

73453-9

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Court of Appeals
Division I
State of Washington

73453-9

NO. 73453-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

EMMANUEL MARTINEZ,

Appellant.

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

The Honorable Douglass North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The Superior Court erred when it placed appellant on 18 months' community custody. The proper term is 12 months.

Issue Pertaining to Assignment of Error

Under the rule of lenity, ambiguous sentencing statutes must be interpreted in the defendant's favor. Martinez was convicted of second degree assault. Under RCW 9.94A.701(2), because this is a "violent offense," Martinez must be sentenced to 18 months' community custody. However, under RCW 9.94A.701(3), because this qualifies as a "crime against persons," Martinez must be sentenced to 12 months' community custody. Because the statute does not indicate which term applies under these circumstances, does the rule of lenity require the lesser 12-month term?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Emmanuel Martinez with one count of first degree assault, which included an aggravating circumstance that the victim was particularly vulnerable. CP 9-10. Jurors were unable to reach a verdict on that charge, but convicted Martinez of the lesser included charge of second degree assault and found the aggravating circumstance established. CP 67-69.

At sentencing, the Honorable Douglass North imposed an exceptional sentence of 100 months. CP 71, 73; RP 14-15. Judge North also imposed 18 months' community custody, the term applicable for violent offenses. CP 74; RP 15. Martinez timely filed a Notice of Appeal. CP 86-96.

C. ARGUMENT

RCW 9.94A.701 IS AMBIGUOUS AS TO THE COMMUNITY CUSTODY TERM FOR SECOND DEGREE ASSAULT

Second degree assault is statutorily defined as both a violent offense and a crime against a person. These two types of offenses carry different mandatory community custody terms under RCW 9.94A.701(2) and (3). Because these statutes irreconcilably conflict, they are ambiguous, which requires them to be interpreted in Martinez's favor under the rule of lenity. The trial court therefore erred in imposing 18 months of community custody rather than 12 months.

Statutory interpretation is an issue of law reviewed de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). A trial court's authority to impose a community custody condition is also an issue of law reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). An illegal or erroneous sentence

may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The court's primary duty in construing a statute is to determine the legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. Id. If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute's legislative history and circumstances surrounding its enactment to determine legislative intent. Id.

The trial court sentenced Martinez to 18 months of community because second degree assault is defined as a "violent offense" under RCW 9.94A.030(54)(a)(viii). CP 74. This is consistent with RCW 9.94A.701(2), which specifies a "court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." (Emphasis added.)

However, RCW 9.94A.411(2) also specifies that second

degree assault is a "crime against persons." RCW 9.94A.701(3) requires a court to "sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: (a) Any crime against persons under RCW 9.94A.411(2)." (Emphasis added.)

Therefore, second degree assault is statutorily defined as both a violent offense and a crime against a person. But different community custody terms apply to these two types of offenses. Because the statute does not specify which community custody term applies in these circumstances, it is ambiguous. Under the rule of lenity, ambiguous criminal statutes must be construed in the accused's favor. State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005); see also United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.").

The State may argue the legislature intended for those who commit violent offenses to receive a longer term of community custody than those who commit crimes against persons. Any such argument should be rejected because it is not clear from the statute.

For instance, when an offender is sentenced to less than one year incarceration, the court may impose “up to one year of community custody” for both a violent offense and a crime against a person. RCW 9.94A.702(1). The two offenses are treated no differently.

Further, RCW 9.94A.701(1)(b) requires courts to impose three years of community custody for a “serious violent offense.” RCW 9.94A.701(2) requires courts to impose 18 months of community custody “for a violent offense that is not considered a serious violent offense.” (Emphasis added.) This provision expressly distinguishes between a violent and a serious violent offense, making it clear which community custody term should apply. By contrast, RCW 9.94A.701(3)(a) includes no such distinguishing or clarifying language: the trial court must sentence an offender to one year of community custody for “[a]ny crime against persons under RCW 9.94A.411(2).” The legislature did not say “any crime against persons *that is not considered a violent offense,*” as it did in RCW 9.94A.701(2).

“Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions.” In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002)

(citations omitted); see also State v. Delgado, 148 Wn.2d 723, 728-729, 63 P.3d 792 (2003) (treating two-strike statute differently than three-strike statute based on legislature's omission of specific language). The legislature included clarifying language in RCW 9.94A.701(2) that it omitted in RCW 9.94A.701(3)(a). Therefore, it is not clear from the statute that the legislature intended second degree assault to be punished as a violent offense rather than a crime against a person.

The statute remains ambiguous as to whether Martinez should receive 18 months of community custody because second degree assault is a violent offense or 12 months of community custody because it is a crime against a person. The rule of lenity dictates the ambiguous statute should be interpreted in Martinez's favor, and so the 12-month term applies.

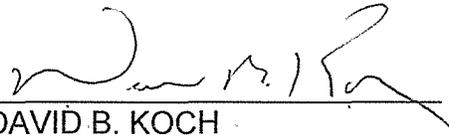
D. CONCLUSION

This Court should reverse the community custody term and remand for imposition of the correct term.

DATED this 24th day of November, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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COA NO. 73453-9-I

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 24TH DAY OF NOVEMBER 2015, 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] EMMANUEL MARTINEZ
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SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF NOVEMBER 2015.

x Patrick Mayovsky