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FILED
March 27, 2015
Court of Appeals
Division I
State of Washington
NO. 72465-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID OGDEN,

Appellant.

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

The Honorable Richard Eadie, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The judgment and sentence in case no. 10-1-09065-3 SEA contains an ambiguity that should be corrected.

2. The judgment and sentence in case no. 10-1-09191- 9 SEA contains an ambiguity that should be corrected.

Issue Pertaining to Assignments of Error

Should this court remand for resolution of the ambiguity in each judgment and sentence?

B. STATEMENT OF THE CASE¹

The State charged David Ogden with first degree robbery (count 2), attempted first degree robbery (count 2), and attempted second degree robbery (count 3) for three incidents occurring in October of 2010. CP 1-5, 56-61. Counts 1 and 2, alleged to have occurred on October 9, were charged under case number 10-1-09191-9 SEA. CP 56-61. Count 3, alleged to have occurred on October 12, was charged under case number 10-1-09065-3 SEA. CP 1-5. Following a jury trial at which Ogden's primary defense was diminished capacity, he was convicted as charged. CP 27.

¹ This brief refers to the verbatim reports as follows: 1RP – 5/7/14; 2RP – 6/9/14; 3RP – 7/25/14; 4RP – 8/25/14; and 5RP – 8/28/14.

Based on an offender score of 13, the court sentenced Ogden to concurrent standard range terms, the longest of which was 129 months on count 1, and to community custody on each count. CP 6-14, 67-72 (judgment and sentence for each cause number).

Ogden appealed. He argued, in part, that a prior conviction from Colorado was not comparable to a Washington offense; that the 36-month term of community custody for first degree robbery exceeded the 18-month statutory term (count 1); that the total sentence on attempted first degree robbery exceeded the statutory maximum of 120 months (count 2); and that the court erroneously imposed community custody for attempted second degree robbery (count 3). CP 32. The State conceded error as to each claim. CP 31. This Court agreed with the State's concession and remanded for resentencing. CP 32.

Resentencing occurred on August 28, 2014 after a series of hearings at which Ogden challenged the inclusion of prior convictions in calculating his offender score. 5RP 3-43. The State pursued a theory that Ogden's score was at least nine, even if only convictions from 1993 and later were counted. Supp. CP ____ (sub no. 130, State's pre-sentence report, case no. 10-1-09065-3 SEA). In particular, the State argued a 2004 California second degree robbery conviction was comparable to a Washington felony and that a 1996 Arizona conviction prevented

“washout”² of earlier convictions under the Sentencing Reform Act. 5RP 3-5. The State introduced a judgment and sentence from California as well as documents from Arizona. 5RP 22; Exs. 1, 2. Defense counsel argued the California robbery conviction was not comparable to a Washington robbery conviction and that the State presented insufficient evidence of the Arizona convictions. 5RP 6, 18-19.

Agreeing with the State, the court calculated Ogden’s offender score as nine on all counts. 5RP 8, 21, 29. On count 1, the court again sentenced Ogden to 129 months, the low end of the standard range. Supp. CP ___ (sub no. 132, Judgment and Sentence, case no. 10-1-09191-9 SEA, at 4). On count 2, the court sentenced Ogden to 120 months, the statutory maximum for the offense. *Id.* The court also sentenced Ogden to 18 months of community custody for count 1, considered a “violent offense” under the Sentencing Reform Act (SRA). *Id.* at 5 (page attached as Appendix A); 5RP 37 (oral ruling). The court stated it would not impose community custody on count 2. 5RP 37. But, confusingly, the community custody portion of the judgment and sentence also states “18

² See former RCW 9.94A.525(2) (2010) (setting forth periods after which convictions are no longer counted in the offender score, provided certain conditions are met).

months . . . for count 2.”³ Supp. CP ____ (sub no. 132, supra, at 5); App.

A.

On count 3, consistent with this Court’s opinion and the SRA, the court imposed no community custody. CP 39 (attached as Appendix B). But the judgment and sentence includes an “Appendix H,” which lists a host of community custody conditions and orders Ogden to have no contact with two individuals associated with the underlying crime. CP 43 (attached to this brief as Appendix C).

Ogden timely appealed. CP 45; Supp. CP ____ (sub no. 139, Notice of Appeal, case no. 10-1-09191-9 SEA).

C. ARGUMENT

THIS COURT SHOULD REMAND TO CORRECT AND/OR CLARIFY THE AMBIGUOUS JUDGMENT AND SENTENCE AS TO EACH CASE NUMBER.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

³ The judgment and sentence also contains writing that appears to have been “whited out.”

This Court should remand for clarification of the ambiguities in each judgment and sentence. First, Ogden was convicted of attempted first degree robbery under count 2 and sentenced to 120 months of incarceration. Supp. CP ____ (sub no. 132, supra, at 4). The standard range for that offense is 96.75 to 128.25 months, reflecting the standard range for first degree robbery and the seventy-five percent modifier for inchoate crimes. Former RCW 9.94A.510 (2002); former RCW 9.94A.533(2) (2009). But attempted first degree robbery is a class B felony, with a corresponding maximum sentence of 120 months. RCW 9A.20.021(1)(b); RCW 9A.28.020(3)(a).

Given that the court sentenced Ogden to 120 months on that count, it was appropriate for the court not to order community custody. See RCW 9.94A.701(9) (“term of community custody . . . shall be reduced . . . whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime”). The court stated it was not imposing community custody. But the judgment and sentenced confusingly states Ogden is to receive “18 months . . . for count 2.” App. A.

This Court should remand for correction judgment and sentence in case number 10-1-09191-9 SEA. State v. Calhoun, 163 Wn. App. 153, 170, 257 P.3d 693 (2011) (remanding for correction of scrivener’s error)

(citing State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999)),
review denied, 173 Wn.2d 1018 (2012).

Second, as to the count 3 sentence under case number 10-1-09065-3 SEA, second degree robbery is considered a violent offense under RCW 9.94A.030(54)(a)(xi). But *attempted* second degree robbery is not. See State v. Becker, 59 Wn. App. 848, 852, 801 P.2d 1015 (1990) (for purposes of offender score calculation second degree robbery is treated the same as the completed offense, but it is not defined as a violent offense under RCW 9.94A.030). Nor is attempted second degree robbery considered a “crime against persons” for purposes of the 12-month community custody term under RCW 9.94A.701(3)(a). Leach, 161 Wn.2d at 186-89 (holding list of such crimes under RCW 9.94A.411 is exclusive and does not include attempts to commit such crimes).

One page of the judgment and sentence indicates, correctly, that the court did not impose a term of community custody, CP 39, but the judgment and sentence also includes “Appendix H,” which lists community custody conditions and orders no contact with certain individuals related to count 3 only. CP 43.

To avoid any potential confusion, this Court should remand for the removal of the community custody conditions from the judgment and sentence. Calhoun, 163 Wn. App. at 170.

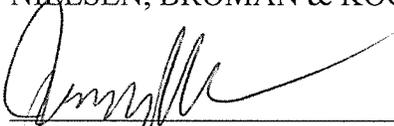
D. CONCLUSION

For the foregoing reasons, this Court should remand for clarification of the judgment and sentence in each case.

DATED this 27th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Appellant

APPENDIX A

(c) **COMMUNITY CUSTODY** - for qualifying crimes committed after 6-30-2000 is ordered for the following established range or term:

- Sex Offense, RCW 9.94A.030 - 36 months—when not sentenced under RCW 9.94A.507
- Serious Violent Offense, RCW 9.94A.030 - 36 months
 - If crime committed prior to 8-1-09, a range of 24 to 36 months.

- Violent Offense, RCW 9.94A.030 - 18 months - for Conv 7
- Crime Against Person, RCW 9.94A.411 or Felony Violation of RCW 69.50/52 - 12 months
 - If crime committed prior to 8-1-09, a range of 9 to 12 months.

18 months (applicable mandatory term reduced so that the total amount of incarceration and community custody does not exceed the maximum term of sentence). - for Conv 2

Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or the court.

- APPENDIX H for Community Custody conditions is attached and incorporated herein.
- APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement, subject to the conditions set out in Appendix H.

4.9 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 8-28-14

Richard D Eadie
JUDGE
Print Name: R. Eadie

RICHARD D. EADIE

Presented by:

[Signature]
Deputy Prosecuting Attorney, WSBA# 39278
Print Name: JASON L. SIMMONS

Approved as to form:

[Signature] 29436
Attorney for Defendant, WSBA #
Print Name: Brian J Todd

APPENDIX B

(c) **COMMUNITY CUSTODY** - for qualifying crimes committed after 6-30-2000 is ordered for the following established range or term:

- Sex Offense, RCW 9.94A.030 - 36 months—when not sentenced under RCW 9.94A.507
 - Serious Violent Offense, RCW 9.94A.030 - 36 months
 - If crime committed prior to 8-1-09, a range of 24 to 36 months.
 - Violent Offense, RCW 9.94A.030 - 18 months
 - Crime Against Person, RCW 9.94A.411 or Felony Violation of RCW 69.50/52 - 12 months
 - If crime committed prior to 8-1-09, a range of 9 to 12 months.
- _____ months (applicable mandatory term reduced so that the total amount of incarceration and community custody does not exceed the maximum term of sentence).

Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or the court.

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Date: 8-28-14

Richard D. Eadie
JUDGE
Print Name: R. Eadie

RICHARD D. EADIE

Presented by:

[Signature]
Deputy Prosecuting Attorney, WSBA# 39178
Print Name: Wesley L. Simons

Approved as to form:

[Signature] 28436
Attorney for Defendant, WSBA #
Print Name: Brian Todd

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVID D OGDEN,

Defendant.

10-1-69065-3 SEA
No. 29577-5-SEA
JUDGMENT AND SENTENCE (FELONY)
APPENDIX H
COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community restitution;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location; and
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706)
- 7) Notify community corrections officer of any change in address or employment;
- 8) Upon request of the Department of Corrections, notify the Department of court-ordered treatment;
- 9) Remain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

The defendant shall not consume any alcohol.

Defendant shall have no contact with:

Anthony's Bm at 2201 Alameda WA Seattle, WA
HAYOZ, Ramon Anthony Wilson

Defendant shall remain within outside of a specified geographical boundary, to wit:

The court finds that the defendant has a chemical dependency (alcohol other substance) that has contributed to his or her offense. Treatment is reasonably related to the circumstances of this crime and reasonably necessary or beneficial to the defendant and the community. (RCW 9.94A.607) Therefore, the defendant shall participate in the following treatment:

The defendant shall comply with the following crime-related prohibitions:

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: 8-28-14

Richard D Eadie
JUDGE

RICHARD D. EADIE

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 72465-7-1
)	
DAVID OGDEN,)	
)	
Appellant.)	

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 27TH DAY OF MARCH 2015, 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] DAVID OGDEN
DOC NO. 920222
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MARCH 2015.

X *Patrick Mayovsky*