

69924-5

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No. 69924-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONNIE W. DURRETT,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF (AMENDED)

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A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED IN FAILING TO
PROVIDE MR. DURRETT AN OPPORTUNITY TO
BE PRESENT AND EXPLAIN TO THE COURT WHY
IT SHOULD RECONSIDER THE SENTENCE

The State contends the Court of Appeals mandate constrained the discretion of the trial court and precluded the court from resentencing Mr. Durrett. SRB at 4. The State's argument is not consistent with the Court of Appeals opinion. The opinion states the case was "remand[ed] to the trial court to enter a term of community custody consistent with RCW 9.94A.701(9)."¹ CP 182; see also CP 184 ("We accept the State's concession and remand solely for entry of a community custody period consistent with RCW 9.94A.701(9)."). In order to enter a term of community custody consistent with RCW 9.94A.701(9), the trial court was required to enter a term of community custody that, when combined with the standard-range sentence, did not exceed the statutory maximum of five years. The court had discretion either to maintain the standard-range sentence originally imposed, 43 months, and add a fixed term of 17 months of community custody, or

¹ RCW 9.94A.701(9) provides: "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."

to impose a new standard-range sentence of up to 57 months, and impose a fixed term of community custody that, together with the standard-range sentence, did not exceed 60 months.

The State ignores State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012), and the remedy dictated by the Washington Supreme Court for the error that occurred in this case. Boyd held that, when a sentence that violates RCW 9.94A.701(9) is reversed on appeal, the trial court has authority on remand to resentence the offender. The Supreme Court reversed Boyd’s illegal sentence and “remand[ed] to the trial court to either amend the community custody term or *resentence Boyd . . . consistent with RCW 9.94A.701(9)*.” Boyd, 174 Wn.2d at 473 (emphasis added). Citing Boyd, the Court of Appeals has also held that resentencing is appropriate when the sentence does not comply with RCW 9.94A.701(9). See State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782 (2013) (remanding “for resentencing to comply with Boyd and RCW 9.94A.701(9)”). Thus, both the Supreme Court and this Court have recognized that when this kind of error occurs, the trial court has authority on remand to reconsider the length of the standard-range sentence.

As explained in the opening brief, a trial court on remand may well desire to reconsider the length of the standard-range sentence in light of the statute's requirement that a fixed term of community custody be imposed. In many cases, the fixed term of community custody required will be less than what the trial court originally contemplated. In such a case, the court may wish to reduce the prison term, thereby imposing a maximum term of community custody, in order to ensure that the offender spends as much time as possible under supervision in the community. In other cases, the court may wish to increase the prison term in order to make up for the reduced time the offender will be spending on community custody. The trial court may have other reasons to reconsider the length of the standard-range sentence.

Citing State v. Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997), the State maintains that the trial court did not have discretion to resentence Mr. Durrett because, unlike the trial court in Broadaway, the court was not "mistaken" about the length of community custody the statute required. SRB at 6. But that is incorrect. At the original sentencing, the court believed it could impose a term of community custody of from 36 to 48 months, and that the term would be reduced

by the Department of Corrections once it was determined how many, if any, early release credits Mr. Durrett would receive. But in fact, the court was authorized to impose only a fixed term of community custody that would not be affected by the earned release credits Mr. Durrett might receive. Because the standard-range sentence was 43 to 57 months, and the statutory maximum was 60 months, the court was authorized to impose only a fixed term of community custody of from 3 to 17 months. This term is significantly different from what the court originally believed was authorized. Thus, contrary to the State's argument, the court *was* mistaken about the term of community custody required.

In Broadaway, the Supreme Court held resentencing was appropriate because the trial court was mistaken about the period of community placement required by law. Broadaway, 133 Wn.2d at 136. The court had believed the required term was two years when in fact it was one year. Id. at 122. Here, like in Broadaway, the trial court was mistaken about the period of community custody required by law. The court believed the required term was 36 to 48 months when in fact it was 3 to 17 months. Thus, under Broadaway, resentencing was required.

Citing State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009), the State contends that even if the trial court had discretion to resentence Mr. Durrett, it indicated its decision *not* to resentence him by entering an order amending the judgment and sentence as to the term of community custody only. SRB at 9. But the situation in Kilgore is much different from the situation here. In Kilgore, the trial court held a hearing at which Mr. Kilgore was present and given an opportunity to argue why the court should reconsider his sentence. Kilgore, 167 Wn.2d at 34. Here, by contrast, the court entered the order amending the judgment and sentence without providing Mr. Durrett *any* opportunity to be heard. Unlike the defendant in Kilgore, Mr. Durrett did not receive even a modicum of due process.

The State's brief demonstrates its impatience with Mr. Durrett, urging this Court to reject his "demand for yet another resentencing hearing." SRB at 12. But an offender may not be deprived of his constitutional rights simply because the State is weary of dealing with him. The rights guaranteed by the Due Process Clause do not disappear simply because an offender has repeatedly chosen to exercise them.

Finally, the State contends the trial court was not inclined to treat Mr. Durrett with leniency. SRB at 10. In other words, by

implication, the State contends the trial court would probably not have chosen to reconsider Mr. Durrett's sentence even if he had been given the opportunity to be heard. This suggestion is speculative and, even if true, does not mean Mr. Durrett had no right to present his argument to the court.

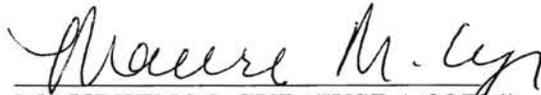
Moreover, the record shows that the court *was* inclined to treat Mr. Durrett with leniency, or, at least, to impose a sentence according to his request. Mr. Durrett told the court he had trouble complying with DOC supervision and did not want to receive any community custody. RP 20. In response, the court stated it would impose the top of the standard range, 57 months, which would "leave a minimal amount of community custody once he is released." RP 21-22. Mr. Durrett then pointed out that he had already served the low end of the standard range, 43 months. RP 22. The court responded, "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?" RP 22. Mr. Durrett then said, "I will take the community custody." RP 22. In order to accommodate Mr. Durrett's request, the court imposed a standard-range sentence of 43 months. RP 22.

In sum, the trial court had authority on remand following this Court's reversal of the community custody term to resentence Mr. Durrett. Therefore, he had a constitutional right to advance notice and a right to be heard, represented by counsel, in order to present his argument for a different standard-range sentence to the court.

B. CONCLUSION

For the reasons given above and in the opening brief, the case must be remanded for a hearing at which Mr. Durrett may be present, represented by counsel, in order to present his argument to the court.

Respectfully submitted this 19th day of February, 2014.


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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69924-5-I
v.)	
)	
DONNIE DURRETT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **AMENDED REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DEBORAH DWYER KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF FEBRUARY, 2014.

x  _____

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