

NO. 67454-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

MAXIMO ARROYO-MIRANDA,

Appellant.

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

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in requiring appellant to “conduct himself as a decent, upright and law-abiding citizen” as a condition of community placement in the amended judgment and sentence.

CP 16.

Issue Pertaining to Assignment of Error

In 2003, this Court entered a per curiam opinion vacating the community placement condition requiring appellant to “conduct himself as a decent, upright and law-abiding citizen.”

In 2011, appellant was resentenced based on what the court concluded was a clerical error in the judgment and sentence. An amended judgment and sentence was entered which re-imposes the condition requiring appellant to “conduct himself as a decent, upright and law-abiding citizen.”

Should this Court remand for the amended judgment and sentence to be corrected to delete reference to this previously vacated condition?

B. STATEMENT OF THE CASE

Appellant Arroyo-Miranda is appealing from re-sentencing on three counts of assault and the denial of his motion to allow him to withdraw his pleas of guilty to those charges, which were entered in

1992. CP 5-12. Those pleas were entered in conjunction with a plea bargain in which Arroyo also pled guilty to first degree murder. Supp. CP __ (sub. no. 149, Findings of Fact and Conclusions of Law Re Motion for Specific Performance and Relief from Judgment, 7/25/11).

Arroyo was initially charged with aggravated first degree murder and three counts of assault, based on allegations that on June 16, 1992; he shot and killed Miguel Chavez-Rubio; shot at, but missed, Chavez-Rubio's visitor, Ruth Rodriguez; and fired shots into the bedroom where Onorio Torres and Enrique Chavez were sleeping. 1RP (12/22/92) 4, 9-11; see also Supp CP __ (sub. no. 90, Memorandum in Opposition to Motion to Vacate, 8/30/01), attached Third Amended Information.

At the plea hearing on December 22, 1992, defense counsel asserted he disagreed with the state's theory regarding the assaults of Torres and Chavez, but that Arroyo wished to take advantage of the plea bargain, regardless:

MS. BERNSTEIN [defense counsel]: As it relates to the charge of Murder in the First Degree and as relates to the first count of Assault in the Second Degree, the pleas of guilty are straightforward and we believe supported by the evidence. Mr. McEachran [the prosecutor] has discussed with me his theory of guilt as relates to the other two counts of

Assault in the Second Degree. I have discussed with him that I respectfully disagree with his legal theory. I have a question as to whether or not they would be supported by the evidence. However, we wish to plead guilty today in order to get the benefit of the plea bargain that's being offered by the state.

As the court can see from the Amended Information, the state has amended the charge that originally brought Mr. Miranda before the court from Aggravated Murder to Murder in the First Degree.

We have explained at some length to Mr. Arroyo the benefit of the Amended Information and we wish to take advantage of that offer which is to Mr. Arroyo's benefit. It is not our wish today to challenge the legal sufficiency of the two counts of Assault in the Second Degree and Mr. Arroyo understands if the court accepts his plea today, that plea will be final and that he will have no opportunity in the future to appeal his plea of guilty to any of the counts that bring him before the court today.

1RP 4.

Regarding Arroyo's potential punishment, the court stated:

THE COURT: Okay. The maximums in this case are life imprisonment and a \$50,000 fine. The standard range runs from 312 months to 416 months. Do you understand that I do not have to follow any recommendation by any person?

1RP 6. Arroyo was informed the state would request 416 months.

1RP 7.

Following the prosecutor's recitation of the allegations, Arroyo pled guilty to first degree murder and three counts of second degree assault. 1RP 20-21.

The judgment and sentence entered on April 9, 1993, indicated the standard range for murder, based on an offender score of 6, was 312 to 416 months, while the standard range for each of the assaults was 33 to 43 months. Supp CP __ (sub. no. 90, Memorandum in Opposition to Motion to Vacate, 8/30/01), attached Judgment and Sentence. At sentencing, the court orally pronounced its sentence as follows:

For all the factors and considerations that I have just gone over the court in the last analysis is opting for the recommendation of the state and is going to follow that recommendation. . . . I appreciate the presentations. Even though the court has ended up on the top end of the standard range, I think the insight into this individual are really helpful and I appreciate that.

The conditions of community placement are as requested by the state, and I haven't talked about these particular assaults. Do they need separate sentencing, Mr. McEachran, or –

MR. McEACHRAN [the prosecutor]: Your Honor, I don't believe they do. They would be involved in this and it would be incorporated in the court's sentence.

Supp. CP __ (sub. no. 90), attached sentencing hearing, page 51-52.¹ The judgment and sentence reads: “416 months for counts I, II, III, and IV to run concurrently.” Id.

¹ As stated by the prosecutor earlier in the hearing, “The recommendation of the state is that the defendant serve 416 months to run concurrently.” Supp. CP __ (sub. no. 90), attached sentencing hearing, page 4.

In 2001, Arroyo filed a Motion to Vacate and Correct Sentence on grounds his multiple convictions for murder assault were based on the same acts directed at the same victim, Miguel Chavez-Rubio. He argued the assault convictions violated double jeopardy and should not have increased his offender score for murder. Supp. CP ___ (sub. no. 85, Motion to Vacate and Correct Sentence, 8/6/01).

The state opposed the motion on grounds there were four victims: Miguel Chavez-Rubio and Ruth Rodriguez, whom Arroyo allegedly shot at; and Onorio Torres and Enrique Chavez, who were sleeping in the bedroom into which Arroyo allegedly shot after Chavez-Rubio and Rodriguez fled into it. Supp. CP ___ (sub. no. 90, Memorandum in Opposition to Motion to Vacate, 8/30/01). The court denied the motion to vacate. Supp. CP ___ (sub. no. 94, Order Denying Motion to Vacate and Correct Judgment, 10/2/01).

Arroyo obtained a partial victory on appeal, but only regarding the propriety of a community placement condition:

Per curiam. Maximo Arroyo-Miranda pleaded guilty to one count of first degree murder and three counts of second degree assault. He eventually moved to vacate and correct his sentence. The trial court denied the motion, and Arroyo-Miranda appeals, contending that the sentencing court lacked authority to order him, as a condition of community placement,

to “conduct himself as a decent, upright and law-abiding citizen.” The State responds that it “does not object” to Arroyo-Miranda’s request to remove the challenged condition from his judgment and sentence.

We treat the State’s response as a concession of error. Because the concession is well taken, we vacate the challenged condition. See State v. Raines, 83 Wn. App. 312, 922 P.2d 100 (1996) (sentencing court lacked authority to order defendant to “obey all laws” as a condition of community placement.” The condition that Arroyo-Miranda “conduct himself as a decent, upright and law-abiding citizen” is vacated.

Supp. CP ___ (sub. no. 128, Mandate, 7/30/03).

On May 31, 2011, Arroyo filed a motion to correct his judgment and sentence, on grounds the sentences for his assault convictions exceeded the standard range, as well as the statutory maximum:

2. I agreed to receive 416 months for Murder 1, and 43 months for the three Assault 2 counts II-IV, to be ran concurrently.
3. I was sentenced in Whatcom County Superior Court on the date of March 22, 1993.
4. The sentencing court’s notation in my judgment and sentence reads: “416 months for counts I, II, III, and IV to be ran concurrently.”
5. The erroneous notation caused the Department of Corrections to calculate my sentence for the three Assault 2 counts to reflect that I received 416 months for each count, and that it caused me to serve 15 additional years on the 43 month counts, when they should have expired in 1996.
6. The early release date on the three Assault 2 counts is tentatively September 30, 2015.

7. The three Assault counts are Class B felonies, and the statutory maximum under RCW 9A.20.021(b) is 10 years (120 mos.)
8. The portion of my sentence for the Assault 2 counts has not only exceeded the standard range, but the statutory maximum.

CP 20-21.

Arroyo argued that because he was misinformed about the direct consequences of his plea, he should be allowed to withdraw his pleas to the second degree assault counts:

Arroyo-Miranda's three Assault 2 convictions carried a 43 month sentence, although concurrent, were direct consequences of his sentence. The error in his judgment and sentence enhanced his punishment 15 years past the expiration date of the 43 month range that he pleaded to. To identify punishment in the context of a direct consequence of a guilty plea, we examine whether the effect enhances the defendant's sentence or alters the standard of punishment. State v. Ward, 123 Wn.2d 488, 513, 869 P.2d 295 (1994) and Barton, 93 Wn.2d at 306.^[2]

The length of the sentence is a direct consequence of a guilty plea. State v. Mendoza, 157 Wn.2d 582, 590, 141 P.2d 49 (2006); State v. Moon, 108 Wn. App. 59, 63, 29 P.3d 734 (2001).

Arroyo-Miranda was not informed that he would serve a 18 year sentence on the three Assault 2 counts, therefore his plea to that portion of the agreement, was involuntary.

...
The three Assault 2 convictions are invalid, because they have ran well beyond the standard range, and statutory maximum allowed. Therefore

² State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980).

Arroyo-Miranda is entitled to withdraw the portion of the plea that concerns the three Assault 2 counts.

Supp. CP __ (sub. no. 136, Motion for Specific Performance, and Relief from Judgment, 5/31/11).

Arroyo concluded he should be resentenced on the first degree murder charge with zero offender score points and a new standard range of 240-320 months. Id. Regarding the one-year time bar for collateral attacks, Arroyo asserted his claim was exempt because the judgment and sentence was invalid on its face. Id.; RCW 10.73.090(1).

At the hearing held June 30, 2011, the court ruled that DOC was incorrect in interpreting Arroyo's sentence as 416 months for each assault. 2RP (6/30/11) 4. According to the court, the original sentencing court ordered Arroyo to serve 416 months for count 1 and failed to state the specific sentences as to counts 2-4. 2RP 4. The court found this to be a clerical error. Supp. CP __ (sub. no. 149, Findings of Fact and Conclusions of Law Re Motion for Specific Performance, 7/25/11).

The court noted that the range for each count was 33-34 months, and the time Arroyo received on each assault was to be served concurrently. 2RP 4. The court resolved the judgment and

sentence should so reflect. 2RP 4. Because any time imposed on the assaults had already run, the court amended the judgment and sentence to reflect that the court imposed a sentence of 33 months for each assault. 2RP 5.

The newly executed judgment and sentence reflects Arroyo's sentences as 416 months on count I and 33 months on counts II-IV, to run concurrently. As a condition of community custody in the amended judgment and sentence, the court ordered: "Defendant shall conduct himself as a decent, upright and law-abiding citizen." CP 16.

In response to the court's ruling, Arroyo protested he never had an opportunity to speak to his attorney, who could have better explained his case. 2RP 7. The court ordered the public defender's office to appoint counsel to assist Arroyo, for counsel to consult with Arroyo before his transport back to DOC and to file a motion for reconsideration, if appropriate. 2RP 7-8. This appeal follows. CP 5-12.

C. ARGUMENT

THE AMENDED JUDGMENT AND SENTENCE SHOULD BE CORRECTED CONSISTENT WITH THIS COURT'S PRIOR OPINION, AND THE COMMUNITY PLACEMENT CONDITION REQUIRING APPELLANT TO CONDUCT HIMSELF "AS A DECENT, UPRIGHT AND LAW-ABIDING CITIZEN" SHOULD BE DELETED FROM THE AMENDED JUDGMENT AND SENTENCE.

Section 4.3 of the amended judgment and sentence contains a scrivener's error requiring correction. The trial court erroneously checked a box requiring Arroyo to "conduct himself as a decent, upright and law-abiding citizen." CP 16.

Arroyo raised this issue in his first appeal, the State conceded error, and in 2003, this Court ordered that the condition be vacated. Supp. CP ___ (sub. no. 128, Mandate, 7/30/03). Whether it was inadvertence, at Arroyo's resentencing in 2011, the condition was again imposed. But as this Court previously recognized, the court was without authority to impose this condition. Id.

The authorized community custody conditions are identified in former RCW 9.94A.120. For those offenders who committed their crimes after July 1, 2000, the Legislature specifically stated that defendants may be required to "obey all laws." There is no similar authority for crimes committed before that date, as in

Arroyo's case. State v. Jones, 118 Wn. App. 199, 205, 76 P.3d 258 (2003).

The court was instead authorized to order compliance with "crime-related prohibitions." Former RCW 9.94A.120(8)(c). But that does not permit courts to require that defendants refrain from new criminal conduct. State v. Raines, 83 Wn. App. 312, 316, 922 P.2d 100 (1996). Accordingly, the original sentencing court was without authority to require Arroyo to conduct himself as a "law-abiding citizen." Moreover, the requirements that he conduct himself as "decent" and "upright" are unconstitutionally vague. See e.g. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008) (a condition is unconstitutionally vague if it does not describe the offense with sufficient definiteness that ordinary people can understand what conduct it proscribes).

Consistent with the State's previous concession and this Court's prior opinion and mandate, the re-sentencing court's section 4.3 imposing the illegal community custody condition should be stricken. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form).

D. CONCLUSION

Because the amended judgment and sentence contains a community custody condition that was previously vacated by this Court, this Court should remand for deletion of reference to this condition.

Dated this 6th day of March, 2012

Respectfully submitted

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DIVISION ONE**

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v.)	COA NO. 67454-4-1
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)	
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 6TH DAY OF MARCH, 2012 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] WHATCOM COUNTY PROSECUTOR'S OFFICE
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- [X] MAXIMO ARROYO-MIRANDA
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STATE OF WASHINGTON
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SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF MARCH, 2012.

x *Patrick Mayovsky*