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NO. 63363-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JIMMY BIZZELL,

Appellant.

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2009 SEP 30 PM 4:52

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

In early 2005, the court sentenced Jimmy Bizzell for two offenses, imposing concurrent prison terms of 57 months and 60 months, respectively, and a single term of community custody for one of the offenses, a class C felony. Two years later, the court amended Bizzell's sentence to reduce the community custody, because the sentence exceeded the 60-month statutory maximum.

Then, on March 25, 2009, the day before the 60-month maximum for the class C felony expired and while Bizzell anxiously awaited his release from custody, the court amended the sentence to add an entirely new term of community custody for the second offense for which Bizzell had been sentenced in 2005. Based on this newly added term of community custody, Bizzell remained in prison for a violation of community custody conditions that had occurred before the new term of community custody was ordered.

The court lacked authority to add a new term of community custody to the sentence five years after the original sentencing; the prosecution had "slept on its rights" and remained mute during numerous opportunities it had to ask the court to amend the sentence; and the Department of Corrections had no authority to ask the court to alter the punishment at this late date. The added

term of community custody was unfair and contrary to the principles of finality and due process of law.

B. ASSIGNMENTS OF ERROR.

1. The court lacked authority to impose a new term of community custody five years after it imposed its sentence.

2. The Department of Corrections (DOC) lacked authority to seek a sentencing amendment five years after the court imposed its sentence.

3. The extremely belated nature of the added penalty violated the principle of finality and denied Bizzell the fundamental fairness required by the constitutional right to due process of law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

The trial court, prosecution, and DOC lack authority to alter sentences without express permission in a statute or court rule.

Here, the court amended Bizzell's sentence years after the time to appeal or seek a sentencing modification had expired. Principles of finality and due process prohibit the court from imposing new punishment long after the time to alter a sentence has expired.

The court's improper imposition of a new term of community custody five years after sentencing was unauthorized and unfair and should be stricken.

D. STATEMENT OF THE CASE.

On January 21, 2005, the trial court sentenced Jimmy Bizzell for one count of second degree assault and one count of third degree rape. CP 9-20. The court imposed standard range concurrent sentences of 57 months for the assault and 60 months for the rape. CP 12. It also ordered Bizzell serve 36 to 48 months of community custody for a “sex offense.” CP 12. It did not impose community custody for assault, or a “violent offense.” Id.

On November 29, 2007, the court amended Bizzell’s sentence, after the Court of Appeals found the 60-month sentence for third degree rape, combined with 18 to 36 months of community custody, exceeded the 60-month statutory maximum. CP 60-61 (order amending judgment and sentence); CP 57-58 (Court of Appeals decision); RCW 9A.20.021. The trial court signed an order drafted by the prosecutor that said, “Under no circumstances shall the length of the defendant’s confinement plus the length of community custody exceed 60 months.” CP 60.

On January 20, 2009, the court entered an order stating that the court “will not have jurisdiction” over Bizzell for “this matter” after he served 60 months in custody, specifically ruling its

jurisdiction ended, “five years from the date of arrest which was March 26, 2009.” CP 62.

But on March 25, 2009, Bizzell was brought back to court and the prosecutor asked the judge to impose a new term of community custody. 3/25/09RP 2-3. The prosecutor argued that that original Judgment and Sentence should have included 18 to 36 months of community custody for second degree assault, and since the statutory maximum for a class B felony is 120 months, the court still had time to add this punishment to Bizzell’s sentence. The prosecutor offered no excuse or explanation for failing to ask the court to impose community custody for the assault conviction at an earlier date. The court found it had no choice but to impose the community custody because it was a mandatory sentencing requirement, and therefore it added another 18 to 36 months of community custody to Bizzell’s sentence more than four years after it originally imposed its sentence. 3/25/09RP 7, 10.

Because Bizzell was in custody for community custody violations at the time of this hearing to amend the sentence, the prosecutor further argued that Bizzell could remain in jail for his violations under this new term of community custody, even though this term of community custody had not been imposed when the

underlying violations occurred. 3/25/09RP 5-6. The prosecutor explained that additional prison time was “still available” for the assault conviction because the statutory maximum had not expired, even though this community custody had not existed until now and without regard to the fact that Bizzell had already served the entirety of the 57-month sentence imposed on the assault conviction. Id.; CP 12.

Bizzell timely appeals.

E. ARGUMENT.

THE COURT LACKED AUTHORITY TO IMPOSE A  
NEW TERM OF COMMUNITY CUSTODY MORE  
THAN FOUR YEARS AFTER SENTENCING AND  
ON THE DATE BIZZELL WAS DUE TO BE  
RELEASED

1. The Judgment and Sentence explicitly limited the term of community custody. On January 24, 2005, the court sentenced Bizzell for one count of second degree assault and one count of third degree rape. CP 9. In addition to a prison term, the court imposed community custody as follows:

COMMUNITY CUSTODY . . . is ordered for the following established range:  
 Sex Offense, RCW 9.94A.030(38) – 36 to 48 months

CP 11. The court did not check any other boxes or order additional community custody for any other offenses. Indeed, the court later said, "it is clear" that at the time of sentencing, no community custody was imposed for second degree assault. 3/25/09RP 10-11.

The court revisited Bizzell's sentence in 2007, after the Court of Appeals found that the originally imposed sentence for third degree rape, consisting of 60 months incarceration as well as 36 to 48 months of community custody, exceeded the 60-month statutory maximum for this Class C felony.

In 2007, the trial court entered an "order amending judgment and sentence." CP 60-61. This order provided that Bizzell could not be confined beyond the statutory maximum sentence permitted by law and specifically ruled:

Under no circumstances shall the length of the defendant's confinement plus the length of community custody exceed 60 months.

CP 60. At no time did anyone ask the court to impose additional community custody for second degree assault.

On January 20, 2009, the court entered another order regarding its jurisdiction over Bizzell. This order provided:

It is hereby ordered that the court will not have jurisdiction over this matter after 5 years from the date of arrest which was March 26, 2004.

CP 62.

Then, on March 25, 2009, five years after Bizzell's arrest and the inception of the state's custody over him for the instant charges, the court entered another order undermining and disregarding its prior orders. The March 25, 2009, order stated:

The Judgment and Sentence is amended to include community custody of 18 to 36 [sic] section 4.4 of the Judgment and Sentence dated Jan. 21, 2005.

CP 63. At the time the court amended the 2005 judgment and sentence to add a new term of community custody in 2009, Bizzell was in custody having been found in violation of the terms of the previously ordered community custody. 3/25/09RP 4-6, 10. Based on the newly imposed 2009 community custody, DOC kept Bizzell in prison for "violations" of community custody terms that occurred prior to the imposition of community custody for second degree assault.

2. The court lacked authority to amend the Judgment and Sentence four years after imposing the sentence and two years after amending it. After final judgment and sentencing, the court loses jurisdiction to the DOC. January v. Porter, 75 Wn.2d 768,

773, 453 P.2d 876 (1969) (“Upon the entry of a final judgment and sentence of imprisonment, legal authority over the accused passes by operation of law to the [prison].”). A sentencing court has discretion in sentencing only where the Sentencing Reform Act (SRA) so authorizes. State v. Shove, 113 Wn.2d 83, 89 n.3, 776 P.2d 132 (1989).

An SRA sentence may be modified by the trial court only if the modification meets the requirements of the SRA provisions relating directly to the modification of sentences. Shove, 113 Wn.2d at 88-89. This pronouncement leaves no room for inherent authority to be exercised by the sentencing court. Id. at 88. Modification of a judgment is not appropriate merely because it appears in retrospect that a different decision might have been preferable, or merely because it appears, with hindsight, that the original sentence was inappropriate.

The trial court is barred from modifying the judgment and sentence following sentencing except in a very limited number of circumstances not present here. State v. Harkness, 145 Wn.App. 678, 685-86, 186 P.3d 1182 (2008). In Harkness, the defendant pleaded guilty and received a standard range sentence. Before he began serving the sentence, the defendant moved the court to

impose a Drug Offender Sentencing Alternative (DOSA) instead of the standard range sentence. Harkness, 145 Wn.App. at 681-82. Over the State's objection, the trial court amended the judgment and sentence and imposed a DOSA. Id. The State appealed, arguing among other things, the trial court lacked authority to modify or amend the judgment and sentence after sentencing. Id. at 684-85. This Court agreed, citing the decisions in January and Shove, for the proposition that the trial court is divested of any inherent authority to change the judgment and sentence after sentencing. Harkness, 145 Wn.App. at 686.

Here the judgment and sentence was final years earlier. The prosecution did not appeal from the sentence imposed or ask to amend it in a timely fashion. See RAP 2.2(b)(6) (giving prosecution right to appeal sentencing error); RAP 5.2 (allotting 30 days for objecting party to file notice of appeal). Even when the State had the opportunity to amend the sentence in 2007, it never asked for community custody based on the assault until after Bizzell had served the entirety of the 57-month sentence imposed for the assault. CP 12; 3/25/09RP 3-4.

One of the reasons the court imposes community custody at the time of sentencing is so the court properly considers all

punishment the offender will receive at that time, because the court's decision to impose a prison sentence of a certain length may be affected by the other punitive measures being imposed such as community custody. State v. Broadaway, 133 Wn.2d 118, 135, 942 P.2d 363 (1997). Timely imposition of community custody also serves the interest of allowing a defendant to appeal an incorrect term of community custody before serving that incorrect term. Id.

The trial court lacked authority to "correct" or modify the judgment and sentence to impose an additional 18 to 36 months of community custody years after sentencing Bizzell, following his completion of the sentence imposed, and it should not have altered his sentence at such a late date.

3. DOC lacked authority to ask the court to modify the Judgment and Sentence years after the sentence's imposition. DOC lacks authority to change the terms of a judgment and sentence even if the judgment and sentence is incorrect. See Broadaway, 133 Wn.2d at 135 (DOC is not authorized to change the terms of an erroneous judgment and sentence); In re Personal Restraint of Davis, 67 Wn.App. 1, 8-10, 834 P.2d 92 (1992) (DOC

is bound by terms of erroneous judgment and sentence unless and until judgment and sentence amended by court).

DOC has a specific, statutorily-authorized remedy to correct what it believes to be an incorrect judgment and sentence. RCW

9.94A.585(7) provides:

The department may petition for a review of a sentence committing an offender to the custody or jurisdiction of the department. The review shall be limited to errors of law. Such petition shall be filed with the court of appeals no later than ninety days after the department has actual knowledge of terms of the sentence. The petition shall include a certification by the department that all reasonable efforts to resolve the dispute at the superior court level have been exhausted.

In addition, RAP 16.18 provides:

(a) Generally. The Department of Corrections may petition the Court of Appeals for review of a sentence committing an offender to the custody or jurisdiction of the Department of Corrections. The review shall be limited to errors of law.

(b) Filing. The petition should be filed no later than 90 days after the Department of Corrections has received the documents containing the terms of the sentence. The petition should be filed in the division that includes the superior court entering the decision under review.

Thus, DOC was required to ask to correct an error in the Judgment and Sentence within 90 days of when it received the sentencing information and by the specific procedure authorized. It

was incumbent upon DOC to petition either the trial court or this Court and seek remand for resentencing to correct the error. But the Department chose neither path. Thus, DOC could not ask the court to amend the Judgment and Sentence in 2009.

Here, no party filed a written request to amend the Judgment and Sentence or explained what legal authority the court had to add punishment at this late date. The motion for resentencing was certainly initiated by DOC, as they were the only entity closely supervising Bizzell at the time and they were the party presently punishing him for violating conditions of community custody. Thus, it appears that DOC belatedly realized Bizzell was due to be released and intentionally circumvented the rules barring it from bringing a late motion to correct a Judgment and Sentence by remaining mute while the prosecutor made the oral request in court. Indeed, in response to Bizzell's currently pending personal restraint petition docketed as COA 63335-0-I, DOC attached "chrono notes" that show several requests from DOC to the trial prosecutor asking how it could extend the court's jurisdiction over Bizzell for a longer period of time. COA 63335-0-I; Response of Department of Corrections, Ex. 2, Attachment B, pages 7 & 12.

4. Adding community custody years after sentencing and confining Bizzell for “violations” that occurred before the term of community custody was imposed offends the principles of finality and fundamental fairness. Even if Bizzell’s sentence was been incorrect when initially imposed and should have included community custody for the assault conviction, the prosecution and DOC had several specific opportunities to ask the court to change its terms. DOC statutorily required to review and complain about sentencing errors within the first 90 days of receiving notice of a sentence. Also, the court resentenced Bizzell’s sentence in 2007, altering the community custody portion of his sentence. At that time, the prosecutor drafted and asked the court to sign an order clearly limiting Bizzell’s sentence to 60 months, without any mention of any additional community custody term. CP 60-61; 11/29/2007RP 4. Again on January 20, 2009, the court signed an order explicitly saying that Bizzell’s sentence would not exceed 60 months. CP 62. Yet two months later and without any explanation for the delay, the prosecutor told the court to impose a new term of community custody that had never been ordered previously. 3/25/09RP 2. The court felt it had no discretion; because the statute required community custody, the court ruled that it must

impose such community custody notwithstanding the unexplained and excessive delay in noticing the sentencing omission and the lack of clear authority permitting the court to amend the sentence so many years later. Id. at 7, 10.

Bizzell did not set up this error and no one has accused him of malfeasance. He had not hidden his criminal history from the court. Rather, he believed the Judgment and Sentence must mean what it says on its face and is entitled to some certainty in the punishment being imposed. He cannot be faulted for the delay or required to pay a penalty.

The principle of the finality of a judgment is accorded great weight in Washington, especially when the parties have had an opportunity for judicial review. See In re Cook, 114 Wn.2d 802, 809-12, 792 P.2d 506 (1990). The “finality of judgments is an important value of the legal system.” Suburban Janitorial Services v. ClarkeAmerican, 72 Wn.App. 302, 313, 863 P.2d 1377 (1993).

Here, Bizzell brought the accuracy of his sentence to the notice of the court and prosecution on several occasions. He filed a direct appeal challenging his restitution, a personal restraint petition challenging the calculation of his offender score, and a second personal restraint petition challenging the sentence for third

degree rape as exceeding the statutory maximum. He brought a further motion in the trial court for a precise declaration of the date the court's jurisdiction expired, and the court specifically ruled that its jurisdiction ended when five years elapsed from the date of Bizzell's arrest in the instant matter.

It is not only unauthorized but also unfair to impose a term of community custody after Bizzell had served the entire 57-month prison term for second degree assault and a mere hours before the court's jurisdiction over Bizzell was to expire. Even if the prosecution could ask to amend a sentence so many years later without explanation for the delay, here the prosecution slept on its rights by completely neglecting the availability of another term of community custody when the court reviewed his sentence several times. Fundamental fairness is the "touchstone of due process." Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). A party may be equitably estopped from bringing a claim when it had the opportunity to raise the claim earlier and reasonably should have done so. See Peterson v. Groves, 111 Wn.App. 306, 315, 44 P.3d 894 (2002). Here, where the prosecution, court, and DOC could and should have brought any request to add a new term of community custody years before

when it had the chance to review the sentence, principles of equity should bar the belated imposition of punitive sanctions. Ordering an entirely new term of community custody on the date of court's jurisdiction expired over a person violates widely held notions of fair play and the traditional priority placed upon advance notice of punishment that underlie the system of justice.

F. CONCLUSION.

For the reasons stated above, Mr. Bizzell respectfully asks this Court to strike the improperly ordered term of community custody.

DATED this 29<sup>th</sup> day of September 2009.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63363-5-I
v.	)	
	)	
JIMMY BIZZELL,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JIMMY BIZZELL 19421 SE 246 <sup>TH</sup> ST COVINGTON, WA 98043	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2009.

X \_\_\_\_\_ 

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