NO. 44589-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOEL KISSLER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Before granting Joel Kissler's request to represent himself, the court told him he faced one Class B felony and the rest were Class C felonies with lesser penalties. This information was wrong. Later, the prosecution added two firearm enhancements but the court never told Mr. Kissler he faced substantial additional punishment from these new allegations. Mr. Kissler waived his right to counsel without understanding the potential punishment he faced if convicted.

Mr. Kissler objected to the prosecution's numerous requests for continuances, including one based on stand-by counsel's vacation even though Mr. Kissler was representing himself. The court granted each request without questioning the basis or length of the delay, thus denying Mr. Kissler his right to a speedy trial under CrR 3.3.

Additionally, the court imposed two firearm enhancements even though it asked the jury to decide whether he possessed a "deadly weapon," which does not authorize the greater punishment attached to a firearm enhancement. The court also extended Mr. Kissler's community custody beyond the statutory maximum, without legal authority.

B. ASSIGNMENTS OF ERROR.

1. Mr. Kissler was denied his right to a speedy trial by the court's failure to properly assess the requirements for granting continuances over defense objection under CrR 3.3.

2. Mr. Kissler did not knowingly, intelligently, and voluntarily waive his right to counsel as guaranteed by the Sixth Amendment and article I, section 22.

3. The court lacked authority to impose firearm sentencing enhancements when the jury only found Mr. Kissler possessed a deadly weapon.

4. The court impermissibly entered an alternative term of community custody that is not authorized by statute.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. CrR 3.3 provides strict criteria governing the court's authority to continue the time for trial over the defendant's objection. Mr. Kissler objected to each continuance requested by the prosecution but the court did not assess the need for the continuance or the necessary length of the request, thereby violating CrR 3.3. Was Mr. Kissler denied his right to a speedy trial under CrR 3.3?

2. An accused person's waiver of his right to counsel is presumed invalid and must be proved valid by affirmative evidence demonstrating the accused understood the nature of the charges he faced as well as the potential penalties if convicted. The accused must understand this information at the time he waives his right to counsel. When the court misstated the statutory maximum for one of the most serious charges Mr. Kissler faced and never informed him of the substantial increase in potential punishment that occurred when the prosecution added several firearm enhancements, has the prosecution met its burden of proving Mr. Kissler validly waived his right to counsel?

3. The court lacks authority to impose a firearm enhancement when the jury has found only that the accused person possessed a deadly weapon. The court instructed the jury to determine, by special verdict, whether Mr. Kissler possessed "a deadly weapon" based on the definition of a deadly weapon, but the court imposed two firearm sentencing enhancements. Did the court violate Mr. Kissler's right to a fair trial by jury when it imposed a punishment that the jury's verdict did not authorize?

4. Under RCW 9.94A.701(9) the trial court must impose determinate terms of community custody, and where the combined term of community custody and confinement exceeds the statutory maximum for an offense, the court must reduce the term of confinement. The court imposed a sentence of 120 months incarceration, the statutory maximum for a Class B felony, yet directed the Department of Corrections to calculate its own term of community custody based on the possibility of early release. Did the trial court lack statutory authority to impose the alternate term of community custody?

D. STATEMENT OF THE CASE.

Joel Kissler was arrested after a friend, Kimber Wheeler, claimed he threatened her with a gun. 2RP 129[1]; CP 1-2. Ms. Wheeler never appeared for trial and the jury acquitted him of the charges of second degree assault while armed with a firearm and felony harassment involving Ms. Wheeler's accusations. CP 143-44.

Before arresting Mr. Kissler, the police saw him put a gun in a bucket. 2RP 181-82. Also inside the bucket, the police found a Crown

[1] The verbatim report of proceedings (RP) from trial is contained in three consecutively paginated volumes of transcripts and are referred to by the volume number of the cover page. All remaining transcripts from pretrial or sentencing proceedings are referred to by the date of the proceeding.

Royale bag that contained heroin. 2RP 136-37. Mr. Kissler had several Xanax pills in his pocket, also known as Alprazolam. 2RP 166-67; CP 4. In addition to the two charges involving Ms. Wheeler, he was charged with possession of a controlled substance with intent to deliver for the heroin; unlawful possession of a firearm in the second degree; and unlawful possession of a controlled substance for the Xanax. CP 1-3. At trial, Mr. Kissler explained that these items belonged to Ms. Wheeler, who was homeless and drug-addicted, and he was removing them from his home because he did not want her staying in his apartment any more. 3RP 219-20, 222, 225-27.

At the first pretrial hearing, Mr. Kissler asked to represent himself. 9/11/12RP 1. He told the court he wanted to be more involved in his case. *Id.* at 2. The court read the names of the charged offenses, without referring to their elements. The court also told Mr. Kissler that the crime charged in Count 1 was a Class B felony, with a maximum of 10 years in prison and a $20,000 fine. *Id.* at 4-5. The court advised Mr. Kissler that the rest of the charged offenses were Class C felonies, with a maximum sentence of five years. *Id.* at 5. The court did not mention that Count 3 was also a Class B felony, and its maximum punishment was 10 years in prison and a $25,000 fine. After warning Mr. Kissler

against self-representation, the court found that he waived his right to counsel. *Id.* at 10. It directed the assigned attorney, Craig Kibbe, to act as stand-by counsel. *Id.*

Several months later, the prosecution added firearm enhancements to Counts 3 and 5, the two drug offenses. CP 26-29. The court read the amended information but did not advise Mr. Kissler that the new charges increased his punishment by requiring consecutive terms of additional confinement and substantially increasing the standard range under RCW 9.94A.518. 12/27/12RP 2-6.

Mr. Kissler repeatedly objected to the prosecution's numerous requests to continue the trial. 9/11/12RP 11; 10/4/12RP 2; 11/27/12RP 2-3; 12/27/12RP 7; 1/17/13RP 4-5, 10; 1/31/13RP 3; 2/4/13RP 5-6. The court granted each request without inquiry into the availability of alternative dates. It also continued the trial when stand-by counsel was on vacation, even though Mr. Kissler objected to the continuance. 11/27/12RP 2. The court denied Mr. Kissler's motion to dismiss the case due to a violation of the time for trial required by CrR 3.3. 1/17/13RP 11.

After a jury trial, Mr. Kissler was convicted of possession of heroin with intent to deliver, unlawful possession of a firearm in the

second degree, and possession of a controlled substance involving Xanax. CP 145, 147, 148. For the two drug charges, the court instructed the jury to decide whether Mr. Kissler possessed "a deadly weapon," but the court imposed firearm enhancements. CP 193, 214, 217. The court also imposed 12 months of community custody, but because the consecutive firearm enhancements resulted in Mr. Kissler serving the statutory maximum, it noted on the judgment and sentence that the community custody term should not "exceed" the statutory maximum. CP 217. The relevant facts are further explained in the pertinent argument sections below.

E. ARGUMENT.

1. **The unnecessary delay in bringing Mr. Kissler's case to trial, over his objection, violated his right to a speedy trial.**

a. *It is the court's obligation, and the State's duty, to bring a person to trial within the required time limits of CrR 3.3.*

The right to "a speedy trial" is guaranteed by the Sixth Amendment and article I, section 22 of the state constitution. *State v.*

Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009).[2] Article I, section 10 further dictates that "[j]ustice in all cases shall be administered . . . without unnecessary delay."

"The right to a speedy trial is 'as fundamental as any of the rights secured by the Sixth Amendment.'" *Iniguez*, 167 Wn.2d at 290 (quoting *Barker v. Wingo*, 407 U.S. 514, 515 n.2, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)). The "right has its roots at the very foundation of our English law heritage," where, "the delay in trial, by itself, would be an improper denial of justice." *Klopfer*, 386 U.S. at 223-24.

"A defendant has no duty to bring himself to trial; the State has that duty." *Barker*, 407 U.S. at 527. Because "society has a particular interest in bringing swift prosecutions, . . . society's representatives are the ones who should protect that interest." *Id.*

CrR 3.3 sets a definite time line in which a trial must occur. The purpose of CrR 3.3 is "to protect a defendant's constitutional right to a

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[2] The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." Article I, section 22 similarly provides, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial."

speedy trial." *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). Speedy trial rules ensure trials occur within a "reasonable period consistent with constitutional standards." *Barker*, 407 U.S. at 523.

The trial court must ensure a defendant receives a timely trial under the requirements of CrR 3.3. *Kenyon*, 167 Wn.2d at 136; CrR 3.3(a)(1) ("It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime."). A trial for a person who is held in custody must occur within 60 days of arraignment. CrR 3.3(b)(1)(i). Failure to comply requires dismissal of the charge with prejudice if the defendant timely objects. CrR 3.3(d)(3), (h).

b. *Mr. Kissler's trial was delayed over his objection and without adequate cause while he waited in custody.*

Under CrR 3.3(f)(2), the court may continue a trial to a specified date if it finds "such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." But the court may not simply declare that the delay is required in the "administration of justice." *State v. Saunders*, 153 Wn.App. 209, 220, 220 P.3d 1238 (2009). The court must first assess

the reasons for the delay and the prejudice to the defense. *Id.* The justification for the continuance must appear "on the record or in writing." *Id.*; CrR 3.3(f)(2).

In *Kenyon*, the trial court declared that the lack of an available judge was an unavoidable or unforeseen circumstance under CrR 3.3(e)(8). The Supreme Court ruled that a court's authority to continue a trial based on an unavoidable circumstance requires it to first try to ameliorate the problem. *Kenyon*, 167 Wn.2d at 138-39. The failure to seek alternatives undermines the court's authority to extend the time for trial under CrR 3.3. *Id.*

Likewise, the court may not simply declare that the "administration of justice" permits further trial delay under CrR 3.3(f)(2). CrR 3.3(f)(2) authorizes the court to continue a case in the administration of justice only if it also finds "the defendant will not be prejudiced in the presentation of his or her defense." *Saunders*, 153 Wn.App. at 220. The court may not ignore this mandatory requirement. *Id.* The failure to consider the prejudice to the defense undermines the court's authority to extend the time for trial under CrR 3.3. *See Kenyon*, 167 Wn.2d at 138-39.

Mr. Kissler remained in custody throughout the pretrial proceedings in his case. *See, e.g.*, 9/11/12RP 1; 10/4/12RP 1; 12/27/12RP 1. He objected to each delay and made plain his desire to receive a timely trial, as detailed below. Instead of receiving a trial within the 60 days allowed under CrR 3.3, he waited in jail for almost six months. CP 1; 1RP 3. The State's case-in-chief involved one day of testimony, including opening statements, but the court granted numerous requests for lengthy extensions of time, over Mr. Kissler's express objection, and without following the requirements of CrR 3.3.

From the inception of the case, Mr. Kissler made plain his intent to proceed to trial immediately, without continuances. 9/11/12RP 11. The trial was set for October 17, 2012, after he was arraigned on August 22, 2012, but on October 4, 2012, the newly assigned prosecutor asked for a continuance. 10/4/12RP 1; CP 1. Prosecutor Bryce Nelson said he was on vacation on the day of October 17, 2012, and had another trial set to begin on October 18, 2012. 10/4/12RP 1. Rather than set Mr. Kissler's trial on October 18, 2013, in the event the prosecutor's other trial did not begin, the court granted the State's request to continue the trial until December 4, 2012. 10/4/12RP 1, 3.

Mr. Kissler objected to this delay. He asked that he not be penalized for the prosecution's lack of preparation and explained he was ready to proceed. 10/4/12RP 3. The court cursorily explained that "under the court rules and case law" the delay was justified. *Id.* The court never explained why it did not set the case for an earlier date in the event that the prosecution's potential trial set for October 18, 2012, did not begin as scheduled. *Id.*

Shortly before the December 4, 2012 trial date, the prosecution requested another continuance over Mr. Kissler's objection. 11/27/12RP 1. The assigned prosecutor was about to start a trial in another case and this trial would go "into" the start of December. *Id.* This may have been the same trial the prosecutor had anticipated in mid-October, as both involved a rape allegation. 10/4/12RP 1; 11/27/12RP 1. The prosecutor also announced that stand-by counsel, Craig Kibbe, was on vacation from December 17 through December 24, 2012. 11/27/12RP 1. The prosecutor asked the court to set the trial date as January 7, 2013, without further explanation. *Id.*

Stand-by counsel Kibbe explained that Mr. Kissler was representing himself and that Mr. Kissler objected to the continuance. 11/27/12RP 2. Mr. Kissler also asked if the prosecutor could be

replaced so the trial could begin. *Id.* He complained that the prosecution was unprepared, not him. *Id.* at 2-3. The court ruled that Mr. Kissler had not shown he would be prejudiced by the delay and cursorily stated that the continuance was "justified and required by the court rules and the case law." *Id.* at 3. The court did not explain what case law it was referring to and did not address how stand-by counsel's vacation could be used to justify a continuance over Mr. Kissler's objection.

On December 27, 2012, the prosecution again asked for a continuance of the January 7, 2013 trial date, seeking postponement until January 31, 2013, because it was not prepared. 12/27/12RP 1. The prosecution filed an amended information, adding two firearm enhancements. CP 26. It admitted that it had not yet tested the drugs or firearm at issue in the case. *Id.* at 6; Supp. CP _, sub. no. 23. It stated it needed more time to conduct this testing. The prosecution offered no explanation about why the testing of the evidence had not yet occurred. 12/27/12RP 6, 9.

Although Mr. Kissler objected and asked for a different prosecutor who could begin the trial, the court ruled that Mr. Kissler had not shown prejudice and the prosecution had shown justification for the continuance. 12/27/12RP 9. The court did not ask the

prosecution to explain why it was unprepared for trial, why necessary testing had not occurred, and why it would take more than one month for the testing to occur. *Id.* To the extent the delay resulted from charges later added by the prosecution, such delay is not necessary just because the prosecution has changed its mind about its charges. *Berry v. State*, 93 P.3d 222, 232-33 (Wyo. 2004).

On January 17, 2013, the court denied Mr. Kissler's motion to dismiss due to the violation of his right to a speedy trial under CrR 3.3. 1/17/13RP 4-5, 11.

On January 31, 2013, trial was set to begin but the prosecutor announced there were no courtrooms. 1/31/13RP 3. The court continued the case until February 4, 2013. *Id.* at 3-4. The court did not provide any explanation of why courtrooms were unavailable or whether any efforts had been made to locate an available judge, contrary to *Kenyon*, 167 Wn.2d at 138-39.

On February 4, 2013, the prosecutor announced that the trial would begin the next day. 2/4/13RP 4. However, stand-by counsel Kibbe was unavailable because he had a trial set to begin in Kitsap County. *Id.* at 5. Mr. Kissler objected to any further continuance, and said, "I want to proceed to trial. Mr. Kibbe doesn't represent me. His

schedule shouldn't have anything to do with mine." 2/4/13RP 6. After further discussion, the court agreed to let Mr. Kissler start trial without stand-by counsel, and the trial began on the following day. *Id.* at 12.

Throughout each pretrial hearing, Mr. Kissler sought a trial to commence as soon as possible. The prosecution delayed the case, sought lengthy extensions of time without trying to accommodate Mr. Kissler's request for a speedy trial, and did not explain why it needed one month to test the drugs or the firearm essential to three of the charges when the case had been pending for four months. The court's cursory analysis of the prosecution's failure to timely prepare for trial as well as its treatment of the potential that the prosecutor could be starting trial in another case as the equivalent of actually starting another trial, when scheduled trials are routinely continued, does not satisfy the administration of justice required to continue case over the *pro se* defendant's objection.

Furthermore, the length of the December continuance was based on a vacation of stand-by counsel, even though Mr. Kissler was *pro se* and he objected to the continuance. Since Mr. Kissler's represented himself, stand-by counsel's vacation did not serve as a valid reason to further delay when Mr. Kissler expressly objected to the continuance.

c. *The remedy for the speedy trial violation is dismissal.*

The failure to abide by the plain terms of CrR 3.3 requires dismissal of the charge. *Saunders*, 153 Wn.App. at 221. The trial court bears the responsibility to ensure an accused person receives a timely trial under the framework of CrR 3.3 and the constitutional right to a speedy trial. By extending Mr. Kissler's trial beyond the 60 days allowed without assessing the need for the delay and merely paying lip service to the criteria of CrR 3.3(f)(2), when confronted with Mr. Kissler's express objections, the trial court violated CrR 3.3, requiring dismissal of the charges. Id.

2. **Mr. Kissler did not knowingly, intelligently, and voluntarily waive his right to counsel when the court did not accurately explain the potential punishment he faced.**

a. *The right to counsel may be waived only when the defendant clearly understands the possible penalties he faces if convicted.*

A valid and effective waiver of the right to the assistance of counsel must unequivocally demonstrate that the accused is competent, and knowingly, intelligently, and voluntarily waives the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Silva*, 108 Wn.App. 536, 539, 31 P.3d 729

(2001); U.S. Const. amend. 6; Const. art. I, § 22. The validity of a waiver is measured by the defendant's understanding *at the time* he waives his right to counsel. *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994).

The knowledge and intelligent understanding that the *pro se* defendant must possess when validly waiving counsel include, at a minimum, "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S. Ct. 316, 92 L. Ed. 309 (1948); *State v. Woods*, 143 Wn.2d 561, 588, 23 P.3d 1046 (2001).

It is the judge's role to "make certain" the waiver of counsel is understandingly made by conducting "a penetrating and comprehensive examination of all the circumstances." *Von Moltke*, 332 U.S. at 724. To ensure that a defendant "truly appreciates the dangers and disadvantages of self-representation," he or she must waive counsel "with an apprehension of the nature of the charges, the statutory offenses included within them, [and] the *range of allowable punishments thereunder.*" *United States v. Moskovits*, 86 F.3d 1303,

1306 (3d Cir. 1996) (*quoting*, *inter alia*, *Faretta,* 422 U.S. at 835 and *Von Moltke,* 332 U.S. at 724; emphasis added in *Moskovits*).

In *Moskovits*, the defendant received a 15-year sentence after trial, but the court granted his motion for a new trial as well as his motion to represent himself. 86 F.3d at 1305. The court entered into a "lengthy and detailed colloquy" with the defendant about the dangers and disadvantages of self-representation but did not mention the possibility that punishment could increase after a new trial. *Id.* at 1306.

When considering the validity of the waiver of counsel on appeal, the court refused to assume that information presented during the course of the first trial's sentencing hearing sufficiently informed the defendant of the possible punishment he faced if convicted after a second trial. *Id.* at 1307. Because a court must "indulge every reasonable presumption against waiver of fundamental constitutional rights," it refused to impute some understanding of the sentencing consequences to the defendant and held that the waiver was inadequate. *Id.* at 1308-09 (citing *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938)).

Similarly, in *Silva*, the defendant demonstrated his understanding of the nature of the charges and their gravity. 108

Wn.App. at 540. He was familiar with trial practice and he showed "exceptional skill" in his pretrial motions. *Id.* at 540-41. But at the time Mr. Silva waived counsel, he was not informed of the possible punishment he faced. *Id.* at 541. This Court explained:

> even the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision. Silva was never advised of the maximum possible penalties for the crimes with which he was charged. Absent this critical information, Silva could not make a knowledgeable waiver of his constitutional right to counsel.

Id. Although Mr. Silva received information about the standard sentencing range, he was not informed that the judge had authority to enter consecutive terms or otherwise impose an exceptional sentence.[3] The waiver of counsel was otherwise based on adequate knowledge of the law, but the court's failure to explain the maximum possible penalties he faced undermine the validity of the waiver of counsel. *Id.*; *see also United States v. Erskine*, 355 F.3d 1161, 1168 (9th Cir. 2004) ("*Faretta* waiver is valid only if the court also ascertained that he understood the possible penalties he faced").

[3] Mr. Silva's sentencing hearing predated the limitations placed on a court's discretion to impose an exceptional sentence in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

"On appeal, the government carries the burden of establishing the legality of the waiver." *Erskine*, 355 F.3d 1167. The "government has a heavy burden and that we must indulge in all reasonable presumptions against waiver." *United States v. Forrester*, 512 F.3d 500, 507 (9th Cir. 2008). The warnings given to Mr. Kissler prior to his waiver of his right to counsel did not convey the essential information that would permit a valid waiver of the right to an attorney. *See Patterson v. Illinois,* 487 U.S. 285, 298, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) ("we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him [to] waive his right to counsel at trial.").

b. *Mr. Kissler was not accurately informed of the possible penalties at the time he waived his right to counsel.*

During the preliminary stage of pretrial proceedings, Mr. Kissler informed the court that he wanted to represent himself. 9/11/12RP 2. The court cautioned Mr. Kissler against doing so and named the charges he faced but did not correctly explain the potential punishment he faced. *See Silva*, 108 Wn.App. at 541-42.

The court read the names of the five offenses with which Mr. Kissler was charged along with the count number. 9/11/12RP 3-5. The court did not read or discuss the elements of the charged offenses, just their names.

Next, in an attempt to address the possible penalties Mr. Kissler faced, the court informed Mr. Kissler that "Count 1 is a Class B felony with a maximum penalty of 10 years in prison." 9/11/12RP 4. Mr. Kissler said he understood. *Id.* The court added that "Count 1 is a maximum of 10 years in prison and a $20,000 fine." 9/11/12RP 5. Mr. Kissler said he understood.

Mr. Kissler's assigned attorney, Craig Kibbe, then said, "I believe all the other counts are Class C." 9/11/12RP 5. The prosecutor agreed. *Id.* The court stated, a "Class C felony has a maximum penalty of five years in prison and a $10,000 fine." *Id.* Mr. Kissler said he understood.

The court added that "[w]ith respect to Count 1, if you were to be convicted, not only is there a maximum penalty but there's a firearm enhancement." 9/11/12RP 5. The court gave no further explanation of possible penalties for any of the charged offenses.

The court's explanation of potential penalties was inadequate because the court erroneously told Mr. Kissler that for the charges other than Count 1, all the remaining charges were class C felonies with statutory maximum penalties of five years. 9/11/12RP 5. Yet Count 3 was also a class B felony: possession with the intent to deliver a controlled substance. RCW 69.50.401(2); CP 2. It has a statutory maximum of 10 years and in fact, due to the firearm enhancements the State later added to the charge, Mr. Kissler received a sentence of 10 years. CP 27; CP 217. It also has a maximum penalty of $25,000, not $20,000 as the court mentioned for the other Class B felony in Count 1, second degree assault. RCW 69.50.401(2)(a); *see* 9/11/12RP 5.

Mr. Kissler was not accurately advised of the penalty he faced upon his conviction what would be the most serious offense for which he was convicted. CP 143-54. The court misadvised him that other than Count 1, the charge of second degree assault, the remaining charges were Class C felonies with a five-year statutory maximum. 9/11/12RP 5. This affirmative misadvise undermines the validity of Mr. Kissler's waiver of counsel. *Silva*, 108 Wn.App. at 541-42.

c. *Mr. Kissler was also not informed of the potential for a substantial increase in punishment caused by the prosecution's addition of two firearm sentencing enhancements.*

When there is a substantial change in the nature of the punishment, the court must advise a pro se defendant of this change to ensure the defendant's decision to waive counsel remains a valid assessment based on an understanding of the risk faced by trial. *See United States v. Hantzis*, 625 F.3d 575, 581 (9th Cir. 2010); *State v. Rhoads*, 813 N.W.2d 880, 887 (Minn. 2012).

Compounding the fatal flaw in the initial colloquy where the court misadvised Mr. Kissler that he faced five year statutory maximums for all charges other than Count 1, even though Count 3 had a ten year maximum, the prosecution substantially increased Mr. Kissler's potential penalty by adding firearm enhancements to Count 3 and Count 5. CP 27-29.

Not only are firearm enhancements unique in that they must be served consecutively to the standard range sentence and consecutively to each other, the imposition of a firearm enhancement significantly increases the seriousness level and standard range for a drug offense. RCW 9.94A.533(3); RCW 9.94A.517. Where Mr. Kissler's standard

range for Count 3 would have been 20+ to 60 months, the firearm enhancement raised this range for 68+ to 100 months. RCW 9.94A.517; RCW 9.94A.518.

When the prosecution filed its amended information, the court informed Mr. Kissler that these charges were being added, but never explained the substantial increase in punishment that would occur if convicted of these offense. 12/27/12RP 2-6. The court also never asked Mr. Kissler if this increase in punishment altered his interest in waiving counsel. *Id.*

In *State v. Modica*, Division One ruled that no second, full colloquy is required when the prosecution adds a charge of witness tampering that is predicated on the defendant's conduct while the case has been pending. *State v. Modica*, 136 Wn.App. 434, 445-46, 149 P.3d 446 (2006), *aff'd on other grounds,* 164 Wn.2d 83 (2008). *Modica* properly cited the rule that ordinarily, only "a substantial change in circumstances will require the [trial] court to inquire whether the defendant wishes to revoke his earlier waiver." *Id.* at 445. *Modica* also accurately cited *Schell v. United States,* 423 F.2d 101, 102-03 (7th Cir.1970), where the trial court erred by failing to conduct a second

colloquy ensuring the validity of a waiver of counsel when the court had initially misadvised the defendant of his potential sentence.

The *Modica* Court concluded that adding a secondary charge of witness tampering, which was less serious than the charged allegation of second degree assault, did not require a full colloquy. 136 Wn.App. at 446; *see* RCW 9A.72.120. Mr. Modica was originally received complete and accurate information about the charges and potential penalties. *Id.* at 441. Moreover, after the new charge was added, the trial court asked Mr. Modica several times whether he still wished to represent himself, thus ensuring that the waiver of counsel remained his voluntary choice. *Id.* at 446.

Unlike *Modica*, Mr. Kissler was not properly advised of the sentencing consequences in the original colloquy. 9/11/12RP 4-6. The additional charges substantially increased his sentencing exposure, and the court's failure to inform him of this change undermined the validity of the waiver of counsel. *See Schell*, 423 F.2d at 102-03. Having never received accurate information about the potential punishment he faced, Mr. Kissler's waiver of counsel was not knowingly, intelligently, and voluntarily entered. *Silva*, 108 Wn.App. at 541.

d. *The inadequate waiver of counsel is structural error requiring reversal.*

Harmless error analysis is inapplicable where the deprivation of the right to counsel is at issue. *Silva*, 108 Wn.App. at 542. Due to the lack of record establishing a knowing, voluntary, and intelligent wavier of counsel, reversal and remand for a new trial are required. Silva, 108 Wn.App at 542.

3. **The court impermissibly imposed a firearm enhancement when the special verdict instruction asked only whether Mr. Kissler a possessed a "deadly weapon"**

"[S]entences entered in excess of lawful authority are fundamental miscarriages of justice." *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 563, 243 P.3d 540 (2010). "When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered." *In re Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

The court exceeds its authority by imposing the punishment allotted to a firearm enhancement when the jury's verdict merely found the defendant possessed a "deadly weapon." *State v. Williams-Walker*, 167 Wn.2d 889, 898-99, 225 P.3d 913 (2010); U.S. Const. amend. 6; Wash. Const. art. I, §§ 21, 22.

In the three consolidated cases in *Williams-Walker*, each defendant was charged with a firearm sentencing enhancement, but the court instructed the jury on the definition of a deadly weapon and asked the jury to find whether the defendant possessed a deadly weapon. *Id.* at 893-94. Each defendant was also convicted of a predicate crime that involved using a firearm. *Id.* However, the Supreme Court held that guilty verdicts on a predicate offense are not "sufficient to authorize sentencing enhancements." *Id.* at 899. Instead, the governing statute and the constitutional right to a jury trial require that the jury authorize the additional punishment by a special verdict. *Id.*

Just as in *Williams-Walker*, the court instructed Mr. Kissler's jury that "for purposes of a special verdict," it must decide whether Mr. Kissler was "armed with a deadly weapon." CP 193 (Instruction 33). Instruction 33 explained the requirements of the special verdict finding and was the only instruction directed at answering this special verdict. *Id.* It defined a deadly weapon as including a "pistol, revolver or any other firearm . . . whether loaded or unloaded," which is the statutory language for defining a "deadly weapon" and not a "firearm" for purposes of the firearm sentencing enhancement. *Id.*; RCW 9A.04.010(6); RCW 9.41.010; RCW 9.94A.533(3). In the special

verdict form, the court asked the jury whether would issue a special verdict finding that Mr. Kissler was "armed with a firearm at the time of the commission of the charged crime" but this question was based on Instruction 33, which explained that any firearm falls under the broad definition of deadly weapon. CP 146, 193. The jury subsequently found Mr. Kissler was armed based on this instruction. CP 146, 153.

A sentencing enhancement must be authorized by the jury in the form of a special verdict. *Williams-Walker*, 167 Wn.2d at 900. The instruction provided to the jury explaining the special verdict simply asked whether the State proved he possessed a deadly weapon. CP 193. Because the court's instruction dictates the nature of the special verdict finding, the verdict form's mention of a firearm does not trump the court's direct instruction that the jury premise its special verdict finding on a deadly weapon. The jury's special verdict finding did not authorize the court to impose the firearm enhancement. CP 193; *Williams-Walker*, 167 Wn.2d at 898-99. Consequently, the firearm enhancement must be stricken.

4. The trial court erred in imposing alternative terms of community custody.

"A trial court only possesses the power to impose sentences provided by law." *Carle*, 93 Wn.2d at 33. 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.

Following the 2009 amendments to RCW 9.94A.701, and elimination of former RCW 9.94A.715, a trial court no longer has the authority to impose a variable term of community custody. *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). Instead, *Franklin* recognized,

> [u]nder the amended statute, a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing. RCW 9.94A.701 (1)- (3); *cf.* former RCW 9.94A.715 (1).

Franklin, 172 Wn.2d at 836. The Court more recently clarified that for persons sentenced after August 2009, the trial court and not the Department of Corrections is responsible for fixing the appropriate term of community custody. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

Mr. Kissler received a sentence of 120 months for a Class B felony as charged in count 3, with a statutory maximum of 120 months. CP 27; CP 217; RCW 9A.20.021(1)(b); RCW 69.50.401(1)(2)(a). RCW 9.94A.701 (3)(c) authorizes a one-year term of community custody for Mr. Kissler's offense. Because Mr. Kissler's standard range sentence is 120 months, however, RCW 9.94A.701(9) required the trial court to reduce the term of community custody to "0." *Boyd*, 174 Wn.2d at 472.

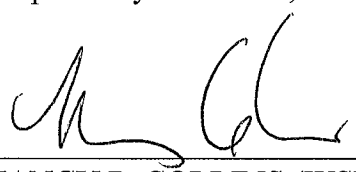
Nonetheless, the Judgment and Sentence contains the handwritten note: "total i/c [in custody] and community custody not to exceed stat. maximum." CP 218. This notation does not suffice. *See Boyd*, 174 Wn.2d at 473. Because it is contrary to RCW 9.94A.701, and Mr. Kissler is serving the statutory maximum for a Class B felony, the Court must strike the alternate term of community custody imposed by notation on the judgment and sentence.

F. CONCLUSION.

Mr. Kissler's convictions should be reversed due to the violation of his right to a speedy trial. Alternatively, a new trial must be ordered based on the deprivation of his right to counsel absent a valid, knowing and intelligent waiver of counsel. Finally, the sentencing errors must be corrected by striking the unauthorized firearm enhancement and term of community custody.

DATED this 22nd day of November 2013.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. JOEL KISSLER, Appellant.	)))))))))	NO. 44589-1-II

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