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REC'D

OCT 21 2009

King County Prosecutor
Appellate Unit

NO. 63549-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MAURICIO SOTO,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT 21 PM 4:00

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

The Honorable Deborah D. Fleck, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in sentencing appellant to an ambiguous term of community placement.

Issue Pertaining to Assignment of Error

Is appellant's term of community placement insufficiently precise when page three of the judgment and sentence states the term is 24 months or up to the period of earned release and Appendix H states the term is three years or up to the period of earned release?

B. STATEMENT OF THE CASE

Appellant Mauricio Soto pled guilty to one count of first-degree assault committed February 6, 2000. CP 6. On July 24, 2000, he was sentenced to 93 months confinement followed by community placement. CP 8. Page three of the judgment and sentence states, "defendant must serve community placement of 24 months or up to period of earned early release, whichever is longer." CP 8. The box is checked that "Appendix H (for additional non-mandatory conditions) is attached and incorporated herein." CP 8. Appendix H states, "Defendant additionally is sentenced . . . to community placement/custody for three years or up to the period of earned release. . . whichever is longer." CP 12.

Soto was released and began his community placement on May 21, 2007. 1RP 19. On June 5, 2009, the court ordered Soto to serve 480 days

in jail as a sanction for 11 violations of his community placement conditions between October, 2008 and April, 2009. CP 30-31. Notice of appeal was timely filed. CP 40.

C. ARGUMENT

THE COURT'S IMPOSITION OF AN AMBIGUOUS TERM OF COMMUNITY PLACEMENT REQUIRES REMAND.

A sentence must be “definite and certain.” State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (quoting Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). It has long been the rule that ambiguous sentences, like other erroneous sentences, are unenforceable. See Davis v. Catron, 22 Wash. 183, 184-86, 60 P. 131 (1900) (two judgments for the same offense with two different sentences renders the sentence void for uncertainty); see also, State v. Whidden, 144 Wash. 511, 512, 258 Pac. 318 (1927) (defendant entitled to have unspecified maximum sentence corrected on appeal).

Erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Although the State may argue the error is not preserved without an objection below, Washington's Supreme Court and this Court have imposed no such requirement. See State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363, 373 (1997); State v. Jones, 93 Wn. App. 14, 17-19, 968 P.2d 2 (1998).

When the community placement provision of the judgment and sentence conflicts with language in the Appendix H form attached to the judgment and sentence, the proper course is remand for resentencing. Jones, 93 Wn. App. at 15-16; Broadaway, 133 Wn.2d at 136. Because the court used conflicting language to impose Soto's term of community placement, this Court should remand for imposition of the precise term.

By statute, the court was required to sentence Broadaway to a one-year period of community placement. Although the court incorrectly stated at sentencing that two years were required, the judgment and sentence stated, "Community placement is ordered for a community placement eligible offense . . . for the period of time provided by law." Broadaway, at 135. Because the sentence did not provide for the statutory one-year term of community placement, remand was required. Broadaway, at 135-36.

In support of remand, the court stated:

In addition to its statutory obligation the trial court should expressly provide in the sentence for the precise term of community placement because in many cases it will assist a trial court in assessing the overall sentence for the defendant, for example whether to impose a sentence within the standard range. It will also allow a defendant to appeal an erroneous sentence of community placement before serving the term of incarceration. This is significant because the Department of Corrections is not authorized to correct an erroneous judgment and sentence.

Broadaway, 133 Wn.2d at 135-36 (citations omitted).

Like Broadaway, Soto appeals to correct an uncertain term of community placement. Page three of Soto's judgment and sentence states his term of community placement is "24 months or up to period of earned early release, whichever is longer." CP 8. By contrast, Appendix H orders community placement for "three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer." CP 12. Like Broadaway's, Soto's judgment and sentence does not tell the defendant or the Department of Corrections which period is correct. As a result, Soto's sentence is neither definite nor certain and should be remanded for correction. See, e.g., Broadaway, 133 Wn.2d at 135-36; State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand to correct scrivener's error referring to wrong statute on judgment and sentence form).¹

The correct term of community placement for Soto is 24 months. CP 6; RCW 9.94A.120(9)(b) (1999); State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

When a court sentences a person to a term of total confinement to the custody of the department of corrections for . . . a serious violent offense, vehicular homicide, or vehicular assault committed on or after July 1, 1990, but before July 1, 2000, the court shall in addition to other terms

¹ Undersigned counsel is aware of this Court's discussion in State v. Rowland, 97 Wn. App. 301, 305-06, 983 P.2d 696 (1999), and intends no disrespect by raising this matter on appeal. However, counsel was appointed to represent appellant in this Court, not the trial court, and is obliged to raise all potentially meritorious issues.

of the sentence, sentence the offender to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer.

RCW 9.94A.120(9)(b) (1999). The error may have occurred because changes to the Sentencing Reform Act became effective July 21, 2000. However, as his crime was committed in February of 2000, the changes do not apply to him. Varga, 151 Wn.2d at 191.

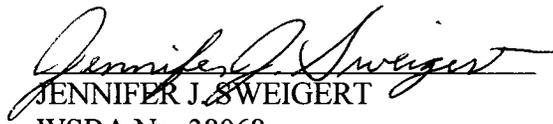
D. CONCLUSION

For the foregoing reasons, Soto respectfully requests this court remand for correction of his judgment and sentence.

DATED this 21st day of October, 2009.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63549-2-1
)	
MAURICIO SOTO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAURICIO SOTO
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KING COUNTY CORRECTIONAL FACILITY
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SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*