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COURT OF APPEALS

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STATE OF WASHINGTON
BY DEPUTY

NO. 34134-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

SYLVESTER JAMES MAHONE,
Appellant.

DIRECT APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

THE HONORABLE: RONALD E. CULPEPPER

APPELLANT'S PRO-SE SUPPLEMENTAL BRIEF

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A). ASSIGNMENT OF ERROR

The 2005 Court erred when it amended appellant's judgment and sentence to include 24 months mandatory community placement, where the amendment did enhance the punishment and did exceed appellant's 178 month top-end, statutory maximum sentence received for appellant's underlying conviction.

(1). ISSUE PRESENTED ON APPEAL

Did the 2005 Court's amendment of appellant's judgment and sentence, to include 24 months community placement, enhance the punishment and exceed appellant's 178 month top-end statutory maximum sentence for appellant's underlying crime?

B). STATEMENT OF THE CASE

In the interest of preserving judicial time to prevent 'pleading repetition' appellant adopts his attorney's 'Statement Of The Case' within her Opening Brief and thus need not be repeated here.

1. THE NOVEMBER 18, 2005 RESENTENCING HEARING

At appellant's November 18, 2005 resentencing hearing appellant made three objections to The Honorable Judge Culpepper's ruling arguing that (1). No Time Bar Applied To Appellant's case; (2). An Invited Error Violation; and (3). A Blakely v. Washington, and State v. DeSantiago, Sentence Enhancement Violation. see (Appendix A, VRP page 12, lines 10-25; page 13-16, lines 1-16).

Appellant's time bar objection demonstrated his Judgment and Sentence was invalid on its face when appellant provided the 2005 Court with his 1995 guilty plea hearing transcript showing the 1995 Court failed to explicitly inform appellant he would receive a 24 month term of mandatory community placement if appellant plead guilty and prior to the Court accepting appellant's plea. . . thus upon this showing is what gave the Court jurisdiction to rule on appellant's motion To Vacate his plea. see (Appendix B, VRP, page 5, lines 19-25; pages 6-10).

Secondly, with respect to appellant's previous objection, appellant's invited error objection put the 2005 Court on notice that the Court would be inviting reversable error if the Court granted the state's motion and amended appellant's Judgment and Sentence (hereafter J&S), to include 24 months mandatory community placement when appellant provided the Court with his 1995 guilty plea

hearing transcript and guilty plea form showing that the Court, State, and appellant's trial attorney failed to explicitly warn appellant that he would receive 24 months community placement and that the community placement was mandatory if appellant plead guilty and prior to the Court accepting appellant's plea. see (Appendix A, VRP, pages 13-15).

Furthermore, appellant notified the Court that the state's motion to correct appellant's J&S to provide for the community placement breached their 1995 plea agreement and that this action was not ratified by the appellant. see (Appendix A, Exhibit 1 Plea Agreement Form page 3, section 7(e)).

Finally, appellant's third objection concerning the sentence enhancement demonstrated the 2005 Court's amending appellant's J&S to include the 24 month mandatory term of community placement exceeded appellant's top end statutory maximum sentence from 178 months to 202 months total, thus further increasing appellant's punishment for his underlying crime. see (Appendix A, VRP, pages 15-16).

The Court overruled all of appellant's objections; transferred appellant's Motion To Set Aside Guilty Plea to the Court Of Appeals II; and this Direct Appeal followed. see (Appendix A, VRP, pages 16-19).

C. ARGUMENT

THE 2005 COURT ERRED IN AMENDING APPELLANT'S JUDGMENT AND SENTENCE TO INCLUDE 24 MONTHS MANDATORY COMMUNITY PLACEMENT BECAUSE THE AMENDMENT ENHANCED THE PUNISHMENT AND EXCEEDED APPELLANT'S STATUTORY MAXIMUM SENTENCE VIOLATING APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS.

RCW 9.94A.505 (5) provides in relevant part:

> Except As Provided Under RCW 9.94A.750 (4) And 9.94A.753 (4), A Court May Not Impose A Sentence Providing For A Term Of Confinement, or Community Supervision, Community Placement, or Community Custody Which Exceeds The Statutory Maximum for The Crime As Provided In Chapter 9A.20 RCW. [1]

Appellant argues the total sentence, including enhancements, remains presumptively limited by the statutory maximum for the underlying offense and if

[1] RCW 9A.20.021 Maximum Sentences For Crimes Committed On July 1, 1984 and after. (1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or a fine exceeding the following: (a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the Court fifty thousand dollars, or by both such confinement and fine.

the total sentence exceeds the maximum sentence provided in RCW 9A.20.021 (1)(a), the underlying sentence, not the enhancement, must be reduced. see State v. De Santiago, 149 Wn.2d 402, 416 n.21 (2003).

Although there was a need for clarification of what the Supreme Court meant in its Apprendi, ruling of what a statutory maximum sentence is, the Washington Supreme Court Justice Chambers - in State v. Evans, 154 Wn.2d 438 (2005), quoted the U.S. Supreme Court's clarification in Blakely v. Washington, 124 S.Ct. 2531, 2537 n.4,5 (2004), that,

> the statutory maximum did not refer to the maximum sentence authorized by the legislature for the crime. Instead, statutory maximum meant the maximum sentence a trial judge was authorized to give without finding additional facts, in the case of the Sentencing Reform Act of 1981, chapter 9.94A RCW, the top of the standard sentencing range.

State v. Evans, 154 Wn.2d at 441-442 (2005). Furthermore, due to appellant's case being on Direct Appellate Review, the Apprendi, De Santiago, and Blakely, rulings apply to appellant's claim herein. Id. at 444 n.2; see also State v. Harvey, 109 Wn.App 157, at 164 n. 1-3 (2001) (see footnote 13). In addition, the Washington State Supreme Court recognized that on direct appeal, the erroneous portion of a sentence in excess of statutory authority must be reversed and a plea agreement to the unlawful

sentence does not bind the defendant. Personal Restraint Petition of Goodwin, 146 Wn.2d 861, at 877 (2002); see also United States v. Fatico, 458 F. Supp. 388, 397-98 (E.D. N.Y. 1978) (misinformation, misunderstanding, or material false assumptions as to any facts relevant to sentencing renders the entire sentencing procedure invalid as a violation of due process).

In State v. Ross, 129 Wn.2d 279 (1996), the Washington Supreme Court defined mandatory community placement as,

> "producing a definite, immediate, and automatic effect on a defendant's range of punishment," id. at 284, and "affects the punishment flowing immediately from the guilty plea," "which imposes a punishment as well."

Id. at 285.

To identify a punishment in this context, the Courts examine whether the effect enhances the defendant's sentence or alters the standard of punishment. State v. Ward, 123 Wn. 2d at 513; State v. Barton, 93 Wn. 2d 301, at 306 (1980). Community placement primarily furthers the punitive purposes of deterrence and protection. see In re Davis, 67 Wn. App. 1, 9 n.5, (1992) (describing community placement as "part of an inmate's punishment" requiring explicit statutory authorization).

Here since appellant, at his 1995 guilty plea, hearing was never explicitly warned appellant would receive 24 months mandatory community placement during his plea colloquy with the Court prior to the Court accepting appellant's guilty plea as required in State v. Miller, 110 Wn.2d 528, at 537 (1988); State v. Ross, 129 Wn.2d 279, at 284 (1996); State v. Turley, 149 Wn.2d 395, at 399 (2003); State v. Isadore, 151 Wn.2d 294, at 297-98 n. 1-5 (2004), as well as this Division II Court Of Appeals in State v. Rawson, 94 Wn. App. 293, at 298 (1999), see (Appendix B, VRP pages 5-9), the 1995 sentencing Court's 24 month mandatory community placement sentencing order was then and is presently constitutionally invalid, id., and is further why appellant argued at his 2005 resentencing hearing on November 18, that the State v. Broadway, 133 Wn.2d 118 (1997) ruling/case was distinguishable from appellant's case rendering the entire November 18, 2005 resentencing hearing constitutionally invalid. see (Appendix A, VRP pages 13-15).

Appellant contends, had the 1995 guilty plea hearing Court given the mandatory community placement 24 month term explicit warning prior to accepting appellant's guilty plea, then sentenced the appellant to the community placement term, [a]nd then forget to check the community placement section/box on appellant's 1995 judgment and sentence form indicating such an order had been lawfully given, then and only then would the Broadway, ruling/case apply to appellant's case on November 18, 2005, and the Court's order amending appellant's judgment and

sentencing be constitutionally lawful; however, the demonstrated Court errors shows this did not happen. see (Appendix A, VRP pages 13-15).

Thus, as in appellant's case, a Court can't lawfully amend, (to the detriment of the appellant), a constitutionally invalid judgment and sentence that evidences infirmities of a constitutional magnitude, see Pers. Restraint Petition of Hinton, 152 Wn. 2d 853, 858 n. 4 (2004); Pers. Restraint of Goodwin, 146 Wn. 2d 861, 866 n. 1 (2002); State v. Ammons, 105 Wn. 2d 175, at 188 (1986). . . as the phrase "on its face" has also been interpreted to mean those documents signed as part of a plea agreement. see State v. Philips, 94 Wn. App. 313, 317 (1999).

In appellant's case in chief, the meat of his argument is that the 2005 Court lacked authority to lawfully amend appellant's judgment and sentence to include 24 months mandatory community placement which unlawfully enhanced the degree of appellant's punishment and exceeded appellant's 178 month statutory maximum sentence that presently totals 202 months for appellant's underlying offense.

Appellant adopts State v. Zavala-Reynoso, 127 Wn. App. 119 (Div. III, 2005), where this Court held in relevant part, Zavala-Reynoso's sentence was facially invalid because it exceeded the statutory maximum for his offense and

Vacated his sentence and remanded his case for resentencing. Id. at 120. This Court furthered that,

> A Court May Not Impose A Sentence Providing For A Term Of Confinement Or Community Supervision, Community Placement Or Community Custody Which Exceeds The Statutory Maximum For The Crime.

Zavala-Reynoso, 127 Wn. App. at 123-24 n. 5-9 (2005); Adopting also, DeSantiago, 149 Wn. 2d at 416, n. 21 (2003). As such, the 2005 Court abused its discretion in granting the State's motion to add 24 months mandatory community placement that enhanced the punishment and exceeded appellant's statutory maximum sentence (178 months) totaling 202 months.

D. CONCLUSION

For the foregoing reasons, appellant requests this Court to uphold the Washington Supreme Court and Court of Appeal rulings herein that a Court may not impose a sentence of mandatory community placement that exceeds the statutory maximum for the underlying offense because it violates due process, but reverse the Superior Court's ruling imposing the 24 month mandatory community placement.

Appellant requests this Court to vacate the erroneous portion of his sentence under Goodwin, supra, at 877, and remand for resentencing under Zavala-Reynoso, supra, at 120, a constitutionally lawful sentence that does not exceed the statutory maximum range for appellant's offense.

Dated this 23 day of May 2006.

Respectfully submitted,
Mr. [illegible] 219359
Mr. Sylvester Mathone
Appellant herein.

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