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COURT OF APPEALS

NO. 34544-7-II

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STATE OF WASHINGTON

BY *[Signature]*

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

STATE OF WASHINGTON, RESPONDENT

v.

EDGAR PEREZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 05-1-02475-7.

Brief of Respondent

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

1. Should this court vacate defendant's sentence and remand for clarification at re-sentencing where defendant's statutory maximum is 60 months incarceration, and the trial court imposed a 60-month sentence plus 9-12 months community custody?
(Appellant's Assignment of Error No. 1)

B. STATEMENT OF THE CASE.

1. Procedure

On May 20, 2005, the State charged the defendant by information with unlawful possession of a controlled substance with intent to deliver (Count I) and reckless driving (Count II). CP 1-4. On September 22, 2005, the State amended the information, further alleging a deadly weapon sentencing enhancement. CP 5-8. On February 2, 2006, the State again amended the information by adding two more deadly weapon (knife) enhancements to Count I. CP 9-12.

On March 1, 2006, defendant's trial was commenced before the Honorable Thomas Felnagle. RP 11. On Count I, the jury returned a verdict of guilty on the lesser offense of unlawful possession of a controlled substance. On Count II, the jury returned a verdict of guilty.

By special verdict, the jury found that defendant was armed with two knives at the time he possessed the methamphetamine (Count I). CP 42-44.

On March 15, 2006, the court sentenced defendant to 60 months¹ incarceration on count I, plus 9 to 12 months community custody. CP 47-56. On count II, the trial court imposed twelve months concurrent to Count I. CP 47-56. SRP 13.² The court did not indicate the specific term of total confinement for each deadly weapon enhancement.

Defendant's timely appeal followed. CP 19.

C. ARGUMENT.

1. DEFENDANT'S SENTENCE ON HIS DRUG CONVICTION IS NOT UNLAWFUL WHERE DEFENDANT CAN SERVE HIS SENTENCE WITHOUT EXCEEDING THE STATUTORY MAXIMUM FOR THIS CRIME, HOWEVER CLARIFICATION OF HIS JUDGMENT IS APPROPRIATE.

In the instant case, defendant challenges his judgment and sentence for his drug possession offense (Count I). Relying on State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005), and State v. Sloan, 121

¹ Defendant's deadly weapon enhancement makes his drug conviction a level three offense. RCW 9.94A.518. With an offender score of one, his standard range is 51 to 68 months. RCW 9.94A.517. This range is limited, however, by the 60-month statutory maximum for defendant's drug offense.

² The Verbatim Report of Proceedings was not sequentially paginated with the Verbatim Report of the Proceedings for the trial. Thus, the State will refer to the former as "SRP."

Wn. App 220, 223-24, 87 P.3d 1214 (2004), defendant contends that his 60 month prison sentence, his two deadly weapon enhancements, and his 9 to 12 month community custody sentence exceeds the statutory maximum. In Zavala-Reynoso, Division Three of the Court of Appeals vacated Zavala-Reynoso's sentence after finding the defendant's community custody term, plus his standard range sentence, exceeded the defendant's ten year statutory maximum term. Id. at 124. In a similar situation, Division One recommended that when a court imposes community custody that could exceed the statutory maximum sentence for an offense, the court should set forth the maximum sentence and state that the total of incarceration, plus community custody, cannot exceed the maximum. Sloan, 121 Wn. App. at 223-24.

Similarly, here defendant concludes that this court should vacate his sentence and remand for clarification regarding his maximum sentence. Though the State does not entirely agree with defendant's interpretation of his judgment and sentence, the State reaches the same conclusion that clarification is appropriate.

Conceivably, defendant will either not earn early release time and be released after serving his time without further obligation, or he will earn early release time and serve that time in lieu of community custody. In either scenario, he will serve no more than his statutory maximum.

“Except as relates to collection of restitution, a sentence may not exceed the statutory maximum set by the legislature.” State v. Sloan, 121

Wn. App. 220, 222, 87 P.3d 1214 (2004), citing RCW 9.94A.505(5). Methamphetamine is a controlled substance. RCW 69.50.206(d)(2). The statutory maximum for possession of methamphetamine is 60 months. RCW 9A.20.021(c), RCW69.50.4013. All deadly weapon enhancements are served in total confinement, and run consecutively to all other sentencing provisions. Former RCW 9.94A.533(4)(e).³ The Sentencing Reform Act (SRA) contemplates defendant's community custody as follows:

When a court sentences a person to the custody of the department for a ...felony offense under chapter 69.50... the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2). ...

RCW 9.94A.715.

³ The legislature amended this statute in 2006. Laws of 2006, ch. 123, § 1 and Laws of 2006, ch. 339, § 301. The changes did not affect the portions of the statute that are reviewed here.

The SRA defines community custody as follows:

‘Community Custody’ means that portion of an offender’s sentence of confinement in lieu of earned release time or imposed pursuant to ...RCW 9.94A.715, served in the community subject to controls placed on the offender’s movement and activities by the department.

RCW 9.94A.030(5).

In the present case, defendant can earn up to fifty percent of aggregate earned release time for his felony conviction under the SRA. RCW 94A.728((1)(b)(ii). Though not specified in his judgment and sentence, defendant must serve his deadly weapon enhancement term (twelve months) in total confinement.⁴ SRP 3-4. DOC must apply the earned release time to the forty-eight month balance of defendant’s underlying sentence.⁵ Thus, defendant could receive up to 24 months earned release time on the underlying drug conviction. Under this scenario, defendant’s term on his drug crime plus his deadly weapon enhancements (12 months), and his 9-12 month community custody term, would not exceed his statutory maximum sentence.

Ultimately, the Department of Corrections (DOC) will determine the defendant’s earned early release to which he is entitled, if any. A sentencing court has no control over whether a defendant will or will not

⁴ This is often referred to as “flat time.”

⁵ See RCW 9.94A.533(4)(g)(if the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum of the offense, the portion of the sentence representing the enhancement shall not be reduced.)

receive earned early release, as that is entirely within the province of the DOC. In re Pers. Restraint of Mota, 114 Wn.2d 465, 478, 788 P.2d 538 (1990). As long as the combination of confinement time and community custody does not exceed the statutory maximum, defendant has not received an unlawful sentence. Sloan, 121 Wn. App. 223, 223, 87 P.3d 1214 (2004)(citing State v. Vanoli, 86 Wn. App. 643, 937 P.2d 1166 (1997)). Because it is difficult to discern how DOC will construe defendant's sentence, remand for resentencing is appropriate to avoid confusion. The proper remedy should be a notation on the judgment and sentence that states the term of confinement, plus the term of community custody, shall not exceed the statutory maximum for each offense consistent with Sloan, 121 Wn. App. at 223-24. The State also recommends that the sentencing court designate defendant's base sentence and the portion of defendant's maximum sentence that is attributed to defendant's deadly weapon enhancements.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm the defendant's convictions. The State agrees with defendant that remand for resentencing on his drug offense is appropriate to clarify any

uncertainty regarding the imposition of his deadly weapon sentencing enhancement or his community custody sentence.

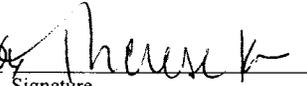
DATED: December 7, 2006

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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.

12/7/06 
Date Signature

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