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COURT OF APPEALS

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STATE OF WASHINGTON

No. 34867-5-II, 8
BY _____
CITY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sang Van Nguyen,

Appellant.

Pierce County Superior Court

Cause No. 01-1-02568-8

The Honorable Judge Linda Lee

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by failing to properly determine Mr. Nguyen's offender score.
2. The trial court erred by failing to determine whether or not Mr. Nguyen's current offenses comprised the same criminal conduct.
3. The trial court erred by sentencing Mr. Nguyen with an offender score of 1.
4. The trial court erred by using a standard range of 86-114 months.
5. The trial court erred by sentencing Mr. Nguyen to 114 months confinement (plus a 60-month firearm enhancement).
6. The trial court erred by denying Mr. Nguyen's CrR 7.8 motion.
7. The trial court erred by imposing 24-48 months community custody.
8. Mr. Nguyen's constitutional right to a jury trial under *Blakely v. Washington* was violated by the imposition of a sentence beyond his statutory maximum without a jury finding.
9. Mr. Nguyen was sentenced under an unconstitutional statute.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Sang Van Nguyen was found guilty of Manslaughter in the First Degree (with a firearm enhancement) and Theft of a Firearm. On remand following a successful appeal of his exceptional sentence, the sentencing court determined his offender score to be one (based on his other current offense), and calculated his standard range as 86-114 months. There is no indication that the court considered whether or not Mr. Nguyen's current offenses comprised the same criminal conduct.

1. Did the trial court err by failing to properly determine Mr. Nguyen's offender score? Assignments of Error Nos.1-5.

2. Did the trial court err by failing to determine whether or not Mr. Nguyen's current convictions comprised the same criminal conduct? Assignments of Error Nos. 1-5.

3. Did the trial court err by sentencing Mr. Nguyen with an offender score of 1? Assignments of Error Nos. 1-5.

The court imposed 114 months confinement and a 60-month firearm enhancement. The court then added 24 to 48 months of community custody to Mr. Nguyen's sentence. Mr. Nguyen moved to correct the sentence under CrR 7.8, arguing that the addition of community custody made the sentence exceed his statutory maximum under *Blakely v. Washington*.

RCW 9.94A.715 and RCW 9.94A.737 permit the Department of Corrections to impose additional incarceration above Mr. Nguyen's statutory maximum based on facts determined by the Department without benefit of a jury and without proof beyond a reasonable doubt.

4. Did the trial court err by denying Mr. Nguyen's CrR 7.8 motion? Assignments of Error Nos. 6-9.

5. Does RCW 9.94A.715 violate a defendant's constitutional right to a jury trial under *Blakely v. Washington*? Assignments of Error Nos. 6-9.

6. Does RCW 9.94A.737 violate a defendant's constitutional right to a jury trial under *Blakely v. Washington*? Assignments of Error Nos. 6-9.

7. Did the trial court exceed Mr. Nguyen's statutory maximum sentence by imposing 24-48 months community custody? Assignments of Error Nos. 6-9.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sang Van Nguyen was charged in Pierce County Superior Court with Manslaughter in the First Degree (with a firearm enhancement) and Theft of a Firearm, arising out of an incident that occurred on May 8, 2001. CP 8. Mr. Nguyen appealed, arguing *inter alia* that his exceptional sentence violated *Blakely v. Washington*. The sentence was vacated and the case was remanded for sentencing within his standard range. CP 1-5. At a resentencing hearing on January 6, 2006, the court sentenced Mr. Nguyen with 1 point, giving him a standard range of 86-114 months on the Manslaughter conviction. CP 9. There is no indication in the record that the court considered whether or not the two charges comprised the same criminal conduct.

Mr. Nguyen moved to modify his sentence, arguing that the statutory maximum for the Manslaughter conviction was exceeded because the court added 48 months of community custody. CP 20-25. The court denied the motion without a hearing. CP 48-49. This timely appeal followed. CP 50.

ARGUMENT

I. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. NGUYEN'S OFFENDER SCORE AND STANDARD RANGE.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...
RCW 9.94A.589(1)(a).

The burden is on the State to establish that multiple convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wn.App. 361 at 365, 921 P.2d 590 (1996), *review denied at* 131 Wn.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v. Jones*, 110 Wn.2d 74, 750 P.2d 620 (1988) and *State v. Gurrola*, 69 Wn.App. 152, 848 P.2d 199, *review denied*, 121 Wn.2d 1032, 856 P.2d 383 (1993). The sentencing court is not bound by prior determinations, but must exercise its discretion and decide whether multiple prior offenses should count separately or

together. *State v. Wright*, 76 Wn.App. 811 at 829, 888 P.2d 1214 (1995), interpreting *former* RCW 9.94A.360(6)(a).

Mr. Nguyen's offenses should have scored as one offense. The sentencing court failed to exercise its discretion by imposing a sentence without determining whether or not the two offenses were the same criminal conduct. Accordingly, the sentence must be vacated and the case remanded for sentencing with a corrected offender score.

II. RCW 9.94A.715 AND RCW 9.94A. ARE UNCONSTITUTIONAL BECAUSE THEY AUTHORIZE CONFINEMENT BEYOND THE STATUTORY MAXIMUM, WITHOUT A JURY DETERMINATION OF ALL FACTS USED TO ENHANCE A DEFENDANT'S SENTENCE.

The Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a criminal defendant the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). Under the Sixth Amendment, any fact used to enhance a sentence above the statutory maximum must be proved beyond a reasonable doubt to a jury. *State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005), citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). The relevant statutory maximum is the high end of the standard range, plus any enhancements legitimately added based on a jury verdict. *Blakely*.

RCW 9.94A.715 authorizes additional confinement for violations of community custody imposed under that statute. If an offender violates conditions of community custody, "the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737..." RCW 9.94A.715(3). RCW 9.94A.737 (entitled "Community custody -- Violations) provides (in relevant part) as follows:

(1) If an offender violates any condition or requirement of community custody, the department may transfer the offender to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation and subject to the limitations of subsection (2) of this section.

(2)...

...(c) For an offender sentenced to a term of community custody... who violates any condition of community custody after having completed his or her maximum term of total confinement... the department may impose a sanction of up to sixty days in total confinement for each violation...

RCW 9.94A.737

Under the plain terms of these statutes, an offender can be imprisoned beyond the statutory maximum based on facts that are not submitted to a jury for proof beyond a reasonable doubt. Under RCW 9.94A.737(2)(c), there is no limit to the additional confinement that the department can impose (in multiples of 60 days). Given enough violations, an offender sentenced to a determinate sentence could serve a

life sentence without a jury determination of the facts used to enhance the sentence beyond the statutory maximum. This violates *Blakely*.

As Mr. Nguyen noted in his CrR 7.8 motion and in his response to the state's filing below, his standard sentence range (with an offender score of 1) is 86-114 months. When the 60-month firearm enhancement is added in, the *Blakely* statutory maximum is 174 months. To his total sentence, the court added 24-48 months of community custody.

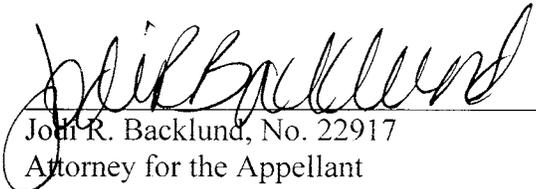
This additional term of community custody subjects Mr. Nguyen to potential imprisonment (under RCW 9.94A.715(3) and RCW 9.94A.737) beyond his statutory maximum, without a jury determination of the facts used to increase the penalty. Because this violates *Blakely*, the sentence must be vacated, and the case remanded for sentencing without the additional 24-48 months of community custody.

CONCLUSION

For the foregoing reasons, the sentence must be vacated and the case must be remanded for a same criminal conduct determination, and imposition of a sentence within the standard range, without an additional term of community custody.

Respectfully submitted on September 25, 2006.

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CERTIFICATE OF MAILING

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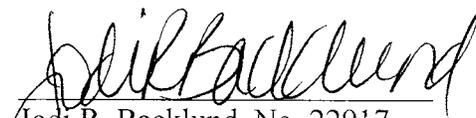
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 25, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 25, 2006.



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