

NO. 68135-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

VERNON D. McHENRY,

Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
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I. ISSUES

1. A defendant was sentenced to 18 months community custody upon conviction of felony DUI. This was consistent with prior law. However, since 2009 only 12 months of community custody may be imposed. The offense date here was in 2010.

2. It appears the trial court's intention was to sentence the defendant on two accompanying bail jumping to 16 months, the top of the standard range. However, a subsequent order modifying sentence specified an 18-month sentence.

The State concedes error. Is a remand to correct in both instances appropriate?

II. STATEMENT OF THE CASE

The defendant was charged with felony driving under the influence. 1 CP 70-71. The date of offense was November 20, 2010. 1 CP 16, 65-67, 70-71. The DUI was elevated to a felony because of prior convictions for vehicular homicide and vehicular assault. RCW 46.61.502(6); see 1 CP 48-49 and 2 CP __ (sub 82, State's sentencing memorandum).

During the pendency of the case the defendant failed to appear for his omnibus hearing. 2 CP __, __ (sub 19, criminal minute entry, and sub 20, order authorizing issuance of bench

warrant). He later failed to appear at a motion hearing. 2 CP __, __ (sub 34, order authorizing issuance of bench warrant, and sub 35, criminal minute entry). As the matter headed to trial the State correspondingly added two counts of bail jumping. 1 CP 65-67.

The defendant was convicted of all three counts by a jury. 1 CP 27-29 (verdict forms); 2 CP __ (sub 52, trial minutes). As defense counsel explained at sentencing, the defendant took the matter to trial because he had “blown” just under the *per se* limit of .08 and therefore thought he was not guilty. Sent’g RP 14-15. (His BAC test result was .079/.077. 1 CP 50; 1 Verbatim Report of Proceedings at Trial (hereafter “Trial RP” 77.)

At sentencing, the parties agreed on the offender score(s) and on the prior convictions. 1 CP 48-49; 12/15/11 Verbatim Report of Proceedings at Sentencing (hereafter “Sent’g RP”) 14. The only argument appeared to be whether the defendant would receive the midrange or the top of the standard range. Compare Sent’g RP 12 with Sent’g RP 14, 17. The State recommended the top, or near the top, of the standard range. 2 CP __ (sub 82, State’s sentencing memorandum); Sent’g RP 12. For felony DUI, on a score of “6” and a range of 41-54 months, the recommendation was 52 months. Id.; see Caseload Forecast

Council, Adult Sentencing Guidelines Manual II-244 (2011). For bail jumping, on a score of “4” and a range of 12+ to 16, the recommendation was 16 months. 2 CP ___ (sub 82, State’s sentencing recommendation); Sent’g RP 12; see Caseload Forecast Council, Adult Sentencing Guidelines Manual II-209 (2011).¹ All agreed that the sentences on the three counts would run concurrently. Sent’g RP 12; 1 CP 18, ¶ 2.6.

At sentencing, the judge imposed the midrange of 45 months total confinement, reflecting the sentence on the DUI. Sent’g RP 20. He did not squarely address the concurrent sentences on the bail jumping charges. See Sent’g RP 20-21. The corresponding minute entry indicated a 16-month sentence imposed on each bail-jumping count. 2 CP ___ (sub 63, criminal sentencing minute entry). But the applicable portion on the Judgment and Sentence was left blank. 1 CP 19, ¶ 4.1 (Counts II and III blank). A subsequently-entered order modifying the Judgment and Sentence, to fill in the blanks, indicated an 18 month sentence (rather than a 16-month sentence) on each count. 1 CP 14.

¹ The difference in offender score, “4” vs. “6,” is due to the prior vehicular assault and vehicular homicide being double-weighted when scoring for felony DUI. RCW 9.94A.525(11); Sent’g RP 11; see Caseload Forecast Council, Adult Sentencing Guidelines Manual II-244 (2011).

The trial court also imposed 18 months of community custody. Sent'g RP 20; 1 CP 20 (§ 4.2). This was per the State's recommendation. 1 CP 18 (§ 2.6); Sent'g RP 17; 2 CP __ (sub 82, State's sentencing memorandum). The defendant did not object thereto. See Sent'g RP 17.

This appeal followed. 1 CP 1-13, 15.

III. ARGUMENT

The defendant assigns error to bail-jumping sentences in excess of the standard range, and to community custody in excess of 12 months. BOA 2-4. (The conviction is not challenged: No guilt issues are raised.) The State concedes error. It notes that total confinement of 45 months is unchanged.

A. INTENDED STANDARD-RANGE SENTENCE ON THE BAIL-JUMPING CHARGES.

Bail jumping, when the underlying crime is a class B or C felony, is a Level III class C felony with a standard range, on a score of "4," of 12+ to 16 months. RCW 9A.76.170(3); RCW 9.94A.515 Table 2 (list); RCW 9.94A.510 Table 1 (grid); Caseload Forecast Council, Adult Sentencing Guidelines Manual II-209 (2011). As recounted above, the State recommended 16 months. Sent'g RP 12; 2 CP __ (sub 82, State's sentencing recommendation). It appears a 16-month sentence was the trial court's

intention as well. See 2 CP ___ (sub 63, criminal sentencing minute entry, saying so). Yet the subsequent order modifying sentence, 1 CP 14, imposed 18 months. This appears to have been a scrivener's error. There was certainly no evidence of either the prosecution recommending, or the trial court intending, the imposition of an exceptional sentence above the standard range. Consequently, remand is appropriate to correct this oversight.

B. CHANGE IN COMMUNITY CUSTODY TERM.

Felony DUI is a "crime against persons." RCW 9.94A.411. (It is not a "violent offense" or "serious violent offense." See RCW 9.94A.030(44) and (53).) Prior law had required a trial court impose a 9 to 18 month term of community custody for the crime of felony DUI as a "crime against persons." State v. Barber, 152 Wn. App. 223, 229, 217 P.3d 346 (2009); former RCW 9.94A.715(1); WAC 437-20-010 (now superceded). The scoring grid attached to the State's sentencing recommendation, reflecting 2008 law, in fact so specified. 2 CP ___ (sub 82, State's sentencing memorandum, with attachments). And 18 months of community custody was imposed here consistent therewith. Sent'g RP 20; 1 CP 20 (¶ 4.2).

But RCW 9.94A.715 was repealed by Laws 2009 ch. 28 § 42, effective 8/1/09. Sentencing courts are now required to impose

fixed terms of community custody of 36, 18, or 12 months, depending on the type of offense. RCW 9.94A.701(1)- (3); Laws of 2009, ch. 375, § 5 (effective 7/26/09); State v. Winborne, 167 Wn. App. 320, 324-26, 273 P.3d 454 (2012). This charts as follows:

OFFENSE TYPE	COMMUNITY CUSTODY RANGE
Serious Violent Offenses	36 months
Violent Offenses	18 months
Crimes Against Persons as defined by RCW 9.94A.411(2)	12 months
Offenses under Chapter 69.50 or 69.52 RCW (not sentenced under RCW 9.94A.660)	12 months
Offenses involving the unlawful possession of a firearm where the offender is a criminal street gang member or associate	12 months

Felony DUI remains a “crime against persons” as defined in RCW 9.94A.411. But it now (since mid-2009) draws a fixed term of community custody of 12 months. RCW 9.94A.701(3)(a). The date of offense here was Nov. 20, 2010. Thus, pre-2009 law no longer governs. Sentencing based on the repealed 2008 standards was error.

The parties and court below should not be faulted for having missed this, given the changes in community-custody standards. But appellant is correct that the maximum term of community

custody that can be imposed for felony DUI now is only 12 months.
Remand is appropriate to so specify.

IV. CONCLUSION

The defendant's guilt being unchallenged, the conviction should be affirmed. The judgment and sentence should be amended to reflect a standard-range sentence on counts II and III and 12 months of community custody on Count I.

Respectfully submitted on July 6, 2012.

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July 6, 2012

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**Re: STATE v. VERNON D. McHENRY
COURT OF APPEALS NO. 68135-4-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

CHARLES F. BLACKMAN, #19354
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch
Appellant's attorney

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THE STATE OF WASHINGTON,

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 9th day of July, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 9th day of July, 2012.

A handwritten signature in black ink, appearing to read "Diane K. Kremench", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit