

NO. 68250-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES A. BATTLE,

Appellant.

RECEIVED
JUL 17 2017

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES

1. The maximum term of confinement for every offense is set by the legislature. The legislature has provided that a defendant who is convicted of a second or subsequent drug offense “may be imprisoned” for up to twice the term otherwise authorized. Based on Battle’s prior drug offenses, the statutory maximum term for his current drug offense doubled from 10 to 20 years. The trial court sentenced Battle to a term of confinement within the standard range. Is Battle’s sentence of 114 months of confinement plus 9-12 months of community custody a permissible sentence?

2. A defendant has no reasonable expectation of finality in a sentence that he has appealed. Battle challenged his sentence in a personal restraint petition. The trial court amended the sentence solely to correct the statutory maximum term. Should this Court reject Battle’s claim of a double jeopardy violation?

B. STATEMENT OF THE CASE

Defendant James A. Battle was found guilty by a jury of delivery of cocaine. CP 9. The jury also found that Battle committed this crime in a protected school bus zone, as set out in RCW 69.50.435. CP 10, 12.

Battle's offender score was listed as 9 for sentencing purposes, resulting in a standard range of 60-120 months of confinement.¹ CP 10. The enhancement for the school bus zone added 24 months, resulting in a total standard range of 84-144 months of confinement. CP 10. The judgment and sentence listed the maximum term of confinement as 10 years.² CP 10.

The trial court sentenced Battle to a total term of confinement of 114 months: 90 months for the drug delivery, plus 24 months for the school bus zone enhancement. CP 12. In addition, the court imposed a term of 9-12 months of community custody. CP 13.

Battle appealed. CP 18. The Court of Appeals affirmed Battle's conviction in an unpublished opinion (No. 61013-9-I) issued on November 10, 2008, and the Supreme Court denied review on

¹ The trial court ultimately counted only Battle's 7 Washington convictions, all for drug offenses. RP 7; CP 15. This did not affect the standard range, as any score that is 6 or above results in a standard range of 60-120 months. RCW 9.94A 517(1); 9.94A.518.

² RCW 69.50.401(2)(a).

June 2, 2009.³ Appendix A. The mandate issued on June 26, 2009. CP 43-44.

Battle has filed a number of personal restraint petitions, attacking his conviction as well as his sentence. CP 35-37, 48-61.

The most recent Certificate of Finality (No. 66082-9-I) issued on August 24, 2012. Supp. CP ____ (sub # 136) (attached as Appendix B). In this petition, Battle challenged his sentence as exceeding the statutory maximum; he argued that the combined term of 114 months of confinement plus 9-12 months of community custody exceeded the listed statutory maximum of 10 years.

Appendix B. The State conceded that the judgment and sentence was facially invalid, and asked the Court of Appeals to remand to the trial court for an order clarifying that the correct statutory maximum was 20 years, pursuant to RCW 69.50.408. Appendix B.

The Acting Chief Judge agreed that Battle's prior drug offenses "automatically doubled the statutory maximum term for the current offense as a matter of law" under RCW 69.50.408.

Appendix B. Finding no facial invalidity, however, the Acting Chief

³ The Superior Court file mistakenly contains a Court of Appeals Commissioner's Ruling, issued on November 18, 2008, as the opinion attached to the mandate. CP 45-47. This ruling did not decide the appeal on the merits, but rather denied Battle's motion for release pending appeal. CP 45-47. The dates on the mandate correspond to the dates on the decision on the merits and on the ruling denying review. Appendix A; CP 43-44.

Judge rejected the State's concession and request for remand, and dismissed Battle's petition. Appendix B.

Battle sought discretionary review of this ruling in the Washington Supreme Court. Appendix C.⁴ The Supreme Court Commissioner found a facial error, in that "the judgment and sentence imposes a total term of confinement and community custody that potentially exceeds the *stated* maximum sentence." Appendix C (italics in original).

The Commissioner nevertheless rejected Battle's argument that he was entitled to a reduction of his sentence to comport with the stated maximum term of 10 years:

[Battle] urges that the doubling called for by RCW 69.50.408 is discretionary, and that here the superior court exercised its discretion against doubling. This argument is clearly meritless. The superior court retains its discretion to set a term within the standard range (which is not doubled), but the absolute maximum sentence that the court may impose is

⁴ Appendix C is a copy of the Supreme Court Commissioner's Ruling Conditionally Denying Review (No. 86045-9). The State asks this Court to take judicial notice of this court document. See State v. Duran-Davila, 77 Wn. App. 701, 705, 892 P.2d 1125 (1995) (court may take judicial notice of court records in the same case); Spokane Research v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) (same).

automatically doubled. In other words, the statute creates a new statutory maximum.

Appendix C.

The Commissioner denied the motion for discretionary review “on the condition that within 60 days of this ruling the State obtain and file in this court an amended judgment and sentence stating the correct maximum sentence.” Appendix C. Battle’s motion to modify the Commissioner’s ruling was denied by Department II of the Supreme Court. Appendix D.⁵

In accordance with the ruling of the Supreme Court Commissioner, the State obtained an order from the trial court amending the judgment and sentence to correct the statutory maximum term to 20 years and/or \$40,000. CP 25. Battle timely appealed this order. CP 26.

C. ARGUMENT

1. THE STATUTORY MAXIMUM FOR A DRUG OFFENSE IS AUTOMATICALLY DOUBLED WHEN THE CURRENT CONVICTION IS A SECOND OR SUBSEQUENT DRUG OFFENSE.

Battle contends that the doubling of the statutory maximum under RCW 69.50.408 is discretionary with the trial court. He

⁵ The State asks this Court to take judicial notice of this court document. See fn.4, supra.

argues that his original judgment and sentence, which reflected the statutory maximum without doubling, was thus correct. Battle's position reflects a misunderstanding of the statutory language and a misinterpretation of controlling case law.

A defendant who is convicted of a second or subsequent drug offense "may be imprisoned for a term up to twice the term otherwise authorized." RCW 69.50.408(1). A defendant who is convicted of delivering cocaine within 1,000 feet of a designated school bus route stop "may be punished" . . .by imprisonment of up to twice the imprisonment otherwise authorized." RCW 69.50.435(1). Battle has prior drug convictions, and he delivered cocaine within a protected school bus zone; thus, he falls under both provisions.

The maximum punishment for every offense is set by the legislature. State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004); State v. Vant, 145 Wn. App. 592, 605, 186 P.3d 1149 (2008). The trial court has discretion to impose a sentence anywhere within the standard range. State v. Mail, 65 Wn. App. 295, 297, 828 P.2d 70 (1992), affirmed, 121 Wn.2d 707, 854 P.2d 1042 (1993).

This Court has held that RCW 69.50.408 “*automatically doubles* the statutory maximum sentence for convictions under RCW 69.50 when the defendant has a prior conviction under that statute.” In re Personal Restraint of Hopkins, 89 Wn. App. 198, 203, 948 P.2d 394 (1997), reversed on other grounds, 137 Wn.2d 897, 976 P.2d 616 (1999) (italics added). The Court explicitly rejected the contention that this doubling is discretionary. Id.

Addressing both RCW 69.50.408 and 69.50.435, the Supreme Court found “strong evidence that the legislature meant both statutes to have the same effect – *the effect of doubling the statutory maximum sentence.*” In re Personal Restraint of Cruz, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006) (italics added). The court held that “RCW 69.50.408 *doubles the maximum penalty.*” Id. (italics added). See also State v. Barajas, 88 Wn. App. 387, 389, 960 P.2d 940 (1997) (RCW 69.50.435 “by its terms increases the otherwise maximum penalty . . . it does not require imposition of an increased sentence.”), review denied, 134 Wn.2d 1026 (1998).

Battle appears to confuse the trial court’s discretion to “imprison” or to “punish” with the legislature’s power to establish the statutory maximum. The cases he cites in the main support the former. See, e.g., State v. Williams, 70 Wn. App. 567, 571, 853

P.2d 1388 (1993) (phrase “may be punished” in RCW 69.50.435 gives trial court “discretion to sentence” up to double the imprisonment otherwise authorized), review denied, 123 Wn.2d 1011 (1994); State v. Roy, 147 Wn. App. 309, 315, 195 P.3d 967 (2008) (“The maximum sentence available remained double the initial maximum sentence, whether the judge chose to impose it or not.”), review denied, 165 Wn.2d 1051 (2009); State v. O’Neal, 126 Wn. App. 395, 429, 109 P.3d 429 (2005) (drug doubling statute creates a new statutory maximum, but trial court retains discretion “to utilize” the doubling provision), affirmed on other grounds, 159 Wn.2d 500, 150 P.3d 1121 (2007).

In other words, the legislature may double the statutory maximum, but the trial court *need not exceed* the otherwise applicable statutory maximum when sentencing a given defendant. A useful illustration may be based on the facts of In re Cruz, supra. Cruz’s standard range for most of his convictions was 108-144 months. 157 Wn.2d at 84. These convictions carried a maximum term of 10 years. Id. When the statutory maximum was doubled under RCW 69.50.408, the trial court had the *discretion* to go above the otherwise-applicable statutory maximum of 120 months by imposing a sentence of 144 months, but it was not required to do

so. The trial court did *not* have the discretion to sentence above the standard range merely by virtue of the increased statutory maximum. Id. at 90.

In Battle's case, his standard range was 84-144 months. CP 10. When his statutory maximum range was doubled by virtue of either RCW 69.50.408 or 69.50.435, the trial court had the *discretion* to sentence him to 144 months of confinement, a discretion that it did not have before the maximum term was automatically doubled.

Given the doubling of the maximum term, the trial court's sentence of 114 months of confinement, plus 9-12 months of community custody, is proper – it exceeds neither the standard range nor the statutory maximum. This Court should affirm the judgment and sentence.

2. BATTLE HAD NO EXPECTATION OF FINALITY IN THE SENTENCE THAT HE CHALLENGED ON COLLATERAL ATTACK.

Battle claims that his protection against double jeopardy was violated when the trial court amended the judgment and sentence to correct the statutory maximum term. But Battle challenged his sentence on collateral attack; thus, he had no reasonable expectation of finality in that sentence.

“In an ordinary sentencing proceeding to correct an erroneous sentence, the analytical touchstone for double jeopardy is the defendant’s legitimate expectation of finality in the sentence, which may be influenced by many factors such as the completion of the sentence, the passage of time, *the pendency of an appeal or review of the sentencing determination*, or the defendant’s misconduct in obtaining the sentence.” State v. Hardesty, 129 Wn.2d 303, 311, 915 P.2d 1080 (1996) (italics added). Where a defendant has appealed his sentence, he has no reasonable expectation of finality and there is thus no double jeopardy violation upon resentencing. State v. Clark, 123 Wn. App. 515, 520, 94 P.3d 335 (2004).

Battle challenged his sentence on collateral attack. He thus had no reasonable expectation of finality in that sentence. The trial court’s amendment to correct the statutory maximum did not violate the protection against double jeopardy.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence as amended to correct the statutory maximum term.

DATED this 19th day of October, 2012.

Respectfully submitted,

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APPENDIX A

Not Reported in P.3d, 147 Wash.App. 1021, 2008 WL 4838842 (Wash.App. Div. 1)
 (Cite as: 2008 WL 4838842 (Wash.App. Div. 1))

H
 NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 1.
 STATE of Washington, Respondent,
 v.
 James BATTLE, Appellant.

No. 61013-9-I.
 Nov. 10, 2008.

Appeal from King County Superior Court; Honorable James D. Cayce, J.
 Nielsen Broman Koch PLLC, Attorney at Law, Andrew Peter Zinner, Nielsen, Broman & Koch, PLLC, Seattle, WA, for Appellant.

James Arthur Battle, pro se.

Prosecuting Atty King County, King Co Pros/App Unit Supervisor, Kathy K. Ungerman, King County Prosecuting Attorneys Office, Seattle, WA, for Respondent.

SCHINDLER, C.J., AGID, J., DWYER, A.C.J.

UNPUBLISHED OPINION
 PER CURIAM.

*1 A jury found James Battle guilty of delivery of cocaine in violation of the Uniform Controlled Substances Act, RCW 69.50.401. By special verdict, the jury also found that Battle was guilty of delivery of a controlled substance while within 1,000 feet of a school bus route stop. Battle contends he is entitled to reversal and a new trial based on ineffective assistance of counsel. Battle argues his attorney was ineffective in failing to object to testimony that the police officers in the buy-bust operation recognized him. Because defense counsel had a legitimate strategic reason not to object and

Battle cannot establish prejudice, his ineffective assistance of counsel claim fails. We also conclude that the issues Battle raises in his Statement of Additional Grounds are without merit, and affirm.

FACTS

In August 2006, Jennifer Feely agreed to act as a confidential informant for the Tukwila Police Department in a buy-bust operation. The police agreed to not charge Feely with misdemeanor prostitution if the buy-bust operation resulted in two convictions.

On August 10, Officer Eric Lund gave Feely \$40 in pre-recorded bills, told her to stay within certain boundaries, and instructed her on a "good-buy" signal. Officer Lund dropped Feely off in an area in Tukwila where the police officers could keep her under surveillance.

Feely went to a bus stop. She told the men who were waiting at the bus stop that she wanted to buy \$40 worth of crack. James Battle agreed to arrange a meeting between Feely and Robert Gordon to purchase crack cocaine. Feely and Battle walked together to the Mountain Views apartment complex and stopped in the breezeway area of the complex near the stairwell. In the breezeway, they met Gordon and Gordon's girlfriend, Tynne Shine. While in the breezeway, Gordon gave Feely three rocks and broke a fourth rock in half and gave half to Feely and the other half to Battle. Feely then put the rocks in her mouth.

After leaving the breezeway, Feely gave the "good-buy" sign and the officers arrested Feely, Battle, Gordon, and Shine. Feely gave Officer Lund three and half rocks of crack cocaine that she had purchased. In a written statement Feely described what had occurred.

The State charged Gordon and Battle with delivery of cocaine within 1,000 feet of a school bus route stop, resisting arrest, and tampering with a

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witness. ^{FN1} Battle was tried on an accomplice liability theory. Battle filed a motion to exclude 404(b) evidence of prior crimes, wrongs, or bad acts.

FN1. The court later dismissed the tampering with a witness charge.

At trial, Feely testified about the buy-bust operation. Feely's statement to the police was marked for identification and used to refresh her recollection. Feely testified that she met Battle at the bus stop and he told her that he could arrange a meeting in a nearby apartment complex. Feely said that when they reached the stairwell, she gave the money to Battle and Gordon gave her three and a half rocks of crack cocaine. Feely stated that after they left the breezeway, they were all arrested. Feely testified that her statement to the police accurately documented what happened during the transaction.

*2 Sergeant Mark Dunlap testified that he saw Feely walk to the bus stop, make contact with Battle, and watched the two of them as they walked to the apartment complex. Sergeant Dunlap testified that they were joined by another male at the breezeway. Because they had their backs to Sergeant Dunlap, he said that he could not see what they were doing. After another female joined the group, they walked to a 7-Eleven parking lot. Sergeant Dunlap testified that he recognized Battle, but could not recall whether he recognized him from that day. Battle's attorney did not object to this testimony. Sergeant Dunlap testified that he identified Battle as an "[a]dult black male wearing a white T-shirt and long jean shorts" in his police report. Sergeant Richard Mitchell testified that he participated in the arrest and identified Battle.

Officer Lund also testified that he saw Feely make contact with Battle at the bus stop and watched Feely and Battle walk to the apartment complex. Officer Lund could not see them in the stairwell. Officer Lund identified Battle as the person Feely contacted at the bus stop, and said that on

the day of the arrest he did not have to describe Battle because "[m]ost of us knew who he was, so I said his name, and everybody pretty much knew who he was." Battle's attorney did not object to this testimony.

The defense theory at trial was that Feely was not a credible witness and that the State had not proven Battle's participation in the sale beyond a reasonable doubt. Private investigator Jeffrey Porteous testified for the defense and stated that when he interviewed Feely, she said she did not know Battle or remember a drug deal.

The jury found Battle guilty of delivery of cocaine and by special verdict found that the delivery was within 1,000 feet of a school bus route stop. However, the jury found Battle not guilty of resisting arrest. The court imposed a sentence of 114 months. Battle appeals.

ANALYSIS

Ineffective Assistance of Counsel

Battle asserts that his counsel was ineffective in failing to object to the testimony that Officer Dunlap and Officer Lund knew Battle as improper 404(b) evidence. Battle contends the testimony undermined his theory that he did not participate in the drug transaction and raised the inference that Battle had prior drug arrests.

To establish ineffective assistance of counsel, Battle must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re T.A.H.-L.*, 123 Wn.App. 172, 97 P.3d 767 (2004). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "A defendant must affirmatively prove prejudice, not simply show that 'the errors had some conceivable effect on the out-

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come.’ “ *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693). If a defendant fails to satisfy either part of the test, the court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

*3 There is a strong presumption that counsel's representation was effective, and courts should avoid the distorting effects of hindsight. *McFarland*, 127 Wn.2d at 335; *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). An attorney's performance is not deficient if it can be characterized as legitimate trial strategy or tactics. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Battle contends that defense counsel was ineffective in failing to object to Sergeant Dunlap's testimony that he did not recall whether he recognized Battle “from that day,” and Officer Lund's testimony that “[m]ost of us knew who he was” as impermissible ER 404(b) evidence of prior bad acts. A criminal defendant may only be tried for charged offenses. *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). ER 404(b) provides, “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Evidence of prior bad acts is not admissible to show a defendant is a “criminal type.” *State v. Brown*, 132 Wn.2d 529, 570, 940 P.2d 546 (1997).

Defense counsel's failure to object to the two statements does not fall below the objective standard of reasonableness. Objecting to these two statements would draw attention to the evidence that Battle sought to exclude. The attorney's failure to object can be described as a legitimate trial tactic.

Moreover, even if the failure to object did fall below the objective standard of reasonableness, it is

highly unlikely that but for counsel's error, there is a reasonable probability that the result would have been different. Feely testified that she contacted Battle and he was involved in the drug transaction. The police officers performing surveillance corroborated Feely's testimony and identified Battle as the person Feely made contact with. The testimony at trial established that the police and Feely identified Battle as involved in the drug transaction, both on the day of arrest and at trial.

In addition, the fact that the jury acquitted Battle on the resisting arrest charge shows that the jury did not convict Battle based on impermissible 404(b) evidence, but rather on the strength of the evidence at trial.

Statement of Additional Grounds

Battle raises several additional issues in his statement of additional grounds. First, Battle asserts that the trial court abused its discretion by admitting the written statement Feely gave the police because it was inconsistent with testimony at trial. Any inconsistencies in testimony go to the witness's credibility and not to admissibility. *State v. Woodward*, 32 Wn.App. 204, 208, 646 P.2d 135 (1982). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We conclude the trial court did not abuse its discretion in admitting Feely's testimony and allowing the jury to make credibility determinations based on any inconsistency in the testimony.

*4 At Battle's request, the trial court gave the jury a lesser included instruction on possession of a controlled substance. When the court asked the defense whether it wanted to instruct the jury on the lesser included charge of possession of cocaine, Battle's attorney said that they did and noted for the record that Battle was “nodding his head yes.” Battle contends that the trial court erred by instructing the jury on the lesser included offense of possession of a controlled substance because possession of a controlled substance is not necessarily a lesser included offense of delivery of cocaine. Un-

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der the doctrine of invited error, a party may not set up an error at trial and then challenge that error on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). "The invited error doctrine precludes review of any instructional error—even one of constitutional magnitude—where the challenged instruction is one that was proposed by the defendant." *State v. Doogan*, 82 Wn.App. 185, 188, 917 P.2d 155 (1996). We conclude that even if it was error to instruct the jury on the lesser included offense of possession of a controlled substance, it was invited error.

Battle asserts that the evidence at trial did not show that Battle delivered cocaine within 1,000 feet of a school bus route stop.^{FN2} When the defendant in a criminal case challenges the sufficiency of the evidence, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Evidence is sufficient if, after reviewing it in the light most favorable to the State, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003) (quoting *State v. Joy*, 121 Wn.2d 333, 851 P.2d 654 (1993)).

FN2. Under RCW 69.50.435(1)(c), if a defendant delivers a controlled substance within 1,000 feet of a school bus route stop, he may be subject to imprisonment of up to twice the term otherwise authorized.

At trial, Officer Lund marked the location of the bus stop with a "B" on a map showing the apartment complex and school bus stop, and marked the location of the stairwell with an "S." Christine Grimm, the transportation manager for the Tukwila school district, identified the location of the school bus stop on the exhibit and testified that the Mountain View apartments were located within a 303 yard radius from the school bus route stop. Sufficient evidence establishes that Battle delivered cocaine within 1,000 feet of a school bus

route stop.

Finally, Battle asserts that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963), by not designating Feely's statement to the police as a part of the record on appeal. Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Here, the State marked Feely's statement as an exhibit at trial and used it to refresh her memory, but the statement was not admitted. Battle's attorney did not object to the use of the statement at trial and the parts of the statement the State referred to it at trial are in the record. Because the relevant parts of the statement are part of the record on appeal, we conclude that Battle's due process rights under *Brady* were not violated.

*5 We affirm.

Wash.App. Div. 1,2008.

State v. Battle

Not Reported in P.3d, 147 Wash.App. 1021, 2008 WL 4838842 (Wash.App. Div. 1)

END OF DOCUMENT

Westlaw

208 P.3d 1123 (Table)
166 Wash.2d 1003, 208 P.3d 1123 (Table)
(Cite as: 166 Wash.2d 1003)

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H

(The Court's decision is referenced in a Pacific Reporter table captioned "Supreme Court of Washington Table of Petitions for Review.")

Supreme Court of Washington
State

v.

James Arthur Battle

NO. 82524-6

June 02, 2009

Appeal From: 61013- 9-I

Petition For Review: Denied.

Wash. 2009.
State v. Battle
166 Wash.2d 1003, 208 P.3d 1123 (Table)

END OF DOCUMENT

APPENDIX B

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

In the Matter of the Personal)	
Restraint of:)	No. 66082-9-1
)	
JAMES ARTHUR BATTLE, Jr.)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
)	
Petitioner.)	
<hr/>		

A jury found James Battle guilty of delivering cocaine within 1000 feet of a school bus route stop. See King County No. 07-1-00728-4. This court affirmed Battle's conviction on appeal, and the mandate issued on June 26, 2009. See State v. Battle, noted at 147 Wn. App. 1021 (2008), review denied, 166 Wn.2d 1003 (2009). Battle filed this petition on September 23, 2010, alleging that his sentence exceeds the statutory maximum. But Battle has failed to satisfy his burden of demonstrating that his request for collateral relief is timely. See In re Pers. Restraint of Quinn, 154 Wn. App. 816, 226 P.3d 208, 216 (2010). The petition is therefore dismissed as time-barred.

Absent a valid exemption, an appellate court will not consider a collateral attack filed more than one year after entry of a facially valid judgment and sentence by a court with competent jurisdiction. RCW 10.73.090(1); RCW 10.73.100. A

No. 66082-9-1/2

judgment and sentence is facially invalid if, without further elaboration, it shows an error. In re Pers. Restraint of Clark, 168 Wn.2d 581, 585, 230 P.3d 156 (2010).

Battle asserts that his judgment and sentence is facially invalid because the combined term of 114 months of confinement plus 9-12 months of community custody exceeds the statutory maximum sentence of 10 years for a class B felony. But although the crime of delivery of cocaine ordinarily has a 10-year maximum term, as noted on Battle's judgment and sentence, Battle's prior VUCSA offenses, including a prior conviction for conspiracy to deliver cocaine, automatically doubled the statutory maximum term for the current offense as a matter of law. See RCW 69.50.408; In re Pers. Restraint of Cruz, 157 Wn.2d 83, 90, 134 P.2d 1166 (2006); State v. Roy, 147 Wn. App. 309, 315, 195 P.3d 967 (2008).¹ Consequently, Battle's terms of confinement and community custody do not exceed the statutory maximum under RCW 69.50.408 and do not render the judgment and sentence facially invalid.

Without supporting legal argument or citation to relevant authority, the State concedes that the judgment and sentence is facially invalid and requests that the matter be remanded to the trial court for an order clarifying that the statutory maximum is 20 years. But a facial invalidity must be "a more substantial defect than a technical misstatement that had no actual effect on the rights of the petitioner." In re Pers. Restraint of McKiernan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009). Battle

No. 66082-9-1/3

makes no showing that the sentence imposed was invalid or that any error on the judgment and sentence had any effect on his rights. He has not alleged that his sentence, as currently calculated, will exceed even the undoubled 10-year statutory maximum. Under the circumstances, the State's concession is rejected. See State v. Knighten, 109 Wn.2d 896, 920, 748 P.2d 1118 (1988) (appellate court is not bound by a party's erroneous concession on a matter of law).

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 10th day of May, 2011.

Leach, A. C. J.

Acting Chief Judge

FILED
COURT OF APPEALS
DIVISION ONE
MAY 10 2011

¹ Contrary to Battle's assertion, conspiracy to deliver cocaine is subject to the doubling provision of RCW 69.50.408. See RCW 69.50.407.

APPENDIX C

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BY RONALD R. CARPENTER
CLERK

REC'D
SEP 06 2011
King County Prosecutor
Appellate Unit

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

JAMES ARTHUR BATTLE, JR.,

Petitioner.

NO. 86045-9

RULING CONDITIONALLY
DENYING REVIEW

James Battle was convicted in 2007 of delivering cocaine within 1,000 feet of a school bus stop. Based on his offender score, Mr. Battle's standard sentence range, including the enhancement for delivering within a school bus zone, was 84 to 140 months. The trial court imposed a prison sentence of 114 months and a community custody term of 9 to 12 months. The judgment and sentence became final in June 2009. In September 2010 Mr. Battle filed a personal restraint petition in Division One of the Court of Appeals, claiming his sentence was excessive. But finding the sentence facially valid, the acting chief judge dismissed the petition as untimely. Mr. Battle now seeks this court's discretionary review. RAP 16.14(c).

To avoid the one-year time limit on collateral attack of his judgment and sentence, Mr. Battle argues that his sentence is facially excessive because the total term of imprisonment and community custody potentially exceeds the statutory maximum of 120 months for his class B crime. *See* RCW 10.73.090(1) (time limit applies only to facially valid judgment and sentence). But in finding no facial invalidity, the acting chief judge noted that, because Mr. Battle had several prior drug convictions, his maximum sentence was doubled to 240 months. *See* RCW 69.50.408(1); *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006).

To that extent, the acting chief judge was correct. But the judgment and sentence erroneously states that the maximum sentence is 10 years. The State conceded error on this point and urged that the matter be remanded to superior court to correct the error. The acting chief judge declined to accept the concession, however, reasoning that, because the sentence imposed was within the correct statutory maximum, any misstatement in the maximum sentence was merely a technical error that did not affect Mr. Battle's rights and therefore was not a facial defect exempt from the time limit. *See In re Pers. Restraint of McKiernan*, 165 Wn.2d 777, 783, 203 P.3d 375 (2009).

But there is a facial error: the judgment and sentence imposes a total term of confinement and community custody that potentially exceeds the *stated* maximum sentence. Mr. Battle is therefore entitled to correction of the stated maximum term.

Mr. Battle argues, however, that he is entitled to a reduction of his total term to a duration within the stated absolute maximum of 10 years. He urges that the doubling called for by RCW 69.50.408 is discretionary, and that here the superior court exercised its discretion against doubling. This argument is clearly meritless. The superior court retains its discretion to set a term within the standard range (which is not doubled), but the absolute maximum sentence that the court may impose is automatically doubled. In other words, the statute creates a new statutory maximum. *Cruz*, 157 Wn.2d at 90.

The motion for discretionary review is denied on the condition that within 60 days of this ruling the State obtain and file in this court an amended judgment and sentence stating the correct maximum sentence.


COMMISSIONER

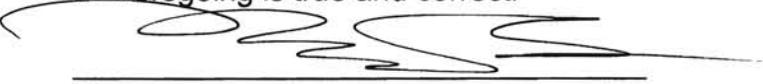
September 2, 2011

APPENDIX D

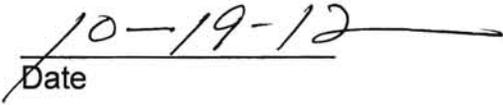
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Andrew Zinner**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent in STATE v. JAMES A. BATTLE**, Cause No. **68250-4-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date