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MAR 30 2012

King County Prosecutor
Appellate Unit

NO. 67127-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JONES,

Appellant.

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

The Honorable John Erlick, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived Jones of his statutory right of allocution when it did not allow Jones to speak before pronouncing sentence.

2. The trial court erred by failing to reduce the term of community custody to ensure that the total sentence will not exceed the statutory maximum sentence as required by RCW 9.94A.701(9).

Issues Pertaining to Assignments of Error

1. Whether Jones was deprived of his statutory right of allocution when the trial court did not permit him to allocute until after sentence was pronounced.

2. Whether the trial court erred by failing to reduce the term of community custody to ensure that the total sentence will not exceed the statutory maximum sentence as required by RCW 9.94A.701(9).

B. STATEMENT OF THE CASE

1. Factual History

Before 5 a.m. on December 5, 2009, Susan Berg heard what sounded like a collision on Maple Valley Highway, above her property. 11/19 RP 162, 164, 172. Berg did not see the crash or the vehicle involved. 11/19 RP 165, 167, 174-5. She called 911. 11/19 RP 164.

Officer Aaron Hisel was dispatched to investigate at 4:51 a.m. 11/19 RP 22-23. When he arrived, the road was deserted—he saw no other cars on the road, nor any pedestrians. 11/19 RP 26-27. Hisel saw that something had hit the Jersey Barrier guarding the Highway from the river at a bend in the Highway. 11/19 RP 28, 31. There were pieces of concrete in the roadway and a piece of door trim from a black vehicle. 11/19 RP 31, 40.

Hisel continued on down the Highway, looking for vehicles matching the trim piece he found. 11/19 RP 46. Around a half mile past the scene, Hisel saw a black Jeep Cherokee parked in the lot for a golf course and restaurant. 11/19 RP 50. Hisel pulled in perpendicular to the vehicle, shone his spotlight on it and looked inside. 11/19 RP 51-52. He saw one man inside, asleep in the passenger seat. 11/19 RP 55. That man was Stephen Jones.

11/19 RP 63-64. This was around 25 minutes after the accident was reported. 11/19 RP 105.

Hisel examined the vehicle and saw there was damage to the passenger side including a missing trim panel matching the one he found. 11/19 RP 81. Hisel woke Jones, and asked him why he was there. 11/19 RP 65.

Jones told Hisel he had been asleep in the car for two hours and denied being in an accident. 11/19 RP 67-68. Hisel testified that Jones said something like: "You can't touch me because I got here in the passenger seat." 11/19 RP 68. Hisel's report said that Jones' statement was: "Doesn't matter what story I gave you, I got into the passenger seat before you arrived, so you can't do anything to him [sic]." 11/19 RP 70. Jones repeatedly told Hisel that he did not know anything about an accident and had been sleeping in the car for a couple of hours. 11/19 RP 72.

Hisel arrested Jones. 11/19 RP 84. In the subsequent search, Hisel found the keys to the Jeep in Jones' pocket and a cell phone. 11/19 RP 87.

Hisel transported Jones to the police station and Jones agreed to take a Breathalyzer Test. 11/19 RP 93. The test results showed a level of .127 and .131. 11/22 RP 24.

Jones testified that at the time of the accident, his friend Junior was driving the car and he was asleep in the passenger seat. 11/22 RP 67. He did not deny that he had been drinking and had been up for 24 hours before the incident, but denied that he was driving. 11/29 RP 56.

The parties stipulated that Jones had been convicted of four qualifying prior offenses within the previous 10 years. 11/18RP 9. A Department of Licensing employee testified that Jones' license had been revoked on June 12, 2007, for a period of 7 years. 11/18 RP 14-15.

2. Procedural History

Jones was charged with felony DUI, and two misdemeanors: driving while license suspended in the first degree and hit and run. CP 35-36. He challenged the admissibility of his statements to Hisel, both before and after Miranda warnings, and a CrR 3.5 hearing was held. 11/15 RP, CP 41-46. The court ruled that the statements were admissible, finding that the pre-Miranda statements were admissible because Jones was not in custody and that after Miranda warnings, Jones voluntarily waived his rights. CP 45-46.

A jury trial was held. After the State rested, the defense made a motion to dismiss, arguing that the State had not established corpus delicti of the crime outside of Jones' statements. 11/22 RP 27. The court found that the evidence was sufficient and denied the motion. 11/22 RP 32.

Jones was found guilty on all three charges. CP 38-40. He was sentenced to 55 months on the felony with 12 months community custody. 4/15 RP 85; CP 77, 79-80. The sentence maximum was 60 months. CP 79. The court also sentenced Jones to 180 days (with 185 days suspended) for driving while license suspended, and 90 days suspended for hit and run. 4/15 RP 85. After the judge had announced the sentence, he noticed he had not yet given the defendant the opportunity to allocute. 4/15 RP 86. The judge permitted Jones to make a statement and then said that he was imposing the same sentence he had already announced. 4/15 RP 87. This appeal timely follows.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY PRONOUNCING SENTENCE WITHOUT FIRST GIVING JONES THE OPPORTUNITY FOR ALLOCUTION.

The defendant has a statutory right to allocute before the court imposes sentence. RCW 9.94A.500(1); In re Pers. Restraint of Echevarria, 141 Wn.2d 323, 336 n. 54, 6 P.3d 573 (2000). Jones was not given the right to allocute until after the judge had announced his sentence. 4/15 RP 86-87. Therefore, his sentence must be reversed and remanded for a new sentencing hearing before a different judge. See State v. Aguilar-Rivera, 83 Wn. App. 199, 203, 920 P.2d 623 (1996).

Both Divisions I and III of the Court of Appeals have held that a defendant is denied the right to allocute when allocution comes after pronouncement of sentence, even if the omission is inadvertent. See State v. Aguilar-Rivera, 83 Wn. App. 199, 920 P.2d 623 (1996); State v. Crider, 78 Wn. App. 849, 899 P.2d 24 (1995).¹ Both courts declined to apply harmless error analysis, holding that the appearance of fairness doctrine requires a bright

¹ Division II has held to the contrary. State v. Hatchie, 133 Wn. App. 100, 118, 135 P.3d 519 (2006) (holding that as long as allocution is permitted before the sentence is reduced to writing, no error has occurred).

line rule in such cases, with the remedy being reversal of the sentence and remand for a new sentencing hearing before a different judge. Aguilar-Rivera, 83 Wn. App. at 203; Crider, 78 Wn. App. at 860-61.

The Crider court noted:

[A]n opportunity to speak extended for the first time after sentence has been imposed is 'a totally empty gesture.' Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant's perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

Crider, at 861. Likewise, Aguilar-Rivera holds that, "Although it is clear to us that the sentencing judge sincerely tried to listen to allocution with an open mind, the judge's oversight effectively left Aguilar-Rivera in the difficult position of asking the judge to reconsider an already-imposed sentence." 83 Wn. App. at 203.

More recently, in State v. Gonzales, 90 Wn. App. 852, 954 P.2d 360, review denied, 136 Wn.2d 1024 (1998), Division I held that harmless error "should be available, albeit used infrequently," to determine whether resentencing is required when the defendant is not afforded an opportunity to allocute. In Gonzales, the Court held that the error was harmless in that case because the

defendant received the lowest possible standard range sentence, had agreed to his criminal history, knew ahead of time of the State's recommendation, did not request an exceptional sentence downward, told the sentencing court to "get it over with," and he thanked the court for the sentence. Gonzales, at 853-55.

In this case, Jones argued for an exceptional sentence downward. 4/15 RP 75-76, 84. The recommendations were not agreed and the criminal history was disputed. 4/15 RP 61-69, 75. Before giving Jones an opportunity to speak, the judge pronounced sentence, giving lengthy reasons for his decision to impose the top of the range, nearly the maximum sentence: 55 months for the felony DUI, and the misdemeanor sentences of 180 days and 90 days, respectively. 4/15 RP 82-86. The Judge also announced the sentencing conditions and costs. 4/15 RP 85-86.

After fully imposing sentence, the judge remembered he had not yet given Jones his opportunity to allocute, stating:

And I did not give Mr. Jones an opportunity to allocute, so I will do that at this time. Mr. Jones, you have this opportunity, if you would like, to speak with the Court. You are not required to say anything, but if you would like, you may.

4/15 RP 86. Jones then made a statement to the court. 4/15 RP 86-87. The judge responded:

Thank you, Mr. Jones. The Court, having heard the defendant allocute, imposes the sentence as previously stated, which is 55 months on the DUI, 365 days in DWLS, with 185 days suspended, and 90 days on the hit and run to run consecutive, suspended for twelve months.

4/15 RP 87.

Like Crider and Aguilar-Rivera, Jones was not given an opportunity to allocute until after the court had already decided on the sentence. Before Jones' allocution, the court announced the sentence and the reason for it in great detail, while after allocution, the judge merely reiterated that he had not changed his mind.

In Gonzales, the fact that Gonzales got the absolute lowest sentence possible without arguing for an exceptional downward seems to have persuaded the court that the allocution error was harmless in that case. 90 Wn. App. at 854. Unlike Gonzales, Jones received a high-end sentence, nearly the maximum sentence possible. 4/15 RP 82-86. Moreover, Jones' counsel argued for an exceptional sentence downward, which was denied before Jones was given the opportunity to speak. 4/15 RP 75-84. By the time Jones was actually given an opportunity to speak, that opportunity was meaningless because the judge had already reached his sentencing decision and announced it in great detail. Assuming

that harmless error analysis applies, this is not the “infrequent” case where the error was harmless.

Jones was deprived of his right to allocute because he was not given that opportunity until after it was too late to have a meaningful opportunity to have his statement considered by the court. Therefore, the sentence imposed in this case must be reversed and the case remanded for a new sentencing hearing before a different judge.

2. THE TRIAL COURT ERRED BY FAILING TO REDUCE THE TERM OF COMMUNITY CUSTODY TO ENSURE THAT THE TOTAL SENTENCE WILL NOT EXCEED THE STATUTORY MAXIMUM SENTENCE AS REQUIRED BY RCW 9.94A.701(9).

RCW 9.94A.701(9) was amended in 2009 to require that: “[t]he term of community custody specified by [RCW 9.94A.701] shall be reduced by the court” when the combined terms of confinement and community custody exceed the statutory maximum.” In Jones’ case, the court imposed 55 months in prison and 12 months community custody. The statutory maximum, however, was 60 months, resulting in the prospect Jones could serve a sentence beyond that term.. CP 79-80; 4/15 RP 85.

The sentencing court recognized that 12 months of community custody could exceed the statutory maximum sentence,

and therefore directed that there be a notation in the sentence that: "Community custody will be a term of community custody for a period of earned early release not to exceed the statutory maximum sentence." CP 79; 4/15 RP 85. But the court did not comply with RCW 9.94A.701(9) because it failed to reduce Jones' community custody sentence to ensure that the total sentence would not exceed the statutory maximum.

The state Supreme Court held in In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009), that, under the old statutory language permitting a variable term of community custody, a sentence did not exceed the statutory maximum where DOC "is required by the SRA to release the offender on or before the date the offender will have served the statutory maximum, and the sentence "specifically directs the DOC to ensure that whatever release date it sets, under no circumstances may the offender serve more than the statutory maximum." 166 Wn.2d at 672-73. Although Brooks noted that the SRA was about to be amended and the Court observed that: "it appears the legislature has addressed the very questions we are asked to answer in this case," 166 Wn.2d at 672 n. 4, the Court did not address how the amendments would change the result.

In the recent case of State v. Winborne, ___ Wn. App. ___ (Div. III, 2012), Division III considered the impact of the 2009 amendment to the Sentencing Reform Act (SRA) on community custody notations such as the one imposed in this case, which it calls a "Brooks notation." In Winborne, the court held that a Brooks notation, such as the one in this case, is not the "reduction" required by the SRA and does not comply with RCW 9.94A.701(9). Winborne, at 9. "While a Brooks notation may not be the opposite of a reduction, it is the negation of one; it is essentially a mechanism by which a court avoids making a reduction." Winborne, at 9.

Winborne held that the 2009 amendment makes it clear that the Legislature requires the sentencing court "to impose the term of confinement, impose the term of community custody, then reduce the term of community custody if necessary," and to "attempt to preempt it with a prophylactic Brooks notation is contrived." Id. at 9-10. To do so "transforms the term of community custody into a variable term, contrary to the clear intent of the 2009 changes." Id. at 10. The Court concluded that the plain language of the statute requires the sentencing court to reduce the term of community custody to a determinate length that does not exceed the statutory

max. Id. at 10-11. Therefore, Winborne holds that the sentencing court commits reversible error when it uses a Brooks notation and the remedy is to remand for resentencing. Id. at 10-11 (Citing State v. Hale, 94 Wn. App. 46, 53, 971 P.2d 88 (1999), and In re Sentence of Jones, 129 Wn. App. 626, 627-28, 120 P.3d 84 (2005)).

Like Winborne, the sentencing court in this case exceeded its statutory authority by imposing community custody of an indeterminate length with a Brooks notation. The court was required by RCW 9.94A.701(9) to reduce Jones' community custody sentence to five months so that it would not exceed the statutory maximum sentence of 60 months. The remedy for this error is reversal and remand for resentencing.

