96675-3

SUPREME COURT NO. _____
COA NO. 76818-2-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LUCIEN THIBODEAUX,

Petitioner.

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

The Honorable Catherine Moore, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Lucien Thibodeaux asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Thibodeaux requests review of the published decision in State v. Lucien Thibodeaux, Court of Appeals No. 76818-2-I (slip op. filed Nov. 26, 2018), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a trial court has discretion to impose an exceptional sentence downward based on the need to comply with the statutory maximum for the offense by reducing the term of confinement to accommodate a term of community custody and, if so, whether resentencing is required because the court did not recognize it had discretion to do so?

2. Whether Thibodeaux was deprived of his right to effective assistance of counsel where the need to comply with the statutory maximum constituted a basis on which to impose an exceptional sentence downward but defense counsel failed to inform the court of its authority to impose an exceptional sentence on this basis?

D. STATEMENT OF THE CASE

Thibodeaux was convicted of third degree child rape committed against 15-year-old R.N. CP 1, 35. R.N. testified that he was in

downtown Seattle at about 11 p.m. when he ran into an acquaintance, S.W. RP[1] 98-100. While walking to a bus stop, they encountered Thibodeaux, S.W.'s stepfather. RP 101-02. Thibodeaux showed signs of intoxication. RP 105-06. On the way to R.N.'s home, they entered a park near the Convention Center. RP 106. According to R.N., Thibodeaux made him engage in sexual activity. RP 106-09. R.N. denied propositioning Thibodeaux for sex. RP 133, 138. Thibodeaux, testifying in his own defense, gave a different version of events. According to Thibodeaux, R.N. propositioned him. RP 228. R.N. made sexual advances toward him in the park. RP 204. Thibodeaux did not respond to them. RP 204. He denied having sexual contact with R.N. RP 210-11, 230-31. The jury returned a guilty verdict. CP 35.

Defense counsel requested an exceptional sentence downward based on these mitigating factors: (1) the victim was an initiator, willing participant or aggressor; (2) the defendant committed the crime under duress, coercion, threat or compulsion insufficient to constitute a complete defense but which significantly affected his conduct; and (3) the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly

[1] This brief cites to the verbatim report of proceedings as follows: RP - six consecutively paginated volumes consisting of 3/28/17, 3/29/17, 3/30/17, 4/3/17, 4/4/17, 5/5/17.

impaired (excluding alcohol). CP 56-59 (citing RCW 9.94A.585(1)(a), (c), (e)). The State opposed the defense request for an exceptional sentence downward. CP 99-105.

At the sentencing hearing, the prosecutor told the court "[t]he only sentence within the Court's discretion right now is 60 months." RP 292. There was 36 months of community custody, which would need to be adjusted to ensure that the entire sentence does not exceed the statutory maximum of 60 months. RP 292-93. The court wondered about the term of confinement and community custody exceeding the statutory maximum. RP 293. The prosecutor assured the court that this was not a basis to impose an exceptional sentence downward. RP 294. The court responded "Okay. Thank you. Okay." RP 294. The court invited defense counsel to respond, but counsel did not challenge the prosecutor's remarks. RP 294.

The court said it was "unfortunate that I am not in a position to give you the leniency that you are requesting the Court to give you today. The law is very clear in this matter that there really is no reason to mitigate down. The reasons that have been put forth by your counsel, the Court does not find that they have been -- these circumstances have been -- the Court finds that these circumstances have not been established by a preponderance of the evidence." RP 304. The victim was not an initiator or willing participant. RP 304. Nor did the evidence support the other

asserted grounds for mitigation. RP 304-06. The court adopted the State's sentencing recommendation, although it gave the court "no pleasure." RP 305-06. The court thus imposed a 60-month term of confinement without community custody. CP 63; RP 306-07.

On appeal, Thibodeaux argued resentencing was required because the need to comply with the statutory maximum for the offense provided a basis to impose an exceptional sentence downward, but the trial court failed to recognize it had discretion to do so. In the alternative, defense counsel was ineffective for failing to seek an exceptional sentence on this ground and to inform the court of authority for the request. The Court of Appeals held the case relied on by Thibodeaux as the basis to impose an exceptional sentence downward was superseded by statute. Slip op. at 4-5.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW IS WARRANTED BECAUSE WHETHER A COMMON LAW MITIGATING FACTOR HAS BEEN SUPERSEDED BY STATUTE IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

In State v. Davis, 146 Wn. App. 714, 717, 192 P.3d 29 (2008), review denied, 166 Wn.2d 1033, 217 P.3d 782 (2009), the Court of Appeals held trial courts have discretionary authority to impose an exceptional sentence downward by lowering the term of confinement to accommodate community custody when their combined term would

otherwise exceed the statutory maximum. The Court of Appeals in Thibodeaux's case held the common law mitigating factor recognized in Davis has been banished by statute. Review is warranted under RAP 13.4(b)(4). Contrary to what the Court of Appeals believes, trial courts have discretionary authority to impose an exceptional sentence downward by lowering the term of confinement to accommodate community custody. The trial court's failure to exercise its discretion requires resentencing because there is a possibility that the court would have given an exceptional sentence downward had it been aware of its authority to do so on this basis. In the alternative, defense counsel's failure to inform the court of this ground for an exceptional sentence constituted ineffective assistance of counsel.

a. Trial courts have discretion to impose an exceptional sentence downward based on the need to comply with the statutory maximum, and the court here committed reversible error in not recognizing it had the authority to do so.

Third degree rape of a child is a class C felony. RCW 9A.44.079(2). The statutory maximum for a class C felony is 60 months. RCW 9A.20.021(1)(c). Based on an offender score of 8 points, the standard range sentence was 60-60 months. CP 61. The offense of third degree child rape qualifies as a sex offense and, as such, includes 36

months of community custody. RCW 9.94A.701(1)(a); RCW 9.94A.030(47)(a)(i).

The combined term of confinement and community custody in excess of the statutory maximum provides a basis to impose an exceptional sentence downward. A trial court may impose an exceptional sentence if it finds "substantial and compelling reasons" to justify departure from the standard range and if those reasons are consistent with the purposes of the Sentencing Reform Act (SRA). RCW 9.94A.535. "The need to sentence within the statutory maximum is a substantial and compelling reason justifying a departure from the standard range." Davis, 146 Wn. App. at 721. Thus, where the combined standard range of confinement and community custody exceeds the statutory maximum, there is a substantial and compelling reason to impose an exceptional sentence downward on the confinement portion of the sentence. Id. at 717.

A defendant generally cannot appeal a standard range sentence. RCW 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). But a defendant "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled

to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "The failure to consider an exceptional sentence is reversible error." Id. at 342.

"When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (citing Grayson, 154 Wn.2d at 342). "A trial court errs when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" McFarland, 189 Wn.2d at 56 (quoting State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998)). A court thus abuses its discretion when it fails to meaningfully consider a possible mitigating circumstance. State v. O'Dell, 183 Wn.2d 680, 696-97, 358 P.3d 359 (2015). Based on the prosecutor's erroneous guidance and defense counsel's silence, the trial court was not informed it had discretion to impose an exceptional sentence downward based on Davis. "This failure to exercise discretion is itself an abuse of discretion subject to reversal." Id. at 697.

Defense counsel did not argue for an exceptional sentence downward based on Davis. The error is still subject to review. McFarland

is instructive. In that case, McFarland argued for the first time on appeal that the sentencing court erred by failing to recognize its discretion to impose an exceptional mitigated sentence by running multiple firearm-related sentences concurrently. McFarland, 189 Wn.2d at 49. The Court of Appeals refused to consider this issue, noting that the sentencing judge "cannot have erred for failing to do something he was never asked to do." Id. The Supreme Court reversed and remanded for resentencing to allow the trial court the opportunity to consider whether to impose a mitigated sentence by running the firearm-related sentences concurrently. Id. at 50. "What the Court of Appeals did not consider is the authority of an appellate court to address arguments belatedly raised when necessary to produce a just resolution. Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values." Id. at 57. The same values are served in Thibodeaux's case. Under McFarland, the argument can be raised for the first time on appeal.

In holding an exceptional sentence on this ground was unavailable as a matter of law, the Court of Appeals relied on RCW 9.94A.701(9), which 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."

The Supreme Court has held RCW 9.94A.701(9), by its terms, only applies to sentences within the standard range; it does not apply to exceptional sentences. In re Pers. Restraint of McWilliams, 182 Wn.2d 213, 217, 340 P.3d 223 (2014). RCW 9.94A.701(9) is irrelevant because Thibodeaux seeks an exceptional sentence outside the standard range, not a standard range sentence. See State v. Ramirez, 190 Wn. App. 731, 735, 359 P.3d 929 (2015) (where defendant received a term of confinement below the standard range, RCW 9.94A.701(9) was inapplicable, citing McWilliams); State v. Chouap, 170 Wn. App. 114, 127 n.4, 285 P.3d 138 (2012), review denied, 182 Wn.2d 1003, 342 P.3d 326 (2015) ("We conclude that an offender sentenced within the standard range term of confinement is the threshold for applying former RCW 9.94A.701(9)").

The Court of Appeals, however, seized on this sentence in McWilliams: "Based on its plain language, RCW 9.94A.701(9) does not apply when a court imposes an exceptional sentence of confinement." McWilliams, 182 Wn.2d at 217 (emphasis added by Court of Appeals). From this, the Court of Appeals distinguished McWilliams on the ground that the trial court here "did not impose an exceptional sentence." Slip op. at 5. This is circular reasoning. It assumes the conclusion by making it a

premise. The premise is that only a standard range sentence is available when the combined term of confinement and community custody exceeds the statutory maximum pursuant to RCW 9.94A.701(9), and based on that premise, the conclusion is that RCW 9.94A.701(9) bars exceptional sentences when the combined term of confinement and community custody exceeds the statutory maximum.

More than that, the Court of Appeals misconstrued what this Court meant. McWilliams made the point clear: "By its plain language, RCW 9.94A.701(9) applies only to terms of confinement imposed within the *standard range.*" McWilliams, 182 Wn.2d at 217. The question posed by Thibodeaux's case involves the trial court's authority to impose an exceptional sentence outside the standard range, not a standard range sentence. Davis, not RCW 9.94A.701(9), answers the question about the sentencing court's authority to impose an exceptional sentence when the combined term to confinement and community custody exceeds the statutory maximum.

RCW 9.94A.505(5) applies when an exceptional sentence is involved. McWilliams, 182 Wn.2d at 218. RCW 9.94A.505 states "Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as

provided in chapter 9A.20 RCW." This is the statutory provision referenced in Davis, and it still exists today. Davis, 146 Wn. App. at 718 n.1. Davis has not been superseded by statute.

In assessing the availability of an exceptional sentence, the Court of Appeals ascribed no significance to RCW 9.94A.505(5). Instead, it focused only on RCW 9.94A.701(9), which it interpreted as prohibiting exceptional sentences. It thought the word "shall" in RCW 9.94A.701(9) precluded the trial court from having any discretion on what to do. Slip op. at 4. But the word "shall" does not have talismanic significance when it comes to the trial court's authority to depart from a statute and impose an exceptional sentence.

For example, RCW 9.94A.589(1)(b) states that sentences for serious violent offenses "shall be served consecutively to each other." Despite this apparently mandatory language, the Supreme Court held trial courts have discretion to impose an exceptional sentence by running the sentences for such offenses concurrently. In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 331, 166 P.3d 677 (2007). In McFarland, one sentencing statute at issue provided "[n]otwithstanding any other law," if an offender is convicted of either unlawful possession of a firearm in the first or second degree, or for the felony crime of theft of a firearm, or both, "then the offender shall serve consecutive sentences for each of the felony

crimes of conviction." RCW 9.41.040(6). The other statute at issue, RCW 9.94A.589(1)(c), stated "[t]he offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed." Despite use of the word "shall" in these provisions, the Supreme Court held a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences. McFarland, 189 Wn.2d at 55.

Similarly, use of the word "shall" in RCW 9.94A.701(9) should not be read to prohibit imposition of an exceptional sentence. It must be considered in relation to the larger sentencing scheme and its available options. The statute itself, by its terms, applies only to standard range sentences. It says nothing about the trial court's authority to impose an exceptional sentence.

This conclusion becomes all the more apparent when we consider that the mitigating circumstance found in Davis derives from the common law. There is no such statutory mitigating circumstance. The statutory provision for exceptional sentences, however, expressly provides that the listed mitigating circumstances "are illustrative only and are not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535(1).

"[T]here must be clear evidence of the legislature's intent to deviate from the common law." State v. Kurtz, 178 Wn.2d 466, 477, 309 P.3d 472 (2013). Here, there is no evidence, let alone clear evidence, that the legislature, in enacting RCW 9.94A.701(9), intended to override the common law mitigating factor identified in Davis. "It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" Potter v. Washington State Patrol, 165 Wn.2d 67, 77, 196 P.3d 691 (2008) (quoting Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia, 464 U.S. 30, 35-36, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983)). "If a statute substantially alters a common law principle, the intent to do so must be apparent from an express declaration, legislative history or the words themselves." State v. A.N.W. Seed Corp., 116 Wn.2d 39, 45, 802 P.2d 1353 (1991).

"A law abrogates the common law when 'the provisions of a . . . statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.'" Potter, 165 Wn.2d at 77 (quoting State ex rel. Madden v. Pub. Util. Dist. No. 1, 83 Wn.2d 219, 222, 517 P.2d 585 (1973)). There is no inconsistency or repugnancy between RCW 9.94A.701(9) and the common law mitigating factor that prevents both from operating simultaneously. Not only is there no

indication that the legislature intended to overrule the common law, there is express language within the statute limiting its application to standard range sentences.

If RCW 9.94A.701(9) were intended to supersede Davis, then we would expect to see legislative history indicating that intent. The Court of Appeals cites none. There is none. The amendments revised who DOC must supervise and replaced community custody ranges with fixed terms. Laws of 2009, ch. 375 (S.S.B. 5288); Final Bill Report (summarizing changes).[2] It is apparent RCW 9.94A.701(9) was the legislature's solution to what the trial court should do when faced with a fixed-term of community custody that would otherwise exceed the statutory maximum when combined with the confinement term for a standard range sentence. Nothing in the legislative history shows intent to limit the court's authority to accommodate community custody by reducing the confinement term as part of an exceptional sentence. The bill reports do not mention Davis. They do not address the availability of an exceptional sentence when the combined term of confinement and community custody would otherwise exceed the statutory maximum.

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[2] The Final Bill Report is attached as appendix A to appellant's reply brief filed in the Court of Appeals.

Davis did not drop from the sky. It is rooted in precedent. A sentencing court may depart from the standard range and tailor a sentence to avoid exceeding the statutory maximum. State v. Hudnall, 116 Wn. App. 190, 192, 64 P.3d 687 (2003). Hudnall thus affirmed an exceptional community custody sentence downward where the trial court imposed a confinement term above the standard range, where imposing the minimum term for community custody would have exceeded the statutory maximum for the offense. Id. at 193. This holding was in keeping with legislative intent "that the exceptional sentencing provisions of the Sentencing Reform Act of 1981, RCW 9.94A (SRA) enable trial courts to tailor sentences for individual situations that do not fit the predetermined structure." Id. at 721-22 (quoting State v. Guerin, 63 Wn. App. 117, 120, 816 P.2d 1249 (1991) (citing State v. Bernhard, 108 Wn.2d 527, 540-41, 741 P.2d 1 (1987), overruled on other grounds by State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989)). That principle is as true today as it was when it was first announced.

Because the statutory examples of mitigating factors are illustrative only, the sentencing court may consider other factors so long as they are consistent with the purposes of the SRA and supported by the evidence. Davis, 146 Wn. App. at 721. Where the combined standard range of confinement and community custody exceeds the statutory maximum,

there is a substantial and compelling reason to impose an exceptional sentence downward on the confinement portion of the sentence. Id. at 717.

"Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). Resentencing is appropriate where "the record suggests at least the possibility" that the sentencing court would have considered a different sentence had it understood its authority to do so. McFarland, 189 Wn.2d at 59. In McFarland, for example, the Supreme Court remanded for resentencing because the trial court "indicated some discomfort with his apparent lack of discretion." Id. at 58-59.

As in McFarland, there is at least a possibility that the trial court would have imposed a downward exceptional sentence based on Davis had it properly understood its discretion to do so. The court told Thibodeaux that it was "unfortunate that I am not in a position to give you the leniency that you are requesting the Court to give you today. The law is very clear in this matter that there really is no reason to mitigate down." RP 304. The court took "no pleasure" in adopting the State's recommendation of 60 months confinement. RP 305-06. Had the court been aware of its discretion to be lenient on a basis recognized by the law, it may have exercised its discretion in Thibodeaux's favor. Thibodeaux

requests remand for resentencing so that the trial court may consider his request for an exceptional sentence downward based on Davis.

b. In the alternative, defense counsel was ineffective in failing to inform the court of its authority to impose an exceptional sentence downward based on the need to comply with the statutory maximum.

Every defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. The performance of Thibodeaux's attorney was deficient because he failed to properly advise the court of its sentencing authority. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226.

Competent counsel would know the trial court had authority to order an exceptional sentence downward to ensure the combined term of

confinement and community custody do not exceed the statutory maximum. Counsel has a duty to know the relevant law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). And only legitimate trial strategy or tactics constitute reasonable performance. Id. at 869. Defense counsel stood mute when the prosecutor told the court this was not a basis for an exceptional sentence downward. Competent counsel would have rebutted the prosecutor's statement by citing Davis. "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." McGill, 112 Wn. App. at 102. The failure to inform the court that it had authority to order an exceptional sentence downward based on Davis cannot be explained as a legitimate tactic.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In McGill, defense counsel was ineffective in failing to cite authority showing the court had discretion to impose an exceptional sentence downward and in failing to request the court to exercise its discretion based on that authority. McGill, 112 Wn. App. at 101-02. Remand for the trial court to exercise its principled discretion was

appropriate where the court's comments indicated it would have considered an exceptional sentence had it known it could. Id. at 100-01.

The same holds true here. As in McGill, defense counsel failed to cite to the relevant authority and thereby inform the court of its decision-making authority. As a result, the court was unaware of its discretion to impose an exceptional sentence based on Davis. As in McGill, it is possible the trial court would have imposed a different sentence had it known an exceptional sentence on this basis was an option. Because Thibodeaux was prejudiced by his attorney's failure to advise the court of its discretion, remand for resentencing is required.

F. CONCLUSION

For the reasons stated, Thibodeaux requests that this Court grant review.

DATED this 24th day of December 2018.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LUCIEN J. THIBODEAUX, Appellant.	)	No. 76818-2-I DIVISION ONE PUBLISHED OPINION FILED: November 26, 2018

BECKER, J. — This is an appeal of a standard range sentence. The appellant was convicted of an offense for which the statutory maximum sentence is 60 months. His statutory standard range sentence had already topped out at 60 months of confinement. Another statute required imposition of a community custody term of 36 months. The issue is whether the trial court had discretion to impose an exceptional sentence downward that reduced the confinement term to 24 months so that he could serve the remaining 36 months of the sentence in community custody. Because a statute enacted in 2009 requires reduction of the community custody term but not the term of confinement, the court correctly imposed a sentence of 60 months with no community custody thereafter.

In 2017, appellant Lucien Thibodeaux was convicted of rape of a child in the third degree for engaging in sexual intercourse with a 15-year-old. Third degree rape of a child is a class C felony for which the maximum term is five

years. RCW 9A.20.021(1)(c); RCW 9A.44.079. With Thibodeaux's offender score of 8, the standard range sentence of confinement was the full five years.

Thibodeaux requested an exceptional sentence downward of 24 months. He proposed three reasons: that he was under duress or compulsion, that he lacked the capacity to appreciate the wrongfulness of his conduct, and that the victim initiated the contact. The prosecutor argued that the evidence did not support any of these reasons for mitigating the sentence. Indeed, the prosecutor said that the State would have requested an exceptional sentence upward if not for the fact that the standard range term of confinement was already at the statutory maximum of five years. He said that Thibodeaux was "for lack of a better word, what we call maxed out and there's no longer a range."

A sentence for third degree rape of a child must also include a three-year term of community custody. RCW 9.94A.701(1). But the statutory maximum includes any term of community custody in addition to the term of confinement, and a court may not impose a sentence that exceeds the statutory maximum. RCW 9.94A.505(5). Thus, the court could not require Thibodeaux to serve both a five-year term of confinement and a three-year term of community custody.

A statute enacted in 2009 resolves this anomaly by providing that when the combined terms of confinement and community custody exceed the statutory maximum, only the community custody term is to be reduced:

> 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). The prosecutor accordingly recommended a standard range sentence of 60 months of confinement, with no time to be served in community custody. The prosecutor said, "The only sentence within the Court's discretion right now is 60 months."

The trial court found no evidence to support an exceptional sentence downward on any of the three grounds advocated by Thibodeaux. The court imposed the sentence recommended by the State: a five-year standard range sentence of confinement with no term of community custody. Thibodeaux appeals the sentence.

As a general rule, the length of a standard range sentence is not subject to appellate review. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a trial court's mistaken belief that it lacked discretion to impose a mitigated exceptional sentence for which a defendant may have been eligible is reversible error. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007). Thibodeaux contends that is what occurred in his case. He contends he was eligible for a mitigated exceptional sentence, not on any of the three grounds that he advocated at sentencing, but based on State v. Davis, 146 Wn. App. 714, 717, 192 P.3d 29 (2008), review denied, 166 Wn.2d 1033, 217 P.3d 782 (2009). He requests that the sentence be reversed and remanded for the trial court to consider imposing an exceptional sentence of 24 months of imprisonment and 36 months of community custody.

In Davis, the defendant's standard range sentence was 43 to 57 months of incarceration and 36 to 48 months of community custody. 146 Wn. App. at 718. Combined, the mandated incarceration and community custody exceeded the 60 month statutory maximum. Davis, 146 Wn. App. at 719. To ensure the defendant would serve at least two years of community custody, the trial court imposed an exceptional sentence downward by reducing the term of incarceration to 36 months. Davis, 146 Wn. App. at 719. This court affirmed, holding that "the need to sentence within the statutory maximum is a substantial and compelling reason justifying a departure from the standard range." Davis, 146 Wn. App. at 721.

RCW 9.94A.701(9), enacted one year after Davis, renders Davis inapplicable to Thibodeaux. "When the meaning of statutory language is plain on its face, the court must give effect to that plain meaning." In re Pers. Restraint of McWilliams, 182 Wn.2d 213, 217, 340 P.3d 223 (2014). The statute specifies that the term of community custody, not the term of incarceration, "shall" be reduced. RCW 9.94A.701(9). The word "shall" is presumptively imperative; it creates a duty rather than conferring discretion. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The legislature's use of "shall" in RCW 9.94A.701(9) makes it clear that when the combined terms of confinement and community custody exceed the statutory maximum, the community custody term must be reduced. In such a case, the requirement in RCW 9.94A.701(1) for a three-year term of community custody gives way to the need to keep the overall sentence within the statutory maximum. This statute resolves the anomaly

created by the other statutes that dictate a combined sentence of eight years even when five years is the maximum sentence.

As a result of RCW 9.94A.701(9), an exceptional sentence is no longer needed to keep the sentence of a person in Thibodeaux's situation within the statutory maximum. He is not required to serve the term of community custody that would otherwise be mandatory under RCW 9.94A.701(1). Unlike in Davis, the trial court could impose a standard range sentence within the statutory maximum of five years simply by reducing the community custody term to zero.

Thibodeaux contends RCW 9.94A.701(9) does not apply because he requested an exceptional sentence. "Based on its plain language, RCW 9.94A.701(9) does not apply when a court imposes an exceptional sentence of confinement." McWilliams, 182 Wn.2d at 217 (emphasis added). But here, unlike in McWilliams, the court did not impose an exceptional sentence. Thibodeax proposed three separate grounds for an exceptional sentence, but the trial court did not find that any of them supplied a substantial and compelling reason to deviate from the standard range. Thibodeaux has not appealed that decision. Because the trial court imposed a standard range sentence, not an exceptional sentence, RCW 9.94A.701(9) is directly applicable.

This is not a case where the trial court categorically refused to consider an exceptional sentence that the defendant may have been eligible to receive. The court's decision to impose a standard range sentence of 60 months of confinement is not reviewable.

As the State concedes, the judgment and sentence does contain a different error. It states that Thibodeaux's duty to register as a sex offender does not end until he obtains a court order relieving him of the duty to register or receives written notice from the sheriff's office that the duty has ended:

> Your duty to register does not end until you have obtained a court order specifically relieving you of the duty to register or you have been informed in writing by the sheriff's office that your duty to register has ended. Your duty to register DOES NOT end when your [Department of Corrections] supervision ends.

This statement is inconsistent with a statute providing that "the duty to register shall end ten years after" certain defined events. RCW 9A.44.140(3). Under the statute, there is no necessity for the offender to obtain a court order or a writing from the sheriff. Thibodeaux is entitled to an accurate judgment and sentence. The trial court shall correct the inaccuracy on remand.

Thibodeaux filed a supplemental brief challenging the imposition of a $100 fee for collection of DNA (deoxyribonucleic acid). At the time Thibodeaux was sentenced, the collection fee was mandatory. A legislative enactment effective June 7, 2018, added the words "unless the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541; SECOND SUBSTITUTE H.B. 1783, ch. 269, sec.18, 65th Leg., Reg. Sess. (Wash. 2018). This amendment applies prospectively to cases pending on appeal. State v. Ramirez, __ Wn.2d __, 426 P.3d 714, 721-23 (2018). That includes Thibodeaux's case.

In light of Ramirez, Thibodeaux argues that the DNA collection fee must be stricken. His argument is based on four premises: the DNA collection fee is

now discretionary rather than mandatory, a discretionary fee cannot be imposed on an indigent defendant, he is indigent, and the State has previously collected his DNA. We need not analyze the first three premises because even if they are true, the last premise is without support in the record. The record is silent as to whether the State has previously collected Thibodeaux's DNA.

Thibodeaux asserts that his DNA would have necessarily been collected as a result of his previous felonies. But as the State points out, defendants do not always submit to DNA collection despite being ordered to do so. See State v. Thornton, 188 Wn. App. 371, 372, 353 P.3d 642 (2015) (defendant had not submitted DNA sample in connection with prior offense). Because the existing record does not establish that the State has already collected Thibodeaux's DNA, he has not demonstrated that it was impermissible to impose the collection fee. We reject his request to strike the DNA fee from the judgment and sentence.

The sentence is remanded for correction of the inaccurate statement about Thibodeaux's duty to register. In all other respects, the sentence is affirmed.

Becker, J.

WE CONCUR:

Andrus, J.

Mann, A.C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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