

67127-8

67127-8

NO. 67127-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JONES,

Appellant.

2012 JUN 28 PM 3:02
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Jones failed to preserve any objection to the timing of his allocution by failing to object in the trial court.

2. Whether the court's offer of an opportunity for allocution, which occurred before the court entered its written sentence, complied with the statutory directive.

3. Where the trial judge presided over this jury trial and considered lengthy argument by counsel and presentence memoranda that described Jones' personal background, and where Jones' allocution addressed only his criticism of a legal ruling as to the admissibility at trial of his statement to police, whether any error in the timing of Jones' allocution was harmless.

4. The State concedes that remand is required for the limited purpose of correcting the term of community custody imposed.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Stephen Jones, was charged with felony driving while under the influence of intoxicants (DUI), driving while license suspended in the first degree, and hit and run - property

damage. CP 35-36. Jones was convicted as charged after a jury trial, Judge John Erlick presiding. CP 38-40; 11-15-11RP 1-2. The court imposed a standard range sentence on the felony conviction and suspended sentences on the gross misdemeanor convictions. CP 76-87.

2. SUBSTANTIVE FACTS

The facts of these crimes are of little relevance to the issues on appeal and will not be described in detail. The core facts are that Jones was driving while intoxicated and while his drivers' license was suspended, and crashed into a jersey barrier. 11-15-11RP 66, 84.

At the sentencing hearing, there was lengthy argument on two scoring issues. 11-15-11RP 1-65. Based on the court's ruling, the presumptive sentence range on the felony DUI was 51-68 months, but the five-year statutory maximum sentence reduced the high end of the range to 60 months. CP 77; 11-15-11RP 65.

Jones requested an exceptional sentence below the standard range. 11-15-11RP 71-77. He filed a presentence memorandum in support of the request. Supp. CP __ (Sub no. 67, Defense Sentencing Memorandum, 3/1/2011). That memorandum

included personal background information about Jones as well as legal argument. Id. The justification for the request was that after he crashed, Jones got off the road and waited for help to arrive. 11-15-11RP 75-76. The State objected to the request for an exceptional sentence. 11-15-11RP 66-67, 80-82.

After the State's argument in response to the defense request for an exceptional sentence, the trial court stated the crimes before the court for sentencing; it discussed the points in the defense presentation with which it agreed and those as to which it disagreed. 11-15-11RP 82-84. The court then orally denied the exceptional sentence request, explaining that the only reason Jones was off the road was that he had disabled his vehicle and could not stay on the road. 11-15-11RP 84. The court then stated the sentence it intended to impose: a sentence of 55 months, with many other terms and conditions. 11-15-11RP 84-86. Defense counsel indicated that Jones would waive his presence at any restitution hearing. 11-15-11RP 86. The court continued listing the conditions of sentence. 11-15-11RP 86.

The court then realized it had not given Jones an opportunity to allocute, and told Jones that he could speak to the court if he chose. 11-15-11RP 86. Jones thanked the court and said that he

felt he was treated fairly by the court. 11-15-11RP 86-87. He stated his disagreement with the court's ruling as to the admissibility of his statement to the police, and again thanked the court. 11-15-11RP 87.

The court stated that after having heard Jones allocute, it would impose the sentence it previously stated. 11-15-11RP 87. The written judgment and sentence was then completed and signed. 11-15-11RP 92.

The court imposed a community custody term of 12 months on the felony DUI conviction, not to exceed the maximum sentence for the crime. CP 79-80; 11-15-11RP 85.

C. ARGUMENT

1. JONES FAILED TO OBJECT IN THE TRIAL COURT AND CANNOT OBJECT ON APPEAL TO THE LATENESS OF HIS OPPORTUNITY TO ALLOCUTE.

Jones claims that because the judge stated the sentence before giving Jones an opportunity to allocute, the sentence must be reversed. This claim is without merit. By failing to object before the court announced its sentence, Jones waived any error.

An accused in a criminal case has a statutory right to allocution before being sentenced. RCW 9.94A.500(1). A trial court's failure to solicit a defendant's statement before imposing sentence is legal error. State v. Hatchie, 161 Wn.2d 390, 405, 166 P.3d 698 (2007). However, the Supreme Court has held that a defendant who does not object in the trial court has failed to preserve a claim of error in that procedure. Id. at 406; RAP 2.5(a)(3). The facts in this case are on all fours with the facts in Hatchie: the judge announced a sentence and then gave the defendant a chance to speak. Id. at 405-06. The defendant did not object or request an opportunity to speak before the oral sentence. Id. The Supreme Court refused to consider any claim of error in the timing of the allocution.

The Supreme Court also has refused to consider a challenge to a complete failure to offer an opportunity for allocution where the defendant did not object in the trial court. State v. Hughes, 154 Wn.2d 118, 153, 110 P.3d 192 (2005), overruled on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); accord, State v. Ague-Masters, 138 Wn. App. 86, 109-10, 156 P.3d 265 (2007).

Any alleged error in providing the opportunity for allocution has not been preserved and this Court should decline to consider it.

2. THE OPPORTUNITY FOR ALLOCUTION WAS OFFERED AND ANY ERROR IN ITS TIMING WAS HARMLESS IN THIS CASE.

Jones contends that because the court orally pronounced its sentence before offering Jones the chance to allocute, his sentence must be reversed. That argument is without merit. Allocution is timely if offered before the order imposing sentence is signed, as it was in this case. Even if the allocution in this case was untimely, it was harmless error.

RCW 9.94A.500(1) provides, in part, that at a sentencing hearing:

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

RCW 9.94A.500(1).

The Court of Appeals in Hatchie, supra, concluded that if allocution is offered at any point before the judge has reduced the

sentence to writing, there is no error. State v. Hatchie, 133 Wn. App. 100, 118, 135 P.3d 519 (2006), aff'd, 161 Wn.2d 390, 405, 166 P.3d 698 (2007). The court noted the established rule that a court's oral opinion is subject to further consideration and may be altered or completely abandoned. Id. "A court's oral ruling has no binding or final effect until it is reduced to writing." Id. (citations omitted). The Supreme Court opinion in Hatchie did not address the question of whether there is error in such a case because it found that any error was not preserved. Hatchie, 161 Wn.2d 390, 406. The court did refer to the trial court's oral pronouncement as "the court's tentative sentence," however, recognizing that the sentence was not finally imposed until it was in writing. Id.

State v. Crider, 78 Wn. App. 849, 899 P.2d 24 (1995), upon which Jones relies, is not inconsistent with this rule. The court there held that reversible error had occurred when allocution was not offered until after the court entered judgment and a notice of appeal was filed. Id. at 853, 861. The court distinguished the situation when allocution occurs before the entry of formal judgment. Id. at 861, citing State v. DeLange, 31 Wn. App. 800, 644 P.2d 1200 (1982).

This Court found reversible error in a 1996 case in which the trial court concluded: “That is the sentence of the court” and requested the defendant’s fingerprints before allocution was offered. State v. Aguilar-Rivera, 83 Wn. App. 199, 920 P.2d 623 (1996). In that case, the defense raised the issue of failure to allow allocution, stating that it had not realized the court was proceeding to sentencing. Id. at 201. Here, it was the judge who offered allocution, after orally stating many terms of the sentence it anticipated it would impose. 11-15-11RP 86. After Jones spoke, the court stated that it would impose the sentence it had announced, then stated, “That is the sentence of the court” and later entered the judgment and sentence. 11-15-11RP 86-92.

In this case, allocution occurred before the written judgment and sentence was entered, so no error occurred.

Even if there was error, the error was harmless. A nonconstitutional error is reversible only if there is a reasonable probability that the error materially affected the outcome. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). While the court in Aguilar-Rivera did not apply this standard, that decision was prior to the Supreme Court decisions in Hughes and Hatchie, which treat the omission of allocution as other nonconstitutional

error is treated, holding that it can be waived entirely if it is not asserted by the defendant.¹ Further, Aguilar-Rivera was a sentencing on a drug offense after a guilty plea, a substantially different situation than a sentencing after a trial, in which the facts of the offense are very thoroughly developed, as in the case at bar.

If there was error in the allocution offered in this case, there is not a reasonable probability that it affected the outcome. The judge spontaneously offered Jones the opportunity to allocute, so there is no reason to believe that Jones would have believed that the judge was not interested in what Jones had to say. The basis for the exceptional sentence proffered by the defense had nothing to do with Jones' personal circumstances – it was based on an argument that a failed defense of being “safely off the road” was a mitigating factor, when Jones had crashed his vehicle into a barrier and, as the judge noted, was unable to drive further because the car was disabled. 11-15-11RP 84. Jones would have and did have nothing to add to that argument or to the legal arguments about how his prior criminal history should be scored.

¹ The holding in State v. Gonzales, 90 Wn. App. 852, 954 P.2d 360 (1998), strictly limiting harmless error in the context of allocution, also preceded Hughes and Hatchie.

When Jones did speak, he thanked the judge for allowing the exceptional amount of time the case had taken and for being treated fairly. 11-15-11RP 86-87. His only other comment was to challenge the court's ruling as to the admissibility of statements Jones made to police. 11-15-11RP 87. The judge imposed a sentence of 55 months, four months above the low end of the standard range for this felony DUI. CP 77, 79. If the statutory maximum term had not truncated the standard range, it would have extended to 68 months. CP 77. There is no reasonable probability that if the trial court had heard Jones' statement before announcing its intentions orally, it would have imposed a lesser sentence as a result.

3. THE COMMUNITY CUSTODY TERM IMPOSED ON THE DUI CONVICTION MUST BE CORRECTED.

The State concedes error in the community custody term that was imposed on the felony DUI conviction.

The length of the term of community custody is governed by statute:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody

exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9). After the sentencing in this case, in State v. Boyd, __ Wn.2d __, 275 P.3d 321 (2012), the Washington Supreme Court determined that, based on this statute, the language used at Jones' sentencing to limit the term of community custody "no longer complies with statutory requirements." 275 P.3d at 322. The trial court is required to reduce the term of community custody to avoid a sentence that exceeds the statutory maximum. Id.

Jones was sentenced to 55 months of confinement on the felony DUI. His term of community custody on that count is thus limited to five months, in order not to exceed the statutory maximum of 60 months. This case should be remanded to the trial court solely to correct the term of community custody as to Count 1, the felony DUI.

D. CONCLUSION

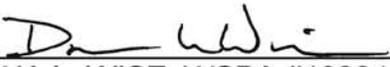
For the foregoing reasons, the State respectfully asks this Court to affirm Jones' convictions and sentence, except as to the

term of community custody on Count 1, the felony DUI, as to which correction on remand is appropriate.

DATED this _____ day of July, 2012.

Respectfully submitted,

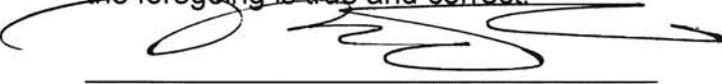
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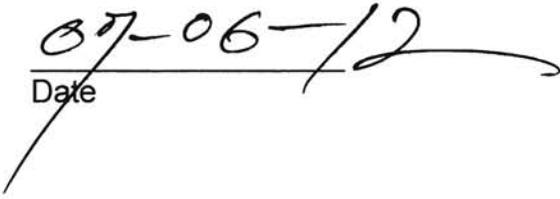
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Rebecca Wold Bouchey, 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. STEPHEN JONES, Cause No. 67127-8-I, 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



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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 09-1-07918-4 KNT
)	
)	
Plaintiff,)	
)	
vs.)	SUPPLEMENTAL
)	DESIGNATION OF CLERK'S
STEPHEN JONES,)	PAPERS TO BE SENT TO
)	COURT OF APPEALS
)	
Defendant,)	COA NO. 67127-8-I
)	

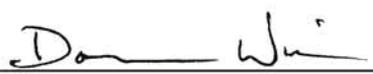
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 STATE OF WASHINGTON
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To: The Superior Court Clerk

Please prepare and transmit to the Court of Appeals, Division I, the following document:

<u>Sub No. or Exhibit No.</u>	<u>Description of Document/Exhibit</u>	<u>Date Filed or Admitted</u>
Sub 67	Sentence Recommendation/ Defense	3-1-11

Dated this 6th day of July, 2012.



 DONNA WISE, WSBA #13224
 Senior Deputy Prosecuting Attorney
 Attorneys for Respondent

SUPPLEMENTAL APPELLATE UNIT OF EXHIBITS TO BE SENT TO COURT OF APPEALS - 1

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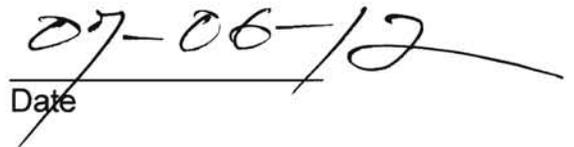
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Rebecca Wold Bouchey, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Designation of Clerk's Papers, in STATE V. STEPHEN JONES, Cause No. 67127-8-I, 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