69924-5

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NO. 69924-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DONNIE W. DURRETT,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA A. MACK, JUDGE

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# BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. ISSUE ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 3

1. UNDER THIS COURT'S NARROW MANDATE, THE TRIAL COURT WAS NOT REQUIRED TO HOLD A NEW SENTENCING HEARING IN ORDER TO PERFORM THE MINISTERIAL TASK OF CALCULATING THE NUMBER OF MONTHS AVAILABLE FOR COMMUNITY CUSTODY WITHIN THE STATUTORY MAXIMUM ..... 3

a. The Mandate Limited The Trial Court's Discretion ..... 3

b. Durrett Had No Constitutional Right To Be Present When The Court Performed This Purely Ministerial Task ..... 5

D. CONCLUSION ..... 12

## TABLE OF AUTHORITIES

Page

### Table of Cases

Washington State:

State v. Boyd, 174 Wn.2d 470,
275 P.3d 321 (2019) ..... 2

State v. Broadaway, 133 Wn.2d 118,
942 P.2d 363 (1997) ..... 6, 7

State v. Kilgore, 107 Wn. App. 160,
26 P.3d 308 (2001) ..... 8, 9

State v. Kilgore, 167 Wn.2d 28,
216 P.3d 393 (2009) ..... 3, 4, 8

State v. Ramos, 171 Wn.2d 46,
246 P.3d 811 (2011) ..... 5, 6, 7

State v. Robinson, 153 Wn.2d 689,
107 P.3d 90 (2005) ..... 5

### Statutes

Washington State:

Former RCW 9.94A.120 (1993) ..... 7

RCW 9.94A.030 ..... 1

RCW 9.94A.701 ..... 1, 2, 4

RCW 9A.20.021 ..... 4

### Rules and Regulations

Washington State:

RAP 2.5 ..... 9

A. ISSUE

1. A trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. When the remand involves only a ministerial correction, the defendant has no constitutional right to be present. In its most recent opinion, this Court remanded "solely for entry of a community custody period consistent with RCW 9.94A.701(9)," and held that "[t]he trial court's resentencing decision is otherwise affirmed." Was the trial court on remand limited to the purely ministerial task of calculating the community custody term available under the statutory maximum? Did the trial court properly file an order amending the judgment and sentence as to community custody only, without holding a resentencing hearing?

B. STATEMENT OF THE CASE

Following an appeal of his 2007 conviction for failure to register as a sex offender, defendant Donnie W. Durrett was resentenced on October 21, 2011. CP 38-47. The court imposed a sentence of 43 months of incarceration. CP 41.

Durrett would normally have been subject to 36 months of community custody. RCW 9.94A.030, 9.94A.701(1)(a). Because that term would have made Durrett's total sentence exceed the

statutory maximum of 60 months, the trial court added a handwritten directive: "The total term of incarceration and community custody cannot exceed a combined term of 60 months." CP 42.

Durrett again appealed. This Court "accept[ed] the State's concession that the trial court on resentencing erred in failing to enter a fixed term of community custody." CP 182 (Court of Appeals No. 67927-9-I); see State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2019) (trial court, not Department of Corrections, must reduce term of community custody to avoid sentence in excess of statutory maximum). The Court "otherwise affirmed" the trial court's resentencing decision, and remanded "*solely* for entry of a community custody period consistent with RCW 9.94A.701(9)." CP 184 (italics added).

On remand, the trial court entered an "Order Amending Judgment and Sentence as to Term of Community Custody Only." CP 198. The order amended the October 21, 2011 judgment and sentence as follows:

> The following language in ¶ 4.7(c) is stricken: "The total term of incarceration and community custody cannot exceed a combined term of 60 months." The

total term of community custody imposed under ¶ 4.7(c) is 17 months.

CP 198.

C. ARGUMENT

1. UNDER THIS COURT'S NARROW MANDATE, THE TRIAL COURT WAS NOT REQUIRED TO HOLD A NEW SENTENCING HEARING IN ORDER TO PERFORM THE MINISTERIAL TASK OF CALCULATING THE NUMBER OF MONTHS AVAILABLE FOR COMMUNITY CUSTODY WITHIN THE STATUTORY MAXIMUM.

Durrett contends that the trial court violated both his right to be present and his right to counsel at all critical stages of his trial when the court, on remand, declined to hold a resentencing hearing and instead issued an order amending his judgment and sentence as to the term of community custody only. Durrett's claim fails. Acting pursuant to this Court's specific and narrow mandate, the trial court was not required to hold a resentencing hearing to perform the purely ministerial act of calculating the number of months available for community custody in light of the term of confinement and the statutory maximum.

a. The Mandate Limited The Trial Court's Discretion.

A trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. State v. Kilgore,

167 Wn.2d 28, 42, 216 P.3d 393 (2009). The Court of Appeals' mandate in this case directed that "[t]his case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision." CP 181. The final paragraph of the decision reads as follows: "**We accept the State's concession and remand *solely* for entry of a community custody period consistent with RCW 9.94A.701(9). The trial court's resentencing decision is *otherwise affirmed.***" CP 184 (italics added).

This mandate narrowly constrained the discretion of the trial court on remand. Durrett's standard range was 43-57 months of confinement. CP 39. The statutory maximum for his crime was 60 months. Id. The statutorily required term of community custody was 36 months. CP 42; RCW 9.94A.701(1)(a). The trial court had sentenced Durrett to 43 months of confinement. CP 41.

RCW 9.94A.701(9) contains a simple requirement: "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." Since this Court in its opinion remanded "solely" to fix

the problem with the term of community custody, and "otherwise affirmed" the sentence, there was nothing for the trial court to do but subtract 43 months (term of confinement) from 60 months (statutory maximum), and impose the remainder (17 months) as the term of community custody.

b. Durrett Had No Constitutional Right To Be Present When The Court Performed This Purely Ministerial Task.

A defendant has a constitutional right to be present at sentencing, including resentencing, and to be represented by counsel at any sentencing hearing. State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011); State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). "However, when a hearing on remand involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present." Ramos, 171 Wn.2d at 48.

Ramos supports the trial court's action here – entry of an order amending the judgment and sentence as to the term of community custody, without holding a resentencing hearing. The Court of Appeals in Ramos, finding that the term of community custody imposed by the trial court was too vague, had remanded "to correct the judgment and sentence to state the exact term of

community placement and specify any special conditions of placement." Id. The appellate court indicated in its opinion that resentencing was not required, and that the trial court need only enter an order clarifying or amending the judgment and sentence. Id.

Ramos successfully petitioned for review by the Supreme Court. Id. That court first observed that, "[w]hen a sentence is *insufficiently specific* about the period of community placement, remand for the ministerial task of expressly stating the correct period of community placement is usually all that is required." Id. (italics added). Citing State v. Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997), the Ramos court contrasted this "ministerial" task with the situation where "the trial court was originally *mistaken* about the period of community supervision."[1] Ramos, 171 Wn.2d at 48 (italics added). In the latter situation, resentencing would be required for the court to "exercise its discretion and reconsider the length of the prison sentence in light of the correct community supervision term." Id.

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[1] In Broadaway, the sentencing court had believed that the correct term of community placement was two years, when in fact it was one year. Broadaway, 133 Wn.2d at 135. Notably, the court that resentenced Durrett in 2011 was not *mistaken* about the statutory term of community custody (36 months), but simply failed to express the term of community custody available under the statutory maximum in the proper form.

Noting that the Court of Appeals had remanded for the trial court to "state the specific term of community placement, which was not so stated in the original judgment and sentence," the court concluded that "[i]f that is all the trial court will be required to do, the remand hearing would be purely ministerial, since the length of community placement is dictated by statute." Id. at 49.

The court in Ramos ultimately concluded that resentencing was required in that case. Id. at 49. But this was not because the trial court was required on remand to specify the correct *term* of community placement, but because the court needed to exercise its discretion in specifying the special *conditions* of community placement:

> Here, the Court of Appeals, relying on *Broadaway*, remanded for correction of Ramos's judgment and sentence to *state the specific term of community placement,* which was not so stated in the original judgment and sentence. *If that is all the trial court will be required to do, the remand hearing would be purely ministerial*, since the length of community placement is dictated by statute. . . . But the Court of Appeals went further, correctly directing the trial court to specify "the 'special terms' of the placement," which it had not originally done. . . . Under former RCW 9.94A.120(8)(b) and (c) (1993), the trial court was required to impose certain conditions of placement unless it waived those conditions, and it had discretion to impose additional special terms, such as crime-related prohibitions. *In directing the trial court to specify any special terms, the Court of Appeals*

> *necessarily required the trial court to exercise discretion in amending the judgment and sentence.* Since the trial court's duty on remand is not merely ministerial, the trial court must exercise discretion. Ramos, therefore, has a right to be present and heard at resentencing.

Id. (internal citations omitted) (italics added).

Kilgore is also instructive. Kilgore had been found guilty of seven counts of criminal sexual misconduct against children. 167 Wn.2d at 33. The trial court imposed an exceptional sentence above the standard range on each count, to run concurrently. Id. Kilgore appealed, but did not challenge the exceptional sentence. Id. The Court of Appeals reversed two counts and affirmed the remaining five, resulting in a reduction in Kilgore's offender score from 18 to 12. Id. at 42. The court then remanded for "further proceedings."[2] Id. at 33-34.

The State decided not to retry Kilgore on the two reversed counts. Id. at 34. At a hearing, Kilgore argued that he should be resentenced. Id. The trial court declined to do so, finding instead that the appropriate action was an order correcting the judgment and sentence. Id. The Supreme Court looked upon this as a decision *not* to exercise discretion as to the remaining counts:

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[2] State v. Kilgore, 107 Wn. App. 160, 190, 26 P.3d 308 (2001).

> Although the trial court had discretion under RAP 2.5(c)(1) to revisit Kilgore's exceptional sentence on the remaining five convictions, it made clear that in correcting the judgment and sentence to reflect the reversed counts, it was not reconsidering the exceptional sentence imposed on each of the remaining counts.

Id. at 41.

Unlike this case, the appellate court in Kilgore did not limit the trial court's discretion on remand; thus, the trial court had the discretion to resentence Kilgore on the remaining valid counts should it choose to do so. Nevertheless, the Supreme Court accepted the trial court's entry of an order correcting the judgment and sentence as that court's decision *not* to readdress those sentences.

Here, the trial court was limited by the appellate court "solely" to entry of a corrected community custody period. CP 184. And even if the trial court had had the discretion to revisit the term of confinement, by entering an "Order Amending Judgment and Sentence as to Term of Community Custody Only" (CP 198), the court signaled unequivocally that it did not intend to do so.

Because the trial court had already sentenced him to the minimum term of confinement under the standard range, Durrett is reduced to arguing that, had he been given the opportunity, he

would have requested a *longer* term of confinement. Appellant's Opening Brief ("AOB") at 19. He claims that, at his resentencing on October 21, 2011, the court "explicitly indicated a desire to be lenient" with him." AOB at 17-18.

Durrett's belief that the trial court wished to treat him with leniency is not supported by the record. The prosecutor at the October 21, 2011 resentencing hearing informed the court that the original sentencing court had imposed 43 months of confinement, and that the State was recommending the same at this resentencing. RP 13.[3] The defense joined in this recommendation. RP 14.

In his allocution, Durrett told the court that "supervision is just not for me." RP 15. He added, "I just simply cannot do it," and assured the court that "in fact, I will not do it." RP 16. The court responded, "So, Mr. Durrett, I want to make sure I understand you. You are telling me you would rather I sentence you to prison than community custody?" RP 20. Durrett replied, "Well, pretty much." Id. After rejecting Durrett's argument that community custody was not statutorily authorized, the court proceeded with sentencing:

[3] "RP" refers to the verbatim report of the resentencing hearing held on October 21, 2011.

> I am going to – let me say first that Mr. Durrett has said and his behavior and inability to comply with community custody show this is correct, that he is either unable or unwilling to comply with the conditions of community custody. He did not report or comply with the conditions of community custody, and I am going to sentence him to the top of the range with a minimum of community custody. I will sentence him to 57 months on the one count because he cannot and will not comply with the conditions of community custody, and that will leave a minimal amount of community custody once he is released.

RP 21-22.

This was apparently not the outcome that Durrett was expecting, and he immediately sought clarification: "Now, you understand that I have done the 43 months and – already; right? So are you telling me you're going to sentence me above that?" RP 22. The court responded with little apparent sympathy: "You said you didn't want to do community custody. That's your choice. You can do it in prison or you can comply with community custody. Which will it be?" Id. Durrett quickly reconsidered: "I will take the community custody." Id. The court responded: "All right. Forty-three months, with no more than the statutory maximum on community custody." Id.

Only wishful thinking could transform the foregoing into an "explicit indication" of the sentencing court's desire to be lenient

with Durrett. The court was clearly annoyed with his past non-compliance with conditions of community custody, and could only have been further provoked by his show of outright defiance at sentencing ("I will not do it"). Far from acting out of sympathy with Durrett's plight, the court appears to have been saying, "Be careful what you wish for." When Durrett backed down, the court imposed the term of confinement that was recommended by both parties.

But what happened at the October 21, 2011 resentencing hearing is really neither here nor there with respect to the issue now before this Court. This Court's most recent directive was clear, and limited the trial court to fixing the term of community custody to fit within the statutory maximum. This is nothing more than "doing the math," and is purely ministerial. And even if the trial court *had* any discretion under this Court's mandate to revisit Durrett's term of confinement, the court indicated by its order amending the judgment and sentence as to community custody only that it was unwilling to do so. Durrett's demand for yet another resentencing hearing should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence as it now stands

amended, and reject Durrett's claim that the case must be remanded for resentencing.

DATED this 9th day of January, 2014.

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 **Maureen M. Cyr**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. DONNIE W. DURRETT**, Cause No. **69924-5-I**, in the Court of Appeals for the State of Washington, Division I.

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

Name

Date 2/-09-14

Done in Seattle, Washington