

NO. 34541-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH R. DOOR, APPELLANT

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON
10/19/18 11:14:12
Clerk of the Court

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 01-1-05424-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. On appellate review, should this court only consider the materials that were considered by the trial court in reaching the decision below?
2. Did the trial court properly deny defendant's motion to modify the judgment when defendant sought to limit the length of his sentence to the statutory maximum and the language of the existing judgment included such a limitation?

B. STATEMENT OF THE CASE.

A jury found appellant, KENNETH R. DOOR, hereinafter defendant, guilty of five counts of assault in the second degree and one count of unlawful possession of a firearm in the first degree. CP 1-18. The jury also returned firearm enhancements on each of the assault convictions. Id. The court entered the judgment on July 12, 2002. Id. Defendant filed an appeal but later moved to dismiss it; the court granted the motion and issued the mandate on June 18, 2003. CP 58.

On February 3, 2006, defendant filed a CrR 7.8 motion to modify his judgment, alleging that the combination of the time imposed for confinement and community custody exceeded the statutory maximum for

his crime in violation of the rule set forth in State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005). CP 19-22. Defendant also cited Blakely v. Washington as being relevant authority to the issues in his motion. CP 19-22. Without calling for a response from the State or setting the matter for a hearing, the court denied the motion to modify in a five page order articulating the court's reasoning. CP 25-29; see, Appendix A. Critical to the court's decision was the fact that it had included a notation in the original judgment stating that the balance of the sentence exceeding the ten year statutory maximum could not be served. Id.

The defendant filed a timely notice of appeal from entry of this order denying the motion to modify. CP 39-44.

C. ARGUMENT.

1. THE PROPER SCOPE OF THIS APPEAL IS LIMITED TO WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S 7.8 MOTION BASED UPON THE MATERIALS CONSIDERED BY THE COURT IN CONJUNCTION WITH THE MOTION.

An appellate court's review of a CrR 7.8 motion is limited to only those issues raised in the motion. State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). Generally, appellate review is limited to a consideration of the record which was presented to the trial court. State ex

rel. Rupert v. Lewis, 9 Wn. App. 839, 841, 515 P.2d 548 (1973).

In support of his CrR 7.8 motion below, defendant filed a written motion with a supporting affidavit, but did not attach a transcript of the sentencing hearing that had occurred nearly four years earlier. CP 59-60. In its order denying the motion to modify, the court indicated that it had reviewed the court file to acquire the factual and procedural history of the case. CP 25-29. Thus, any documents filed with the court - up to the date the court issued its written ruling on the motion to modify - could be properly designated to the appellate court as relevant to the decision below. A transcript of the sentencing was not in the court file. Despite the fact that the transcript of the sentencing hearing was not employed by the court in issuing its ruling, defendant's appellate counsel has designated the transcript to this court as part of the record on review. Because the information contained in the transcript was not in front of the trial court at the time it made its ruling on the motion to modify judgment, it should not be considered by this court on appeal. This court should ignore the presence of this transcript in the record on review and determine whether the trial court properly denied the motion based upon the record it considered in reaching its decision.

2. THE COURT PROPERLY DENIED THE MOTION TO MODIFY AS THE JUDGMENT INCLUDED A NOTATION THAT THE SENTENCE SERVED COULD NOT EXCEED TEN YEARS.

When a court sentences an offender for a violent felony offense, such as assault in the second degree, the court “shall in addition to the other terms of the sentence, sentence the offender to community custody.” RCW 9.94A.715(1)(a). The community custody term begins upon completion of the term of confinement or when the offender is transferred to community custody in lieu of earned early release. *Id.* The presumptive sentence ranges for total confinement do not include the periods of community placement. *In Re Caudle*, 71 Wn. App. 679, 680, 863 P.2d 570 (1993); see also *State v. Bader*, 125 Wn. App. 501, 504-05, 105 P.3d 439 (2005) (defendant’s period of confinement would not be reduced by three years, the term of his mandatory community custody). Community custody is not an exceptional sentence based on aggravating circumstances. RCW 9.94A.535(2). Rather, community custody automatically applies when the defendant is convicted of certain crimes. RCW 9.94A.715(1). *Blakely v. Washington*, *Apprendi v. New Jersey*, and *State v. Hughes* deal with the maximum sentences a judge may impose absent additional factual findings by a jury. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000);

State v. Hughes, 154 Wn.2d 118, 134-35, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006). These cases do not prevent a court from imposing a term of community custody because community custody results directly from the jury verdict and no additional fact finding is required. RCW 9.94A.715(1).

The total time served between incarceration and community custody cannot exceed the statutory maximum sentence for the crime. State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004). Under the Sentencing Reform Act it is possible for a court to impose a sentence where the combined terms of confinement and community custody facially exceed the statutory maximum sentence, but which, due to the possibility of earned early release credits, will not result in the offender actually serving a sentence that exceeds the statutory maximum. Sloan, 121 Wn. App. at 221; State v. Vanoli, 86 Wn. App. 643, 655, 937 P.2d 1166 (1997). When a court imposes a combination of terms of confinement and community custody that facially exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum. State v. Sloan, 121 Wn. App. at 223-224.

In the instant case, the trial court imposed sentence on six counts: one count of unlawful possession of a firearm in the first degree, and five counts of assault in the second degree, each with a firearm enhancement. CP 1-18. Each of these convictions had a statutory maximum sentence of ten years. Id. The court imposed a term of confinement on the firearm possession (Count I) of 116 months, and did not impose any additional time for an enhancement or a term of community custody. Id. The sentence imposed on each of the assault counts consisted of 74 months of confinement, an additional 36 months of enhancement time, and 18-36 months of community custody. Id. This creates a potential total sentence of 128 to 146 months, which exceeds the statutory maximum of 120 months. To address this issue, the court inserted a hand-written notation in the judgment stating:

Statutory maximum sentence is 10 years – balance of sentence over ten years cannot be served.

CP 10. The judgment also indicated that the “[a]ctual number of months of total confinement ordered is 120 months.” Id.

When the trial court denied the motion to modify judgment it did so because it had included this limiting provision in the judgment. The court explained its reasoning thoroughly in its order. CP 25-29. Thus, under the clear terms of the sentence, defendant will not actually serve a sentence that exceeds that statutory maximum for the crime.

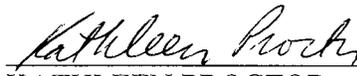
Defendant acknowledges the existence of this language in the judgment but argues that its placement within the judgment limits its application to the confinement period. He contends that the language is insufficient as defendant may still be forced to serve his term of community placement beyond the ten year statutory maximum. Appellant's Brief at p. 5. While the placement of this notation is spatially closer to the section setting forth the portion of the sentence addressing the term of confinement rather than the section setting forth the term community custody, the wording of the notation addresses the total "sentence" rather than limiting its application to either the term of confinement or the term of community custody. In short, the State submits that the wording "balance of sentence over ten years cannot be served" is not ambiguous as to its meaning, and ensures that the entire sentence defendant actually serves will not exceed the statutory maximum. The trial court properly denied the motion to modify as the judgment contained the necessary limiting language.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the trial court's denial of the motion to modify the judgment and sentence.

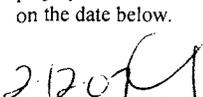
DATED: February 12, 2007.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

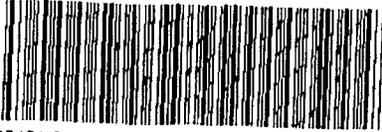

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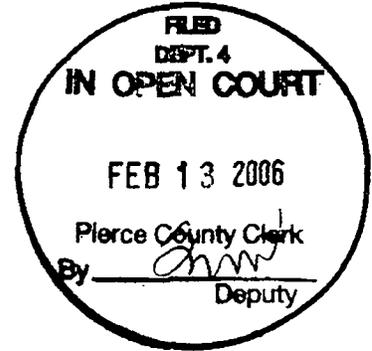
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CLERK OF SUPERIOR COURT
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APPENDIX “A”

Order Denying Motion for Order Modifying Sentence



01-1-05424-6 24833699 ORDY 02-15-06



**SUPERIOR COURT WASHINGTON
COUNTY OF PIERCE**

STATE OF WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	NO. 01-1-05424-6
)	
KENNETH RANDALE DOOR,)	ORDER DENYING MOTION FOR
)	ORDER MODIFYING SENTENCE
Defendant.)	
_____)	

Nature of the motion.

Defendant, by a motion dated January 28, 2006, requests an order that would allow him to be resentenced "in accordance with the laws of the State of Washington and the United State to conform with the "Statutory Maximum" allowed in his sentence, under the Sentence Reform Act of 1981 (SRA)."

Procedural and factual history.

The following procedural and factual history is taken from a review of the court's file. On March 7, 2002 the

defendant was found guilty by a jury verdict of six offenses. On count I he was found guilty of Unlawful Possession of a Firearm in the First Degree. On counts II, III, IV, V and VI, he was found guilty by the jury of Assault in the Second Degree. On each of counts II through VI, the defendant was also found by the jury to have been in possession of a firearm thus adding 36 months to the sentence for each of those counts.

The defendant's standard range sentence on the firearms possession charge was 87 - 116 months confinement. There is no community custody or enhancement on this count. Defendant received a sentence of 116 months on this count.

On counts II through VI, the standard range sentence was 63 - 84 months. As noted above, there is an additional 36 months enhancement for these offenses due to the defendant having been found to have used a firearm in the commission of the offenses. This makes the sentence range for these offenses, 99 - 120 months. In addition, there is community custody of 18 - 36 months or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, on each of these counts.

Defendant received a base sentence of 74 months on each of counts II through VI plus a sentence enhancement of 36 months on each for a total of 120 months - the statutory

maximum. The base confinement on all of the counts is served concurrently. The Judgment and Sentence does fail to indicate whether the sentence enhancements run concurrently or consecutively. But such sentence enhancements are served consecutively, pursuant to RCW 9.94A.510(4)(e).¹

Importantly, however, the judgment and sentence also contains the following language: "Statutory maximum sentence is 10 years - balance of sentence over ten years cannot be served." Judgment and Sentence ¶4.5(b), p. 8.

Analysis.

Defendant correctly points out that the standard range for his offense is 99 - 120 months. Defendant also asserts that the imposition of community custody in the amount of 36 months exceeds the statutory maximum for the offense. Defendant is correct legally but not factually. That is, legally, RCW 9.94A.505(5) does state that "[e]xcept 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,

¹ RCW 9.94A.510(4)(e) provides that "[n]otwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter."

or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW."

First, Mr. Door may bring this matter to the court pursuant to CrR 7.8(b)(4). RCW 10.73.090(1) provides, "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." The term "valid on its face" has been interpreted to mean "'without further elaboration.'" In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000) (quoting State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 (1986)). In State v. Zavala-Reynoso, 127 Wn. App. 119, 123-124, 110 P.3d 827 (2005) the Court of Appeals noted that Zavala-Reynoso's community custody term (9-12 months), plus his standard range sentence (114 months), exceeds his statutory maximum term. Because Zavala-Reynoso's total (123 - 136 months) on its face exceeds the 120 month maximum term he was not barred from bringing this motion.

In the case of Mr. Door, the statutory maximum term is exceeded on its face because the total of 74 months plus 36 months enhancement of confinement totals 120 months. This is precisely the amount of the statutory maximum and any

amount of community custody would bring the total time in confinement beyond 10 years. Thus Mr. Door's motion for relief from judgment coming nearly four years after his sentence would not be untimely if he were correct.

However, as we have seen, the judgment and sentence expressly caps the amount of time served at 10 years. Because of this, the sentence does not exceed the statutory maximum and so Mr. Door's motion is not supported by the facts.

Decision/Order.

For the reasons set forth above, the defendant has failed to establish grounds for relief. The court hereby **DENIES** the motion for order modifying sentence without further hearing. CrR 7.8(c).

DATED: February 13, 2006.


BRYAN CHUSHCOFF, JUDGE

Cc: Pierce County Prosecutor

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