Id. An unambiguous statute, however, does not require construction and courts may not consider non-textual considerations such as the rule of lenity<sup>4</sup> when applying a statute's plain language. State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996).

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<sup>4</sup> The rule of lenity requires courts construing an ambiguous criminal statute to adopt the most favorable interpretation to the defendant. In re Sietz, 124 Wn.2d 645, 649, 880 P.2d 34 (1994).

Assuming that the Legislature "meant exactly what it said" in RCW 9.95.210(1) and applying the required plain language approach, "maximum term of sentence" refers to the statutory maximum amount of time faced by a defendant on each individual count. By its plain words, the statute indicates that the court may impose probation when "**the sentence**" is suspended and limit the probation term to the longer of two years or "**the maximum term of sentence.**" RCW 9.95.210(1) (emphasis added). Both references to "sentence" are in the singular and preceded by the word "the," suggesting that the Legislature was referring to one specific, discrete crime. See State v. Mortell, 118 Wn. App. 846, 850, 78 P.3d 197 (2003) (reasoning that the Legislature's use of the word "a" before "gross misdemeanor" denoted one specific, discrete crime).

Although Parent argues that the "maximum term of sentence" is the total amount of time facing a defendant on all counts, there are no words to that effect in the statute. The statute does not contain the words "total," "aggregate," "combined," or "sum," nor does it reference situations involving multiple counts or cause numbers. When the Legislature has intended that courts consider multiple counts together it has specifically provided for

such situations. E.g., RCW 9.94A.589(1)(a) (“whenever a person is to be sentenced for *two or more current offenses*”) (emphasis added); RCW 9.92.080(3) (“whenever a person is convicted of *two or more offenses*”) (emphasis added). Parent essentially asks the Court to “read in” language missing from the statute and to conclude that “maximum term of sentence” means the combined maximum sentence on all counts, despite the absence of such language and the statute’s plain meaning.

Examining the context of RCW 9.95.210(1) and related statutes confirms that the plain meaning of “maximum term of sentence” is the maximum sentence for each count. The subsection immediately following RCW 9.95.210(1) provides in relevant part:

**In the order granting probation** and as a condition thereof, the superior court may in its discretion imprison the defendant in the county jail for a period not exceeding one year and may fine the defendant any sum not exceeding the statutory limit for **the offense committed**, and court costs.

RCW 9.95.210(2) (emphasis added). Subsection (2)’s limited focus on the “the offense committed” suggests that subsection (1) is similarly focused on the statutory maximum for each count, rather than the maximum on all counts combined.

Related statutes in the same chapter further indicate that the plain meaning of "maximum term of sentence" is the maximum sentence on each crime. RCW 9.95.010, although applicable only to pre-SRA felonies, specifically defines "maximum term" as "the maximum provided by law for *the crime* of which such person was convicted." (Emphasis added). Similarly, RCW 9.95.100 mandates that defendants convicted of felonies prior to the SRA's inception must be discharged from custody after "serving *the maximum punishment* provided by law for *the offense*." (Emphasis added).

The Legislature's consistent linking of "maximum term" and "maximum punishment" with a singular "crime" or "offense" suggests that the Legislature intended that "maximum term of sentence" refer to the maximum sentence on each count, rather than the maximum sentence on all counts combined as argued by Parent. Reading the statutes together in harmony and consistent with RCW 9.95.210(2), RCW 9.95.010, and RCW 9.95.100, the plain meaning of "maximum term of sentence" is the maximum sentence on each count. State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282, cert. denied, 531 U.S. 984 (2000) (related statutory provisions must be read together and harmonized in order to achieve a unified statutory scheme).

Parent apparently has abandoned the argument made in the trial court that the "maximum term of sentence" must mean the aggregate maximum sentence because otherwise that term is rendered meaningless because two years will always be longer than the 90-day maximum misdemeanor sentence or the one-year maximum gross misdemeanor sentence. 3RP 3. See Whatcom, 128 Wn.2d 537 at 546 (requiring courts to give effect to every word used in a statute). That argument fails because when it drafted the language at issue, the Legislature intended that "maximum term of sentence" apply to both misdemeanor and felony probation.

As originally drafted in 1939, the statute allowed courts to grant probation upon conviction of a "felony offense" for a "period of time, not exceeding the maximum term of sentence." Laws of 1939, ch. 125, § 1. The Legislature did not amend this provision until 1983, when it extended the term of probation available in courts of limited jurisdiction to two years. Laws of 1983, ch. 156, § 1-2. The 1983 amendment specified that the term of probation could not exceed "the maximum term of sentence in the case of a superior court or a period of two years in the case of a court of limited jurisdiction." Laws of 1983, ch. 156, § 4.

Realizing that it had neglected to consider misdemeanors in superior court, the Legislature amended the statute the next year to read as it now appears, providing that probation cannot exceed "the maximum term of sentence or two years, whichever is longer." RCW 9.95.210(1); Final Legis. Rep., HB 1166, at 68-69 (Wash. 1984) (stating the 1984 amendment "has the effect of putting superior and district courts on an equal basis" and resolves the "serious 'equal protection' problem"). Given that the "maximum term of sentence" on a single felony could be longer than two years, the phrase "maximum term of sentence" was not superfluous in the context of a sentence on a single crime.<sup>5</sup>

Further, Parent's interpretation of "maximum term of sentence" as the aggregate maximum sentence on all counts combined leads to absurd results. See Davis, 137 Wn.2d at 963 (courts avoid reading a statute in a way that leads to absurd results). By Parent's interpretation, a defendant could be sentenced on a misdemeanor in superior court one day, receive the maximum two years probation, and then the next day receive the

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<sup>5</sup> In 2001, the Legislature amended RCW 9.95.200 to add subsection (2), which enumerates the sections of RCW 9.95 that apply to pre-SRA felonies. It is unclear why the Legislature did not include RCW 9.95.210 as one of the sections that apply to pre-SRA felonies.

same sentence on a misdemeanor under a different cause number, resulting in 48 months total probation.

Yet, if this defendant was sentenced on the same day on two misdemeanor counts joined under the same cause number, then the defendant could only receive 24 months probation. The Legislature could not have intended for such absurd and disproportionate results, particularly given the Legislature's previously demonstrated intent that superior courts and courts of limited jurisdiction have equal probation authority over misdemeanors.

Based on a plain reading of "maximum term of sentence," the surrounding context in which it appears, and related statutory provisions, the Court should find that "maximum term of sentence" is unambiguous and means the maximum sentence on each count. The Court should reject Parent's efforts to insert language that does not exist in RCW 9.95.210(1) and leads to absurd results.<sup>6</sup>

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<sup>6</sup> Although Parent raises the potential issue of mootness based on the possibility of his suspended sentence being revoked, the State is not aware of any effort to revoke Parent's sentence and is therefore not raising the issue.

D. CONCLUSION

For the reasons stated above, the trial court properly sentenced Parent to serve 48 months probation. The Court should affirm Parent's sentence.

DATED this 20<sup>th</sup> day of December, 2010.

Respectfully submitted,

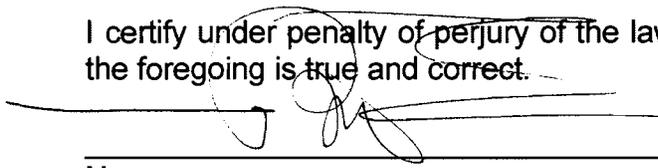
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer L. Dobson and Dana M. Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KERRY PARENT, Cause No. 65375-0-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name  
Done in Seattle, Washington

Date 12-20-10

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