

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALAN JOHN NORD,

Appellant.

No. 77435-2-I

DIVISION ONE

UNPUBLISHED OPINION

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WA State Court
Court of Appeals
Division One
January 22, 2019
Case No. 77435-2-I

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.

Leach, J.

WE CONCUR:

Wells, J.

Drey, J.