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Supreme Court No. 97178-1
(Court of Appeals No. 77435-2-I)

**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

ALLAN NORD, Appellant.

PETITION FOR REVIEW

**ERIC RICHEY,
Whatcom County Prosecuting Attorney
By KELLEN B. KOOISTRA
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #39288 / ADMIN. #91075
Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 778.5710**

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A. IDENTITY OF RESPONDENT, PETITIONER

Respondent, State of Washington, by Kellen B. Kooistra, deputy prosecutor for Whatcom County, seeks the relief designated in Part B.

B. COURT OF APPEALS DECISION

The State of Washington petitions this court for review of the Court of Appeals Opinion in State v. Nord, #77435-2-I (Unpublished), filed January 22nd, 2019. A copy of the opinion and the denial of the motion to reconsider are attached as exhibit A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the community custody term for one count must be stricken as exceeding the statutory maximum sentence permitted for *that* crime predicated on the confinement ordered to be served on a separate crime.

D. STATEMENT OF THE CASE

Nord was convicted following jury trial of two separate offenses, unlawful delivery of a controlled substance, a class B offense and unlawful possession of a controlled substance, a class C felony. At sentencing, Nord was sentenced to two years confinement and 12 months of community custody on the class C unlawful possession offense, a sentence well within the statutory maximum sentenced authorized for that offense. On the unlawful delivery charge, Nord was sentenced to 10 years,

the statutory maximum for that offense in addition to a term of community custody. The court ordered the two sentences to run concurrently.

On direct appeal, the state conceded the community custody term on the delivery offense should be stricken because it violated the statutory maximum sentence permitted for that offense. Following remand to strike the community custody provision on the delivery offense, Nord again appealed. This time Nord claimed in part, that because he was to serve ten years confinement on the delivery charge, the community custody period ordered on the possession charge, to commence after his term of confinement on the delivery charge pursuant to RCW 9.94A.171, exceeded the statutory maximum sentence permitted for the unlawful possession charge, even though the total confinement and community custody term ordered on the unlawful possession charge did not exceed the statutory maximum sentence of 60 months permitted for that offense.

The Court of Appeals adopted Nord's argument, holding that because Nord would serve the 12 month community custody term on the unlawful possession charge after he served his 10 year sentence on the unlawful delivery conviction, his resulting sentence would result in a sentence that exceeds the 5 year statutory maximum permitted on the unlawful possession charge. The court held consequently, the community custody term imposed on the unlawful possession conviction exceeded the statutory maximum sentence that could lawfully be imposed and should

therefore be stricken. The State sought reconsideration of the Court of Appeals decision which was subsequently denied. The State now petitions this Court for further review of Nord's sentence.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review of the Court of Appeals Opinion in this case because the analysis misapplies this Court's decision in State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012), is inconsistent with the rationale in State v. Acrey, 97 Wn. App. 784, 784, 988 P.2d 17 (1999), is contrary to the plain language of the applicable sentencing statutes and presents an issue of substantial public interest in ensuring consistency across the State when trial court's sentence offenders for multiple but separate crimes under the Sentencing Reform Act. RAP 13.4(b)(2)(4).

F. ARGUMENT

Following a jury trial, Nord was sentenced to one class C crime, unlawful possession of a controlled substance and one class B crime, unlawful delivery of a controlled substance, to be served concurrently, . On the unlawful possession charge, Nord was sentenced to 2 years confinement and 12 months community custody, well within the 5 year statutory maximum sentence permitted for that offense. On the unlawful delivery charge however, Nord was given a 10 year sentence.

The Court of Appeals held, notwithstanding the plain language of RCW 9.94A.701(9), that because the community custody term ordered on the possession offense would be tolled until Nord was released from 10 years of confinement on the delivery offense, Nord’s sentence on the unlawful possession offense exceeded the statutory maximum five year sentence permitted for that offense. This decision ignores the plain language of the applicable sentencing statutes under the Sentencing Reform Act and applicable case law. Review by this Court should be granted.

A sentence includes periods of total or partial confinement, as well as any term of community custody imposed by the court. RCW 9.94A.030(8), RCW 9.94A.505(2)(a)(i),(ii). RCW 9.94A.171 requires that a term of community custody be tolled while the defendant is in custody for any reason. RCW 9.94A.171(3)(a)¹. Finally, RCW 9.94A.701(9), as codified in 2009, requires that the period of community custody “shall be reduced” when the “standard range of confinement in combination with a term of community custody exceeds the statutory maximum *for the crime* as provided in RCW 9A.20.021.” (*Emphasis added*); State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012). This is consistent with the requirement reflected in RCW 9.94A.505(5) that

¹ There are a couple of exceptions not pertinent here.

precludes sentences beyond the authorized statutory maximum. *See also*, State v. Bruch, 182 Wn.2d 854, 346 P.3d 724 (2015).

The Court of Appeals decision that Nord’s sentence of two years confinement and 12 months community custody exceeds the statutory maximum for the crime of unlawful possession of a controlled substance because he was given a 120 month sentence on a separate unlawful delivery charge is directly contrary to the applicable statutory sentencing provisions that require the trial court to strike or modify a term or community custody if the sentence exceeds the statutory maximum for “*the crime*.” See, RCW 9.94A.701(9).

Moreover, the Court of Appeals erred by adopting Nord’s analysis that this Court’s decision in State v. Boyd supports his argument. While Boyd was convicted of multiple offenses, this Court only examined the statutory validity of his sentence pertaining to only one of those offenses, a violation of a protection order, to ensure his sentence for that offense did not exceed the statutory maximum sentence. In that context, this Court concluded that Boyd’s 54 month sentence and a 12 month term of community custody on his violation of a protection order offense exceeded the 60 month statutory maximum sentence permitted for that offense, notwithstanding that the trial court had written into Boyd’s judgment that the total term of confinement and community custody could not exceed the 60 month statutory maximum sentence for the offense. *Id.* This Court

held that this notation, otherwise known as the ‘Brooks’ notation, in light of the passage of RCW 9.94A.701(9) was no longer sufficient in evaluating or ensuring an offender’s judgment and sentence for a crime did not exceed the statutory maximum sentence permitted for that offense. Instead, this Court held that trial courts were now tasked pursuant to RCW 9.94A.701(9) to ensure that incarceration and fixed terms of community custody do not exceed the statutory maximum sentence for *the crime* at sentencing. *Id.* at 474(*emphasis added*). Therefore, because Boyd’s judgment reflected a total sentence of 66 months based on the total confinement and the term of community custody ordered on *the* protection violation offense, his sentence for that offense exceeded the statutory maximum 60 month sentence the trial court was authorized to impose for that offense. Boyd in no way holds that a judgment reflecting sentences for multiple separate offenses must be considered collectively, from the perspective of the longer term of incarceration imposed on any separate offense to determine if any term of community custody on a separate offense exceeds the statutory maximum sentence authorized for ‘the crime.’ Without further review of Nord’s case by this Court, sentencing courts may inconsistently sentence offenders when they are sentenced for multiple separate offenses based on the Court of Appeals flawed analysis and will impact the operation of the community custody tolling provision under RCW 9.94A.171(3).

The Court of Appeals decision in this case is also inconsistent with the analysis in State v. Acrey, 97 Wn. App. 784, 988 P.2d 17 (1999).

There the court held that the limits imposed by the statutory maximum for an offense did not require striking a term of community custody unless the total sentence for that crime, by itself, exceeded the statutory maximum.

Acrey, 97 Wn. App. at 787. Acrey was sentenced on two counts of assault in the third degree and one count of unlawful possession following jury trial. Id. at 786. The sentencing court imposed 60 months on the first assault count, 55 months on the second assault count, and 47 months with a mandatory year of community custody on the unlawful possession count, all to run concurrently. Id. This resulted in Acrey serving 60 months of confinement on the first assault count, followed by 12 months of community custody on the unlawful possession count that was tolled while he completed his incarceration on the other charge. Id. The Acrey court found that this sentence structure did not exceed the statutory maximum sentence limits because when viewed separately, the 43 month term of confinement for the unlawful possession charge with the mandated 12 months community custody for a total sentence of 55 months was well within the maximum sentence authorized for that offense. Id. at 787-788.

The Court in Acrey noted:

We perceive no reason why it is logical or effectuates the purposes of [former] RCW 9.94A.170(3)² or [former] RCW 9.94A.120(9)(a)³ to require a sentencing court to reduce a criminal defendant's sentences if "the defendant happens to be sentenced at the same time to a longer sentence on a completely different crime." Acrey, 92 Wn.App. at 788 (quoting State v. Cameron, 71 Wn.App. 653, 655-56, 861 P.2d 1069 (1993))

Id. at 787-788. In other words, the term of confinement on Acrey's assault convictions had no impact on the question of whether the community custody imposed on the possession count exceeded the statutory maximum statutorily authorized for that offense. The Court of Appeals held that when examining whether a term of community custody exceeds the statutory maximum for a particular crime, the court should look only to the sentence of *that crime*, not to other sentences that may have been imposed simultaneously to be run concurrently. The plain language of RCW 9.94A.701(9), that states "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*" is consistent with and does not change the rule stated in Acrey. RCW 9.94A.701(9) (*emphasis added*). Nord's unlawful possession sentence of two years of confinement and 12 months of community custody was well

² Recodified as 9.94A.171(3).

³ Requiring a term of community custody for drug offenses.

within the five year statutory maximum for that offense. The provisions of the Sentencing Reform Act do not permit a community custody term to be reduced or stricken based on confinement imposed for a separate crime.

Subsequent to Acrey, our Supreme Court adopted a similar rationale in addressing an analogous issue pertaining to firearm enhancements. State v. Thomas, 150 Wn.2d 666, 674, 80 P.3d 168 (2003). Thomas held that the combined sentence for multiple charges is not capped by the statutory maximum of the most serious charge. In Thomas, the defendant was found guilty of two counts of robbery in the second degree, class B felonies, and one count of unlawful possession of a firearm in the second degree, a class C felony. Id. at 668-669. Thomas was sentenced to 120 months on each of his robbery convictions, 84 months plus a mandatory 36 month enhancement. Id. On the firearm possession count Thomas was sentenced to 60 months, the statutory maximum for that charge. Id. The base sentences for Thomas's convictions were run concurrently, but the firearm enhancements, pursuant to statute, ran consecutive to the longest concurrent base sentence and consecutive to each other. As such, the total period of confinement Thomas faced was 13 years. Id.

Thomas appealed his sentence and argued that the imposition of a firearm enhancement on the robbery charges exceeded the 10 year statutory maximum for those offenses. This Court ruled that it did not,

holding that the plain, unambiguous language of former RCW 9.94A.310(3)(g)⁶ required determining the statutory maximum for each crime individually. Id. at 671. Since each robbery count had a sentence of seven years plus three years for the enhancement, both sentences were within the statutory maximums permitted for each conviction despite the total period of confinement for the crimes together exceeding ten years. Id. at 673. Thomas based this holding on the fact that the language of former RCW 9.94A.310(3)(g) focuses on a single crime, using the term “the offense.” RCW 9.94A.701(9) applicable in this case also uses singular language, referring to “the crime.” The interpretation of the plain language referring to ‘the offense’ of the applicable statute in Thomas applies similarly here when analyzing RCW 9.94A.701(9).

As made clear by Boyd, Acrey, and the plain language of RCW 9.94A.701(9), courts must examine the sentence for each conviction separately to determine whether a sentencing court has exceeded the statutory maximum sentence authorized to be imposed. On the unlawful possession conviction, Nord was sentenced to two years confinement and 12 months community custody, clearly within the five year statutory maximum. Nord’s argument that the sentence on the conviction of unlawful delivery affects whether the unlawful possession sentence


⁶ Recodified as RCW 9.94A.533(3)(g)

exceeds the statutory maximum misinterprets applicable law. Combining the sentences of two different crimes to determine whether the sentence exceeds the statutory maximum is also contrary to the plain meaning of the statute.

The State respectfully asserts that the Court of Appeals misapprehended and misapplied the law in its Opinion by applying the sentence of one crime to the determination of whether the sentence of a separate crime exceeded the statutory maximum. RCW 9.94A.701(9) states clearly that the term of community custody shall be reduced when the “term of community custody exceeds the statutory maximum for *the* crime.” RCW 9.94A.701(9) (emphasis added). While this statute was not in effect at the time of the Acrey decision, the rule expressed in the statute, prohibiting sentences exceeding the statutory maximum, was in effect and the language used by the current applicable community custody statutory provisions remain consistent with the analysis in Acrey reaffirming the requirement that a sentencing court examine each sentence and each statutory maximum individually. Review is important to clarify the applicable rule and ensure that sentences across the State are imposed consistently predicated on applicable law. Mr. Nord’s sentence of two years confinement and one year of community custody does not exceed the statutory maximum for unlawful possession of a controlled substance.

As such, the State asks this Court to grant this motion for discretionary review.

Respectfully submitted this 8th day of May, 2019.



KELLEN B. KOISTRA WSBA#39288
Deputy Prosecutor
Whatcom County Prosecuting Attorney

APPENDIX

A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALAN JOHN NORD,

Appellant.

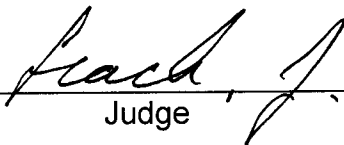
No. 77435-2-1

ORDER DENYING MOTION
FOR RECONSIDERATION

Respondent State of Washington, having filed a motion for reconsideration herein and appellant John Nord having filed a response thereto, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Judge

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
ALAN JOHN NORD,
Appellant.

No. 77435-2-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: January 22, 2019

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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LEACH, J. — Alan John Nord appeals his sentence for unlawful delivery of a controlled substance and unlawful possession of a controlled substance and challenges the court's imposition of a \$200 criminal filing fee. He claims that the sentencing court mistakenly believed it did not have discretion on remand to resentence him for the delivery conviction. He also asserts that his sentence for the unlawful possession conviction exceeds the statutory maximum sentence for that offense.

First, because this court in an earlier appeal provided the sentencing court specific instructions on remand, the sentencing court did not have discretion to resentence Nord. Second, under RCW 9.94A.701(9), a trial court may not impose a total term of confinement and community custody in excess of the statutory maximum. Nord's sentence for unlawful possession is unlawful

because the 12-month community custody term in addition to the 2-year term of confinement run concurrently with his 10-year sentence for unlawful delivery, which exceeds the 5-year statutory maximum for unlawful possession. And, consistent with State v. Ramirez,¹ because the lower court found Nord indigent, the criminal filing fee should be stricken. We remand to the trial court to strike the community custody term and the criminal filing fee.

BACKGROUND

This is Nord's third appeal to this court. In July 2013, a jury convicted Nord of unlawful delivery of a controlled substance (methamphetamine), unlawful possession of a controlled substance (methamphetamine), and attempting to elude a police vehicle. The maximum sentence is 10 years for unlawful delivery, 5 years for unlawful possession, and 5 years for attempting to elude.² The court sentenced Nord to 10 years for unlawful delivery, 2 years for unlawful possession, and 41 months for attempting to elude. It also imposed 12 months of community custody for unlawful delivery, 12 months of community custody for unlawful possession, and approximately \$3,000 in restitution.

Nord appealed to this court.³ This court affirmed the drug convictions but reversed the eluding conviction, vacated the restitution order, and remanded for resentencing.⁴ On remand, the sentencing court imposed 10 years for unlawful

¹ 191 Wn.2d 732, 426 P.3d 714 (2018).

² RCW 69.50.401(2)(b), .4013(1); RCW 46.61.024; RCW 9A.20.021(1)(b), (c).

³ State v. Nord, No. 70806-6-I, slip op. (Wash. Ct. App. Mar. 23, 2015) (unpublished), <http://www.courts.wa.gov/opinions/pdf/708066.pdf>.

⁴ Nord, No. 70806-6, slip op. at 16, 24.

delivery and 2 years for unlawful possession to run concurrently with one another, and 12 months of community custody for each conviction. The court noted on the judgment and sentence, "community custody to be imposed only if defendant is released from prison early so there is still time available to serve comm[unity] custody."

Nord appealed a second time.⁵ He claimed that 10 years of confinement and 12 months of community custody for his unlawful delivery conviction exceeded the statutory maximum term of confinement of 10 years for unlawful delivery.⁶ The State conceded error and that this case required remand "so that the judgement and sentence c[ould] be corrected by striking the 12-month community custody term and the notation provision."⁷ This court "accept[ed] the State's concession" and "remanded for proceedings consistent with this opinion."⁸

On remand, Nord's trial counsel asked that the court impose 12 months of community custody and 9 years as opposed to 10 years of confinement for the unlawful delivery conviction. The State asserted Nord should not receive a resentencing hearing because he appealed the specific imposition of the 12 months of community custody, and this court accepted the State's concession that the community custody provision and notation should be stricken. Nord's

⁵ State v. Nord, No. 74767-3-I, slip op. (Wash. Ct. App. June 19, 2017) (unpublished), <http://www.courts.wa.gov/opinions/pdf/747673.pdf>.

⁶ Nord, No. 74767-3, slip op. at 5.

⁷ Nord, No. 74767-3, slip op. at 5.

⁸ Nord, No. 74767-3, slip op. at 5, 6.

trial counsel responded that this court found the sentence imposed was unlawful so, on remand, the sentencing court maintained discretion to resentence Nord. The sentencing court signed the State's order striking the 12-month community custody term for the unlawful delivery conviction and the notation provision; it stated, "I believe I am to follow the mandate of the Court of Appeals." Nord appeals a third time.

ANALYSIS

Nord challenges his sentence on two grounds and his criminal filing fee. Each claim presents an issue of law that this court reviews de novo.⁹

Unlawful Delivery

First, Nord claims that the sentencing court mistakenly believed that this court's decision did not allow it discretion to resentence Nord on the unlawful delivery conviction. We disagree.

Trial courts "must strictly comply with directives from an appellate court which leave no discretion to the trial court."¹⁰ "The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate."¹¹ But when the appellate court remands "for further proceedings" or instructs the trial court to enter judgment "in any lawful manner consistent with [its] opinion," the trial court should "exercise its authority to decide any issue necessary to

⁹ Mains Farm Homeowners Ass'n v. Worthington, 121 Wn 2d 810, 813, 854 P.2d 1072 (1993).

¹⁰ State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006).

¹¹ State v Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

resolve the case on remand.”¹² When a trial court maintains discretion in sentencing a defendant, it “must meaningfully consider the [defendant’s] request in accordance with the applicable law.”¹³

Here, Nord claims that the sentencing court mistakenly believed that it did not have discretion to resentence him on remand. But this court did not remand with an instruction to enter judgment in any lawful manner consistent with our opinion. We “remanded for proceedings consistent with [our] opinion.”¹⁴ Our opinion states, “The State concedes that this matter should be remanded so that the judgment and sentence can be corrected by striking the 12-month community custody term and the notation provision regarding the unlawful delivery count. We accept the State’s concession.”¹⁵ This court mandated that the lower court strike the community custody term and notation provision only. This mandate limited the lower court’s discretion to resentence Nord. The sentencing court correctly understood that it did not have discretion to resentence Nord.

Alternatively, Nord contends that even presupposing no error, this court should remand for the lower court to reconsider its decision because this court did not provide the proper remedy in our previous decision. Nord asserts that when a total sentence exceeds the statutory maximum, the proper remedy is remand for correction either by amendment or resentencing. He relies on State

¹² Schwab, 134 Wn. App. at 645.

¹³ State v. McFarland, 189 Wn 2d 47, 56, 399 P.3d 1106 (2017).

¹⁴ Nord, No. 74767-3, slip op. at 6.

¹⁵ Nord, No. 74767-3, slip op. at 5 (citation omitted).

v. Boyd¹⁶ to support this proposition. There, our Supreme Court held that statute required the trial court to reduce Boyd's term of community custody to avoid a sentence in excess of the statutory maximum and remanded "to the trial court to either amend the community custody term or resentence Boyd."¹⁷ But Boyd does not require this remedy. This court had discretion to require a correction on remand consistent with the State's concession. Nord does not show error.

Unlawful Possession

Next, Nord claims that the sentence for his unlawful possession conviction exceeds the statutory maximum, which requires remand. We agree.

As a preliminary issue, the State contends that because the lower court did not exercise its independent judgment on remand, Nord cannot appeal this issue. The State cites State v. Kilgore¹⁸ to support the proposition that when a sentencing court does not exercise its independent judgment on remand, no appealable issues remain. In Kilgore, Division Two of this court affirmed some of Kilgore's convictions and reversed and remanded others for retrial.¹⁹ The State chose not to retry the reversed convictions.²⁰ Kilgore then challenged the sentences for the convictions that Division Two had upheld on appeal.²¹ Our Supreme Court held that Kilgore could not appeal those sentences because the trial court made no discretionary ruling on remand and had not conducted a

¹⁶ 174 Wn.2d 470, 275 P.3d 321 (2012).

¹⁷ Boyd, 174 Wn.2d at 473.

¹⁸ 167 Wn.2d 28, 216 P.3d 393 (2009).

¹⁹ Kilgore, 167 Wn.2d at 32.

²⁰ Kilgore, 167 Wn.2d at 32.

²¹ Kilgore, 167 Wn.2d at 32-33.

resentencing hearing.²² The court stated, "Our rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue. We will not waive this rule to make exceptions for defendants where a mere possibility of direct review exists."²³ Thus, without some discretionary decision by the lower court, Kilgore could not raise new issues that he had failed to raise on direct appeal.²⁴

This reasoning applies here. Consistent with our ruling stated above, this court's mandate to the lower court to strike only the community custody term and notation provision prevented the lower court from exercising discretion on remand. Consistent with Kilgore, normally we would decline to review Nord's claim. But in accordance with our Supreme Court's pronouncement in State v. McFarland,²⁵ an appellate court has authority "to address arguments belatedly raised when necessary to produce a just resolution. Proportionality and consistency in sentencing are central values of the SRA,^[26] and courts should afford relief when it serves these values " Consistent with this instruction and in the interest of judicial economy, we review the merits of Nord's claim.

Nord notes that because the trial court required that his 10-year term for unlawful delivery and his 2-year term for unlawful possession run concurrently,

²² Kilgore, 167 Wn.2d at 43.

²³ Kilgore, 167 Wn.2d at 43.

²⁴ Kilgore, 167 Wn.2d at 43-44.

²⁵ 189 Wn.2d 47, 57, 399 P.3d 1106 (2017) (citing RAP 2.5(a) and stating "appellate courts may entertain issues raised for the first time on appeal in the interest of justice").

²⁶ Sentencing Reform Act of 1981, ch. 9.94A RCW.

by the time he is released from the unlawful delivery sentence, more than the 5-year maximum for unlawful possession will have elapsed. So, an additional 12-month community custody term exceeds the 5-year statutory maximum for unlawful possession. Nord again relies on Boyd, in which our Supreme Court held, consistent with RCW 9.94A.701(9), that a trial court may not impose a total term of confinement and community custody in excess of the statutory maximum.²⁷

The State responds that a 2-year term of confinement and 12-month community custody term does not exceed the 5-year maximum for unlawful possession because RCW 9.94A.171 tolls a defendant's community custody while he is in confinement. The State relies on State v. Jones,²⁸ in which our Supreme Court held that credit cannot be granted toward a defendant's community custody sentence for a defendant's confinement in excess of his sentence because a defendant must serve his term of community custody in the community. The court noted that Jones's judgment and sentence did not exceed the statutory maximum of life in prison for his offense.²⁹ Because Jones does not involve a sentence in excess of the statutory maximum, it does not apply here.

²⁷ Boyd, 174 Wn.2d at 473; see also In re Pers. Restraint of Johnson, No. 50461-8-II, slip op. (Wash. Ct. App. Dec. 5, 2017) (unpublished), <http://www.courts.wa.gov/opinions/pdf/504618.pdf> (holding Johnson's judgment and sentence was facially invalid because he could serve a punishment greater than the statutory maximum as a result of his concurrent sentences and his community custody term).

²⁸ 172 Wn.2d 236, 245-46, 257 P.3d 616 (2011).

²⁹ Jones, 172 Wn.2d at 240.

Consistent with Nord's argument, because his 10-year total term of confinement in addition to the 12-month community custody term exceed the 5-year maximum sentence for unlawful possession, his judgment and sentence is unlawful. This requires remand.

Criminal Filing Fee

Nord asks that this court strike his \$200 criminal filing fee from his judgment and sentence as required by our Supreme Court's recent holding in State v. Ramirez.³⁰ There, our Supreme Court discussed and applied House Bill (HB) 1783, which became effective June 7, 2018, and applies prospectively to all cases on direct appeal.³¹ Our Supreme Court explained that HB 1783 categorically prohibits the imposition of discretionary legal financial obligations on indigent defendants.³² In addition, it amended the criminal filing fee statute³³ to prohibit a court from imposing this otherwise mandatory fee on indigent defendants.³⁴

The trial court found Nord indigent and ordered him to pay the \$200 filing fee. The State agrees that the change in the law applies to Nord's case because it is on direct appeal and not final. We direct the trial court to strike the \$200 criminal filing fee from Nord's judgment and sentence.

³⁰ 191 Wn.2d 732, 426 P.3d 714 (2018).

³¹ Ramirez, 191 Wn.2d at 738, 747; LAWS OF 2018, ch. 269.

³² Ramirez, 191 Wn.2d at 739.

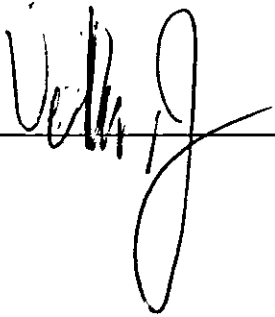
³³ RCW 36.18.020.

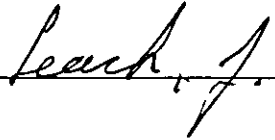
³⁴ Ramirez, 191 Wn.2d at 739; RCW 36.18.020(2)(a), (h).

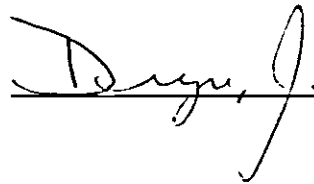
CONCLUSION

We remand to the trial court to strike the community custody term and the criminal filing fee.

WE CONCUR:







WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

May 08, 2019 - 4:26 PM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Number: Case Initiation
Appellate Court Case Title: State of Washington, Respondent v. Alan John Nord, Appellant (774352)

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Bellingham, WA, 98225
Phone: (360) 778-5755

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