

*Original*

No.36481-6-II

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

STATE OF WASHINGTON  
Respondent,  
v.  
CARL CUNNINGHAM,  
Appellant.

*Law*  
SUPERIOR COURT  
PIERCE COUNTY  
NOV 27 2009  
11:26 AM

*27 11-26-09*

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

The Honorable Vicki Hogan

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in imposing an unlawful sentence that subjected Mr. Cunningham to a sentence beyond the statutory maximum sentence.
2. Mr. Cunningham must get specific performance for a plea that was accepted by the trial court when the court and government erroneously advised him the court “shall” order 12 months community placement for an offense to which such placement is not authorized.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court error when it imposed an unlawful sentence subject Mr. Cunningham to a sentence beyond the statutory maximum sentence permitted by law?
2. Did the trial court violate Mr. Cunningham’s right to due process when it accepted a plea after misinforming him about a direct consequence of his plea, that is, when the court and government indicated it must impose 12 months of community placement for an offense that no placement was authorized?

**C. STATEMENT OF THE CASE**

In 1992, Mr. Cunningham was charged in Pierce County, Washington with, among other counts, Second Degree Felony Murder under Cause No. 92-1-00443-9. The trial court erroneously permitted instructions that manslaughter was a lesser included offense to Second Degree Felony Murder. The jury returned a verdict of guilty to Manslaughter in the First Degree. On July 7, 1992, based on the jury verdict, the court imposed the following sentence:

Count I:	Manslaughter First Degree:	116 Months
Count II:	Assault in the Second Degree:	57 Months
Count III:	Burglary in the First Degree:	89 Months
Count IV:	Possession of Stolen Property:	12 Months
Count V:	UPCS:	12 Months <sup>1</sup>

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<sup>1</sup> Mr. Cunningham actually entered a plea of guilty to Count V on May 15, 1992, but was sentenced in conjunction with Counts I – IV.

The court sentenced Mr. Cunningham to current time for all counts and gave him credit for 249 days of already served in custody.

Three weeks later, on July 12, 1992, Mr. Cunningham was sentenced in Pierce County under Cause No. 91-1-0123-9. Under this cause number, Mr. Cunningham was sentenced to 195 total months, with no credit for time served. The court, under Cause No. 91-1-0123-9 ordered the sentence to run consecutive to the 116 months he had previously been sentenced, and serving, under Cause No. 92-1-00443-9. Consequently, Mr. Cunningham was to serve the 116 months under Cause No. 92-1-00443-9 before starting any of the 195 months imposed under Cause No. 91-1-0123-9.

On May 8, 2006, the Washington State Supreme Court unanimously concluded that Mr. Cunningham's First Degree Manslaughter conviction under Cause No. 92-1-00443-9 was invalid "because that crime [manslaughter is not a lesser included offense of second degree felony murder, the only homicide with which Mr. Cunningham was charged." *PRP of Carl Cunningham*, No. 77746-2 C/A No. 32937-9-II.

On July 13, 2006, Pierce County Superior Court Judge Beverly Grant signed an Order Vacating Sentence Pursuant to Address/Hinton.<sup>2</sup> CP 11-12.<sup>3</sup> That same day, the Pierce County Prosecutor's Office filed, under Cause No. 92-1-00443-9, an Amended Information as to Count I Only (Post-Address) charging Mr. Cunningham with the crime of Manslaughter in the First Degree. CP 13. The court also signed an order, not only vacating the First Degree Manslaughter conviction, but also an order establishing

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<sup>2</sup> For clarification, the Washington State Supreme Court did not reverse Mr. Cunningham's First Degree Manslaughter conviction pursuant to either *In Re Personal Restraint Petition of Address*, 147 Wn.2d 602, 604, 56 P.3d 981 (2002) or *In Re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004).

<sup>3</sup> Clerk's Papers are designated by CP. The Verbatim Report of Proceedings (VRP) are based on the date of the hearing.

conditions of Mr. Cunningham's release status. CP 14 – 15. More specifically, a condition placed on Mr. Cunningham was bail at \$250,000. CP 13, VRP 6/15/07, page 17.

Mr. Cunningham was therefore being held in-custody for the First Degree Manslaughter charge as of July 13, 2006. On February 23, 2007, Mr. Cunningham entered a plea of guilty to the charge of First Degree Manslaughter. CP 16-23. VRP 2/13/2006. Because the offense was from 1992, the statutory maximum sentence for Manslaughter in the First Degree – a Class B Felony – was 120 Months (10 years). RCW 9A.21.021(1)(b). CP 16 – 23. As part of the Statement on Pleas of Guilty, Mr. Cunningham was specifically advised that he was subject to 12 months community placement. CP 16 – 23, page 2, paragraph 6(a). He was also advised that:

If this crime is a ... serious violent offense, the judge will order me to serve at least one year of community placement. CP 16 – 23, page 3, paragraph 6(f) (emphasis added).<sup>4</sup>

On February 23, 2007, the court conducted the colloquy of Mr. Cunningham to explain the conditions of the pleas. In particular, the court advised Mr. Cunningham as follows:

THE COURT: It's (first degree manslaughter) as strike. Community Placement for 12 months upon your release from prison; you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: And that the total sentence cannot exceed 120 months, and community placement can only be for the period of time that you earn for early release. So there's a condition of community placement. You understand that?

THE DEFENDANT: I do, Your Honor.

VRP 2/23/07, page 23, lines 3 – 13.

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<sup>4</sup> In the document, "two" years was crossed out and "one" was inserted. The language "subject to statutory maximum term" was also written under the paragraph. CP 16 – 23, page 3, paragraph 6(f).

During the June 15, 2007, sentencing, Mr. Cunningham argued that he had served the statutory maximum sentence permitted because: (1) the statutory maximum was 120 months; (2) he had served 116 months on the original sentence (before the conviction was vacated); (3) he is entitled to credit for time served from July 13, 2007 – the date he was arraigned and the court imposed \$250,000 bail – to June 15, 2007, the date he was sentenced; and (4) he was advised in writing and orally that the court “will” impose 12 months of community placement, which coupled with the 116 months already served would exceed the statutory maximum sentence permitted by law.VRP 6/15/2007.

The court sentenced Mr. Cunningham to the statutory maximum sentence 120 months. The court, however, refused to give Mr. Cunningham credit for time served from the date he was arraigned (July 13, 2007) to the date he was sentenced (June 15, 2007) even though he was in-custody on the specific charge. The court also concluded that community placement was not an option for the offense Mr. Cunningham was being sentenced and consequently imposed an additional 395 days in jail. VRP 6/15/2007, pages 39-42.

Mr. Cunningham properly filed an appeal of the trial court’s decision.

#### **D. INTRODUCTION**

The trial court erred when it imposed a sentence that exceeded the statutory maximum sentence permitted by law. Because the court imposed conditions on Mr. Cunningham’s release, effectively holding Mr. Cunningham in-custody between arraignment and sentencing, the court was obligated to give credit for time served for this time in jail. Moreover, as part of the plea colloquy, Mr. Cunningham was advised – in writing and orally – that 12 months of community placement “will” be ordered by the

court as part of his sentence. CP 16 – 23, page 3, paragraph 6(f); VRP 2/23/07, page 23, lines 3 – 13.

Mr. Cunningham, however, was misinformed since community placement was not an option for the offense to which Mr. Cunningham entered a plea of guilty.

#### **E. ARGUMENT**

##### **1. The trial court erred when it imposed an unlawful sentence that subjected Mr. Cunningham to a sentence beyond the statutory maximum sentence.**

On June 15, 2007, Mr. Cunningham was sentenced unlawfully to time that exceeded the statutory maximum permitted by law. Mr. Cunningham was being sentenced for a 1992 First Degree Manslaughter offense, which as a Class B Felony had a statutory maximum sentence of 120 months.

Mr. Cunningham was originally sentenced to 116 months for First Degree Manslaughter. The court ordered that sentence to start immediately. Subsequently, Mr. Cunningham was sentenced 195 months for unrelated offense, which was to run consecutive to the First Degree Manslaughter. Mr. Cunningham began serving his time on the First Degree Manslaughter on July 7, 1992, which included credit for time served prior to the sentencing date. On December 24, 2000, Mr. Cunningham had completed his 116 months and began serving the 195 months imposed on Cause No. 91-1-0123-9.

On May 8, 2006, the Washington State Supreme Court reversed the First Degree Manslaughter conviction and remanded that count. On July 13, 2006, the First Degree Manslaughter count was vacated by Pierce County Superior Court. The same day, Pierce County Prosecutor's Office filed an amended information charging Mr. Cunningham, under the same cause number, with First Degree Manslaughter. Mr. Cunningham entered

a plea of not guilty and the court remanded Mr. Cunningham into custody on \$250,000 bail.

On June 15, 2007, Mr. Cunningham was sentenced on the First Degree Manslaughter count. The court refused to afford Mr. Cunningham credit for time served from the date of his arraignment (July 13, 2006) to the date of sentencing (June 15, 2007) even though he was in-custody on this cause number.

It is undisputed that Mr. Cunningham is afforded credit for time served from 1992.

Where a defendant who has successfully appealed has spent time in prison prior to winning his or her appeal, the State must give credit for that time against the sentence for any second conviction. “[T]he constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully ‘credited’ in imposing sentence upon a new conviction for the same offense.” (Footnote omitted) *North Carolina v. Pearce*, 395 U.S. 711, 718-19, 89 S.Ct. 2072, 2077, 23 L.Ed.2d 656 (1969).

*State v. Phelan*, 100 Wash.2d 508, 515, 671 P.2d 1212, 1216 (Wash., 1983). The trial court did acknowledge this point. VRP 6/15/2007, page 39.

The trial court, however, refused to give Mr. Cunningham credit the date of he was arraigned on the amended charge (July 13, 2006) to the date of sentencing (June 15, 2007). The court citing the “intent of 9.94A” concluded that Mr. Cunningham should not be afforded credit for time served. VRP 6/15/2007, page 39, lines 17 -24. Although the trial court does not specifically cite to a provision of RCW 9.94A, presumably it was referring to RCW 9.94A.505(6), which states that ‘{t}he sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement

was solely in regard to the offense for which the offender is being sentenced.<sup>5</sup> If so, the trial court's reliance on RCW 9.94A.505(6) is misplaced.

There exists a plethora of cases that expressly hold that a defendant shall receive credit for time he or she was incarcerated during the pending of a case. *Petition of Gunter*, 102 Wn.2d 769, 689 P.2d 1074 (1984) (defendant convicted of second degree assault was entitled to credit for against his sentence for the four months and 22 days he spent in jail between his arrest and date of sentencing); *Matter of Acosta*, 37 Wn.App 378, 680 P.2d 423 (1984)(defendant was required to be credited with 105 days of presentence jail time against his discretionary minimum term of imprisonment); *State v. Cook*, 37 Wn.App. 269, 679 P.2d 413 (1984)(pretrial detention time must be credited to mandatory minimum sentences in criminal proceedings, and failure to allow such credit violates the due process, equal protection, the prohibition against multiple punishment); and *State v. Phelan*, 100 Wash.2d 508, 515, 671 P.2d 1212, 1216 (1983).

Because the court denied credit for time served from the date Mr. Cunningham was arraigned on the amended information to the date of sentencing – even though he was held on that cause number – the sentence violated the due process, equal protection and the prohibition against multiple punishment.

**2. Mr. Cunningham was misinformed about a direct consequence of his plea when the court indicated it must impose 12 months of community placement for an offense that no placement was authorized.**

A total sentence imposed, including community placement, may not exceed the statutory maximum. RCW 9.94A.505(5); *State v. Zavala-Reynoso*, 127 Wn.App 119, 110 P.3d 827 (2005). However, Mr. Cunningham was misinformed about the imposition of community placement prior and during the entry of his plea of guilty.

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<sup>5</sup> Formerly RCW 9.94.120(14).

On February 23, 2007, Mr. Cunningham entered a plea of guilty to the charge of First Degree Manslaughter. CP 16-23. VRP 2/13/2006. Because the offense was from 1992, the statutory maximum sentence for Manslaughter in the First Degree – a Class B Felony – was 120 Months (10 years). RCW 9A.21.021(1)(b). CP 16 – 23. As part of the Statement on Pleas of Guilty, Mr. Cunningham was specifically advised that he was subject to 12 months community placement. CP 16 – 23, page 2, paragraph 6(a). He was also advised that: If this crime is a ... serious violent offense, the judge will order me to serve at least one year of community placement. CP 16 – 23, page 3, paragraph 6(f) (emphasis added). On February 23, 2007, the court conducted the colloquy of Mr. Cunningham to explain the conditions of the pleas. In particular, the court advised Mr. Cunningham as follows:

THE COURT: It's (first degree manslaughter) as strike. Community Placement for 12 months upon your release from prison; you understand that?

THE DEFENDANT: I do, Your Honor.

THE COURT: And that the total sentence cannot exceed 120 months, and community placement can only be for the period of time that you earn for early release. So there's a condition of community placement. You understand that?

THE DEFENDANT: I do, Your Honor.

VRP 2/23/07, page 23, lines 3 – 13.

This was in error. In 1992, the year of the offense to which Mr. Cunningham was entering a plea to, community placement was not an option for First Degree Manslaughter. Even though on the Statement of Plea of Guilty and the court's oral colloquy informed Mr. Cunningham that community placement "will" be ordered, the same judge at the sentencing hearing acknowledged that "with regards to the community placement, there is no community placement, as it was not an option in 1992 on this

count.” VRP 6/15/2007, pages 40-41. Therefore, Mr. Cunningham was erroneously informed that 12 months of community placement would be ordered, coupled with the 116 months he had already served, that he had served the statutory maximum sentence allowed.

Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. *State v. Barton*, 93 Wash.2d 301, 304, 609 P.2d 1353 (1980) (citing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). A defendant need not be informed of all possible consequences of a plea, but rather, only the direct consequences. *State v. Ross*, 129 Wash.2d 279, 284, 916 P.2d 405. The maximum sentence and term of mandatory community placement are among such direct consequences of a plea. *State v. Morley*, 134 Wash.2d 588, 621, 952 P.2d 167 (1998); *Ross*, 129 Wash.2d at 284-87, 916 P.2d 405. If based on misinformation about sentencing consequences, a guilty plea is not entered knowingly. *State v. Miller*, 110 Wash.2d 528, 531, 756 P.2d 122 (1988); *State v. Knotek*, 136 Wash.App. 412, 423, 149 P.3d 676, 681 (2006).

Once it is held that “where the terms of a plea agreement conflict with the law or *the defendant was not informed of the sentencing consequences of the plea*, the defendant must be given the initial choice of a remedy *to specifically enforce the agreement or withdraw the plea.*” *State v. Miller*, 110 Wash.2d 528, 531, 756 P.2d 122 (1988); *State v. Turley*, 149 Wash.2d 395, 398-99, 69 P.3d 338 (2003). (emphasis added). As such, Mr. Cunningham is entitled to specific performance, as guaranteed in *Miller*: “[T]he integrity of the plea bargaining process requires that *once the court has accepted the plea, it cannot ignore the terms of the bargain*, unless the defendant ... chooses to withdraw the

plea.” *Id.* at 536 (emphasis added); *see also State v. Harrison*, 148 Wash.2d 550, 556-57, 61 P.3d 1104 (2003)(observing that, because plea agreements are contracts that “concern fundamental rights of the accused, they also implicate due process considerations that require a prosecutor to adhere to *the terms of the agreement* ” (emphasis added)). A defendant is entitled to specific performance of the plea agreement, even “where the terms of a plea agreement conflict with the law.” *Miller*, 110 Wash.2d at 536, 756 P.2d 122; *see, e.g., PRP of Isadore*, 151 Wash.2d 294, 302-03, 88 P.3d 390 (2004)(permitting defendant to request specific performance of a plea agreement that erringly failed to include a mandatory term of community placement); *State v. Cosner*, 85 Wash.2d 45, 51-52, 530 P.2d 317 (1975) (allowing reduction in defendants' mandatory minimum terms “in accordance with their understanding of the length thereof at the time of their pleas”). *State v. Bisson*, 156 Wash.2d 507, 520-521, 130 P.3d 820, 826 - 827 (2006).

Mr. Cunningham was told that the court will order 12 months community placement for a 1992 first degree manslaughter conviction, a condition that was not legally authorized. At the time Mr. Cunningham entered the plea, he had already served 116 months on the first degree manslaughter offense, which at the time was a Class B Felony with a 120 months statutory maximum. Consequently, Mr. Cunningham was misinformed of a significant consequence and should be granted specific performance.

#### **F. CONCLUSION**

Mr. Cunningham was unlawfully sentenced beyond the statutory maximum sentence permitted by law. The court failed to afford the appropriate credit for time served for the time between Mr. Cunningham was arraigned on an amended charge and the date of sentencing; even though he was expressly held on that charge. Moreover,

because Mr. Cunningham had served 116 months of a 120 months statutory maximum sentence, the trial court's imposition of an additional 395 days exceeded the statutory maximum permitted by law. Finally, because the court misinformed Mr. Cunningham of a perceived mandatory 12 months community placement, a condition that was not authorized by law, the plea was involuntary and subject to specific performance.

DATED this 26<sup>th</sup> day of November, 2007

  
\_\_\_\_\_  
Mark Larrañaga, WSBA No. 22715

COURT OF APPEALS  
DIVISION II

07 NOV 27 PM 2:15

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

CERTIFICATE OF SERVICE

I certify that on the 26<sup>th</sup> day of November, 2007 a true and correct copy of the foregoing OPENNING BRIEF OF APPELLANT was served upon the following individual by depositing same in the United States Mail, first class, postage prepaid:

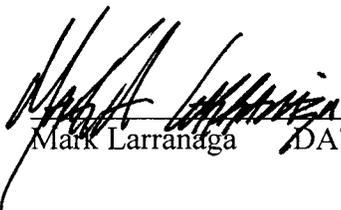
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