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COA NO. 65215-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES O. WIGGIN,

Appellant.

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

The Honorable Gerald L. Knight, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information was defective because it omitted an essential element of the crime. CP 36.

2. The court erred in imposing an unlawful term of community custody.

3. Legislation retroactively applied to appellant to increase the community custody term violated the ex post facto clauses of the United States Constitution and Washington Constitution.

4. The trial court violated appellant's constitutional right to due process by imposing a term of community custody unauthorized by statute.

5. Appellant received ineffective assistance of counsel at sentencing.

Issues Pertaining to Assignments Of Error

1. A charging document must properly notify a defendant of the charges against him by including the essential elements of the crime. Is reversal required because the information failed to allege the reporting deadline for the crime of failure to register?

2. The court imposed 36 months of community custody. By law, appellant was subject to only 12 months of community custody at the time he committed his offense. Does the imposition of 36 months of

community custody violate the constitutional prohibition against ex post facto laws? In the alternative, did the trial court violate appellant's due process rights in imposing 36 months of community custody? In further alternative, was defense counsel ineffective in agreeing to the increased term of community custody?

B. STATEMENT OF THE CASE

The State charged James Wiggin with the crime of failing to register as a sex offender, initially alleging he "did, on or about the week of April 7, 2009 through July 14, 2009, knowingly fail to report in person to the county sheriff's office" after having registered as lacking a fixed residence. CP 40. The State later amended the information upon realizing Wiggin was incarcerated for the latter portion of that charging period. CP 36; 5RP 2, 36-37, 41. The amended information alleged Wiggin "did, on or about the week of April 7, 2009 through May 30, 2009, knowingly fail to report in person to the county sheriff's office" after having registered as lacking a fixed residence. CP 36.

The trial court concluded Wiggin was guilty following a bench trial. CP 1-2. In support, the court found the following facts:

The defendant registered with the Snohomish County Sheriff's Office as having no fixed address on March 31, 2009. As a result he was required to return to the Snohomish County Sheriff's Office every Tuesday to account for his whereabouts. He did not return to the

Sheriff's Office the following Tuesday or any Tuesday through May 30, 2010.

CP 1.

The offense was unranked and therefore subject to a standard range of zero to 12 months of confinement. 5RP 43. The court sentenced Wiggin as a first time registration offender to 30 days confinement. CP 22.

At the sentencing hearing, the prosecutor expressed his belief that the law currently required 36 months of community custody, although pending legislation could change that requirement. 5RP¹ 43. Defense counsel agreed, stating "at this point the Court does not have discretion to give him only 12 months." 5RP 47. The court imposed 36 months of community custody with a number of specified conditions. CP 23-24; 5RP 47. This appeal follows. CP 4-18.

C. ARGUMENT

1. THE REPORTING DEADLINE IS AN ESSENTIAL ELEMENT OF THE CRIME OF FAILURE TO REGISTER AND THE INFORMATION IS DEFECTIVE IN FAILING TO INCLUDE IT.

Wiggin's conviction for failure to register as a sex offender must be reversed because the charging document does not set forth the reporting deadline, which is an essential element of the crime.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 2/4/10; 2RP - 3/5/10; 3RP - 3/8/10; 4RP - 3/19/10; 5RP - 3/22/10.

The State charged Wiggin by amended information with the offense of failure to register as follows:

That the defendant, having been convicted on or about the 19th day of March, 1998, of a sex offense or kidnapping offense, to wit: First Degree Rape of a Child, being required to register pursuant to RCW 9A.44.130, and having registered as not having a fixed residence did, on or about the week of April 7, 2009 through May 30, 2009, knowingly fail to report in person to the county sheriff's office; proscribed by RCW 9A.44.130, a felony[.]

CP 36.²

A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the established "essential elements" rule is to apprise the defendant of the charges against him and allow preparation of a defense. Id.

When Wiggin must report is an essential element of the crime. Former RCW 9A.44.130 (11)(a) provides in relevant part "A person who knowingly fails to register or who moves within the state without

² The original information contains the same language except for a longer charging period. CP 40.

notifying the county sheriff *as required by this section* is guilty of a class C felony."³ (emphasis added).

RCW 9A.44.130(4)(b) states "Failure to register within the time required under this section constitutes a per se violation of this section and is punishable as provided in subsection (11) of this section."

Wiggin was convicted of violating RCW 9A.44.130(6)(b), which provides: "A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours."

Under the statute, a person cannot be convicted for failing to report to the county sheriff during some unspecified period of time. The statute sets forth specific timeliness requirements that must be complied with in order to avoid conviction.

"An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). The failure to comply with the reporting deadline is necessary to establish the very illegality of the

³ Laws of 2006 ch. 129 § 2 (effective Sept. 1, 2006). All statutory references to RCW 9A.44.130 are to the version in effect as of the time of the offense.

registration offense. The failure to report weekly on a day specified by the county sheriff's office is therefore an essential element of the crime that needed to be set forth in the charging document.

In concluding the deadlines in the failure to register statute are not alternative means, the Court of Appeals in State v. Peterson also concluded they are not elements of the crime. State v. Peterson, 145 Wn. App. 672, 678, 186 P.3d 1179 (2008). The Supreme Court, however, did not follow the Court of Appeals' analysis. State v. Peterson, 168 Wn.2d 763, 771, 772, 230 P.3d 588 (2010). The Supreme Court recognized the alternative means question and the elements question are different and should be analyzed separately. Id. at 771.

The Court noted "[c]ommon sense suggests the statutory deadline is part of the State's burden of proof." Id. at 771 n.7 (not deciding question but noting it would be insufficient for the State to prove failure to register within 24 hours of relocating when the statutory deadline is 72 hours); cf. State v. Castillo, 144 Wn. App. 584, 588, 183 P.3d 355 (2008) (in deciding sufficiency of evidence issue, "State must show that Mr. Castillo (1) changed his residence on or after August 8, 2006, (2) knowingly failed to provide written notice of the change of his address to the Yakima County sheriff's department within 72 hours of moving, and

(3) had previously been convicted of a sex offense that required registration.").

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." Peterson, 168 Wn.2d at 772 (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (quoting Black's Law Dictionary 559 (8th ed. 2004))).

To sustain Wiggin's conviction, the court found, and needed to find, that Wiggin "was required to return to the Snohomish County Sheriff's Office every Tuesday to account for his whereabouts. He did not return to the Sheriff's Office the following Tuesday or any Tuesday through May 30, 2010." CP 1. The charging document omits an essential element of the crime in failing to include the requirement that Wiggin report to the Snohomish County Sherriff's Office every Tuesday.

Statutes will not be construed in a way that leads to unlikely, absurd, or strained results. State v. Ammons, 136 Wn.2d 453, 457, 963 P.2d 812 (1998). One of the things required by the statute is that those obligated to register must do so within a certain deadline and that the failure to do so constitutes a per se violation. RCW 9A.44.130(4)(b) and (6)(b).

Absurd results follow if the reporting deadline is not an element of the crime. For example, an offender could report at some point *after* the specified weekly day for reporting and still not be guilty of a punishable offense, in contradiction to statutory mandate. Conversely, an offender could report any day *before* the specified weekly reporting date, fail to report on the specified day, and still not be guilty of an offense because he reported to the sheriff at some earlier point in time. Such senseless results flow from the premise that the failure to comply with the reporting deadline is not an essential element of the crime.

Absurd results follow in related contexts if the deadline is not an element of the crime. RCW 9A.44.130(5)(a), for example, requires notification of a county sheriff within 72 hours of moving. A person could fail to notify the sheriff within 24 hours of moving and yet still be found guilty of failing to register if the 72 hour deadline is not an essential element of the crime. See Peterson, 168 Wn.2d at 771 n.7 (it would be insufficient for the State to prove failure to register within 24 hours of relocating when the statutory deadline is 72 hours).

Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show

that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

The information did not allege Wiggin failed to register on a weekly basis on the day specified by the county sheriff. CP 36. The information is deficient because it lacks the reporting deadline, which is an element of the crime.

A charging document need not include the exact words of a statutory element; words conveying the same meaning and import are sufficient. Kjorsvik, 117 Wn.2d at 108. The charging document at issue here contains no words conveying the deadline element of the crime.

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of when Wiggin must report is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Wiggin's conviction. McCarty, 140 Wn.2d at 425.

2. THE 36 MONTH TERM OF COMMUNITY CUSTODY TERM IS UNLAWFUL.

The trial court erred in imposing a standard range community custody term of 36 months. CP 23. Imposition of a 36 month term of community custody violates the constitutional prohibition against ex post facto laws or, in the alternative, Wiggin's right to constitutional due process.

a. The Statutory Law In Effect When The Offense Occurred Specifies No More Than 12 Months Of Community Custody.

The offense took place between April 7, 2009 and May 30, 2009. CP 19, 36. Sentencing took place on March 22, 2010. 5RP. The court imposed 36 months of community custody under RCW 9.94A.505 and RCW 9.94A.702. CP 23.

Former 9.94A.505(2)(b) (Laws of 2006 c 73 § 6, eff. July 1, 2007), in effect when Wiggin committed the offense, provides:

If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; until July 1, 2000, a term of community supervision not to exceed one year and on and after July 1, 2000, a term of community custody not to exceed one year, subject to conditions and sanctions as authorized in RCW 9.94A.710 (2) and (3); and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement if the court finds reasons justifying an exceptional sentence as provided in RCW 9.94A.535.

(emphasis added).

A standard range sentence has not been established for the first time offense of failure to register. See RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (only a second or subsequent violation of the registration statute carries a seriousness level).

A first time violation of the registration statute is not found on the sentencing grid and is therefore considered an unranked felony. In re Pers. Restraint of Acron, 122 Wn. App. 886, 887-88, 95 P.3d 1272 (2004). Unranked felonies are subject to the sentencing provisions of RCW 9.94A.505(2)(b). Acron, 122 Wn. App. at 890, 895. Former RCW 9.94A.505(2)(b), in effect when Wiggin committed the offense, unambiguously authorizes only 12 months of community custody.

The Legislature subsequently enacted various changes to RCW 9.94A.505 and other provisions as part of an overhaul of laws affecting community custody terms. Laws of 2008 c 231 § 25 (eff. Aug. 1, 2009; H.B. 2719); Laws of 2009 ch. 28 § 6 (eff. Aug. 1, 2009; S.S.B. 5190); Laws of 2009 ch. 375, § 20 (eff. Aug. 1, 2009; E.S.S.B. 5288); Laws of 2009 ch. 389 § 1 (eff. Aug. 1, 2009) (S.H.B. 1791). These changes took effect August 1, 2009. Wiggin's offense occurred before the effective date.

The default rule is that any sentence imposed under the Sentencing Reform Act "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.701. Furthermore, RCW 10.01.040⁴ generally requires that crimes be prosecuted under the law in effect at the time they were committed if there are substantive changes in the law. State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007).

The Legislature, however, specified that recent changes to the community custody terms were intended to apply both prospectively and retroactively:

Sections 6 through 58 of this act also apply to all sentences imposed or reimposed on or after August 1, 2009, for

⁴ RCW 10.01.040, which provides: "No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein."

crimes committed prior to the effective date of this section, to the extent that such application is constitutionally permissible.

Laws of 2008 ch. 231 § 55(2).

Laws of 2009 ch. 375, which amended the new community custody changes in certain respects, retained the same retroactivity requirement. Laws of 2009 ch. 375, § 20.

The relevant portion of RCW 9.94A.505(2)(b) initially remained unchanged from the version in effect at the time of Wiggin's offense. Laws of 2008 ch. 231 § 25; Laws of 2009 ch. 28 § 6. Laws of 2009 ch. 389 § 1 changed the language of RCW 9.94A.505(2)(b):

If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9.94A.702 not to exceed one year; and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement and a community custody term under RCW 9.94A.701 if the court finds reasons justifying an exceptional sentence as provided in RCW 9.94A.535.

(emphasis added).

Former RCW 9.94A.702 (1) (Laws of 2008 ch. 231 § 8) provided "If an offender is sentenced to a term of confinement for one year or less for one of the following offenses, the court may impose up to one year of

community custody: (a) A sex offense, other than failure to register under RCW 9A.44.130(1)[.]"

b. Imposition Of 36 Months Of Community Custody Violates The Ex Post Facto Clause Of The Washington And Federal Constitutions

As set forth in section 1. a., supra, Wiggin was subject to 12 months of community custody as of the time he committed the offense. The trial court, however, imposed 36 months of community custody based on its belief that the statute in effect at the time of sentencing authorized the longer term. If the trial court was correct in believing the statute mandated 36 months of community custody, then the statute violates the constitutional prohibition against ex post facto laws.

The ex post facto clauses of the United States and Washington constitutions forbid the State from enacting laws that impose punishment for an act that was not punishable when committed or increase the quantum of punishment annexed to the crime when it was committed. In re Pers. Restraint of Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991); U.S. Const. art. 1, § 10, cl. 1⁵; Wash. Const. art. 1, § 23.⁶ A claimed

⁵ "No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U.S. Const. art. I, § 10, cl. 1.

⁶ "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Wash. Const. art. I, § 23.

denial of constitutional rights is reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

Statutes generally operate prospectively to give fair warning that a violation will result in a specific consequence. Pillatos, 159 Wn.2d at 470. A law violates the ex post facto clauses if it inflicts a greater punishment than the law annexed to the crime when the crime was committed. State v. Ward, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (citing Calder v. Bull, 3 U.S. 386, 390, 1 L. Ed. 684 (1798)).

In other words, a law violates the ex post facto clause if it is: (1) substantive, as opposed to merely procedural; (2) retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it. Powell, 117 Wn.2d at 185 (citing Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

The three criteria are met here. A law is substantive as opposed to procedural when it is "criminal" or "punitive." Forster v. Pierce County, 99 Wn. App. 168, 180, 991 P.2d 687 (2000). The law at issue here is substantive. Community custody requirements falls within Title 9A RCW, Washington's Criminal Code, and not Title 10 RCW, Criminal Procedure, or Title 4 RCW, Civil Procedure.

More importantly, the imposition of community custody with its attendant conditions is indisputably a form of punishment. Community

custody is the intense monitoring of an offender in the community. In re Pers. Restraint of Crowder, 97 Wn. App. 598, 600, 985 P.2d 944 (1999). It is designed to keep an offender under control through compliance with specified conditions. State v. Madsen, 153 Wn. App. 471, 480, 228 P.3d 24 (2009). Community custody conditions are a form of punishment and impose "significant restrictions on a defendant's constitutional freedoms." State v. Ross, 129 Wn.2d 279, 286, 916 P.2d 405 (1996).⁷

There is no question the statute is retrospective. It was enacted after Wiggin committed his crime and was applied to him. Powell, 117 Wn.2d at 185. New legal consequences, in the form of an increased term of community custody, attach to an act completed before the effective date of the law's enactment. Pillatos, 159 Wn.2d at 471; State v. Hylton, 154 Wn. App. 945, 957, 226 P.3d 246 (2010).

Whether a law is "disadvantageous" turns on whether the law alters the standard of punishment that existed under prior law. Ward, 123 Wn.2d at 498. Community custody is a form of punishment. The new

⁷ Moreover, the failure to comply with a condition of community custody subjects the offender to burdensome sanctions and serious loss of liberty. See RCW 9.94B.040(3)(a) and (c) (formerly RCW 9.94A.634(3)(a)(i) and (c)) (court may impose 60 days confinement for each violation or impose any number of sanctions for failure to comply with sentence condition, including work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, and supervision enhanced through electronic monitoring).

law relating to community custody is disadvantageous because it increases the standard of punishment that existed when Wiggin committed his crime.

In sum, "[e]x post facto problems are avoided when a defendant is subject to the penalty in place the day the crime was committed. After the fact, the State may not increase the punishment." Pillatos, 159 Wn.2d at 475. Wiggin completed his crime before the new community custody law became effective. The law violates the ex post facto clauses because they increase Wiggin's punishment.

- c. In The Alternative, The Trial Court Violated Due Process In Imposing A Term Of Community Custody Unauthorized By Statute.

The Legislature anticipated retroactive application of the law would be constitutionally impermissible in circumstances such as the one presented here. Laws of 2008 ch. 231 § 55 provides:

(3) To the extent that application of sections 6 through 58 of this act is not constitutionally permissible with respect to any offender, the sentence for such offender shall be governed by the law as it existed before the effective date of this section, or on such prior date as may be constitutionally required, notwithstanding any amendment or repeal of provisions of such law.

(4) If application of sections 6 through 58 of this act is not constitutionally permissible with respect to any offender, *the judgment and sentence shall specify the particular sentencing provisions that will not apply to such offender.* Whenever practical, the judgment and sentence shall use the terminology set out in this act.

(emphasis added).

The Legislature did not intend the trial court to impose unconstitutional sentences.⁸ It directed courts to avoid unconstitutional application of the law by requiring judgments and sentences to specify the particular sentencing provisions that were not applicable to a given offender in the event a provision was not constitutionally permissible.

The statute does not authorize unconstitutional applications, such as those that would violate the ex post facto prohibition. The trial court therefore lacked statutory authority to impose 36 months of community custody because the statute expressly directs courts to avoid constitutionally impermissible sentences.

The trial court nevertheless imposed 36 months of community custody even though Wiggin was subject only to 12 months at the time of his offense. As a result, the trial court violated Wiggin's right to constitutional due process. U.S. const. amend. XIV; Wash. Const. art. I, § 3. Due process is violated when imposition of an improper community custody term results not from the action of the Legislature but from

⁸ See also Laws of 2008 ch. 231 § 6 ("These sections are not intended to either increase or decrease the authority of sentencing courts or the department relating to supervision, except for those provisions instructing the court to apply the provisions of the current community custody law to offenders sentenced after July 1, 2009, but who committed their crime prior to the effective date of this section to the extent that such application is constitutionally permissible.")

actions of the sentencing court. See In re Pers. Restraint of Crabtree, 141 Wn.2d 577, 584-85, 9 P.3d 814 (2000) (Crabtree's due process rights would have been violated if the offenses for which the community placement was imposed had occurred before the effective date of the statute authorizing community placement); In re Pers. Restraint of Hartzell, 108 Wn. App. 934, 944-45, 33 P.3d 1096 (2001) (two-year term of community placement violated due process because the applicable statutes were amended during the charging period; ex post facto not implicated because legislature did not intend amendment to apply retroactively).

d. The Invited Error Doctrine Is Inapplicable.

Defense counsel agreed with the State that the statute in effect at the time of sentencing required 36 months of community custody. 5RP 47. The invited error doctrine does not apply in this circumstance.

As set forth in section 1. c., supra, , the trial court lacked statutory authorization to impose 36 months of community custody. A court may only impose a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "[A] defendant cannot empower a sentencing court to exceed its statutory authorization." State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980); see, e.g., In re Pers. Restraint of West, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005) ("even where a defendant clearly invited the challenged sentence by participating in a plea

agreement, to the extent that he or she 'can show that the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review.'"); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (defendant's request to receive mental health treatment as part of community custody does not give the court authority to impose it). "Courts have the duty and power to correct an erroneous sentence upon its discovery." In re Pers. Restraint of Call, 144 Wn.2d 315, 334, 28 P.3d 709 (2001).

In addition, invited error does not apply to any ex post facto violation because neither the parties nor the trial court were aware of the ex post facto error. In re Pers. Restraints of Thompson, 141 Wn.2d 712, 724-25, 10 P.3d 380 (2000) (invited error doctrine does not apply unless knowing and voluntary action set up the error).

- e. In The Alternative, Defense Counsel Was Ineffective In Allowing Wiggin To Be Sentenced Without Lawful Authority.

Even if the invited error doctrine applies, Wiggin still prevails. The invited error doctrine does not preclude review where defense counsel was ineffective in inviting the error. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. 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). The right to effective assistance extends to the sentencing stage. 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; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. A defendant demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Id.

Only legitimate trial strategy constitutes reasonable performance. Aho, 137 Wn.2d at 745. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The record in this case rebuts the presumption of reasonable performance.

There is no conceivable reason why defense counsel would legitimately want to subject his client to increased punishment. Counsel has a professional duty to research and know the relevant law. Kyllo, 166 Wn.2d at 862. Counsel's acquiescence in this case stemmed from ignorance of the law. Ignorance is not a legitimate tactic. The prejudice, meanwhile, is obvious. Wiggin received 24 months more of community custody than he lawfully should have received. Wiggin establishes his attorney provided ineffective assistance.

f. The Current Version Of The Statute Allows For Only 12 Months Of Community Custody and Must Be Applied to Wiggin.

The current version of RCW 9.94A.505(2)(b)⁹ states "If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include . . . a term of community custody under RCW 9.94A.702 not to exceed one year."

The current version of RCW 9.94A.702(1)¹⁰ provides:

If an offender is sentenced to a term of confinement for one year or less for one of the following offenses, the court may impose up to one year of community custody:

(a) A sex offense; . . .

(e) A felony violation of section 3(1) of this act (failure to register).

⁹ Laws of 2010 ch. 224 § 4 (eff. June 10, 2010).

¹⁰ Laws of 2010 ch. 267 § 12 (eff. June 10, 2010).

The current versions of RCW 9.94A.505(2)(b) and RCW 9.94A.702(1) mandate no more than one year of community custody for a first-time failure to register offense. These current versions are applicable to Wiggin because they are meant to operate retroactively. Laws of 2008 ch. 231 § 55(2); Laws of 2009 ch. 375, § 20.

Indeed, the Legislature appears to have recognized the specific ex post facto problem presented by imposition of community custody on first time registration offenders. Laws of 2010 ch. 267, § 13 provides:

On or before January 1, 2011, the department of corrections shall recalculate the term of community custody for each offender currently in confinement or serving a term of community custody for a first conviction for a failure to register under RCW 9A.44.130 consistent with the provisions of RCW 9.94A.701 and 9.94A.702. The department shall reset the date that community custody will end for those offenders. The recalculation shall not extend a term of community custody beyond that to which an offender is currently subject.

Wiggin is entitled to have his judgment and sentence corrected to reflect a maximum term of 12 months of community custody.

D. CONCLUSION

For the reasons stated, Wiggin requests that this Court reverse the conviction. In the event this Court declines to do so, then the erroneous community custody portion of the sentence should be reversed and the case remanded for correction of the community correction term.

DATED this 31st day of August 2010.

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65215-0-1
)	
JAMES O. WIGGIN,)	
)	
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 31ST DAY OF AUGUST 2010, 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] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] JAMES O. WIGGIN
DOC NO. 730559
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2010.

x *Patrick Mayovsky*

2010 AUG 31 PM 4:16

COURT OF APPEALS
STATE OF WASHINGTON
[Signature]