

original

No. 36868-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEIF ALLEN

Appellant.

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

COURT OF APPEALS
DIVISION II

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

The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-00493-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether former RCW 26.50.110 was ambiguous as to whether a contact prohibited by a no-contact order but without acts or threats of violence constituted a crime.

2. Whether two e-mail messages sent in violation of a no-contact order, sent on different dates but received by the victim at the same time, constitute one unit of prosecution so that convictions for two counts of violation of a no-contact order violate the constitutional prohibition against double jeopardy.

3. Whether three prior convictions were properly included in the defendant's offender score, where at sentencing he neither objected nor affirmatively agreed to their inclusion.

4. Whether the defendant's sentence of fifty months confinement plus nine to eighteen months of community custody exceeds the statutory maximum of 60 months.

5. Whether the defendant's two current convictions should be counted as separate offenses for purposes of calculating his offender score.

6. Whether the defendant received ineffective assistance of counsel because his trial attorney failed to raise the above issues at trial and/or sentencing.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

1. Former RCW 26.50.110 was ambiguous, but the ambiguity can be, and has been, resolved. Violations of a no-contact order that did not include acts or threats of violence were criminal acts and Allen's convictions are lawful.

Since Allen's brief was written, Division I of this Court of Appeals has issued an opinion in State v. Bunker, Docket No. 59322-6-I (May 5, 2008). In that opinion, the court held that while former RCW 26.50.110, as written at the time of these offenses, was ambiguous, principles of statutory construction can be applied to resolve the ambiguity. Since the primary goal of statutory construction is to discern and implement the intent of the legislature, the 2007 amendment to the statute figured prominently in the court's analysis. The amended statute makes it clear that all violations of a no-contact order are criminal, and the legislature specifically stated in the text of the amending legislation, Substitute House Bill 1642, that:

The legislature finds this act necessary to restore and make clear its intent that a willful violation of a no-contact provision of a court order is a criminal offense and shall be enforced accordingly to preserve the integrity and intent of the domestic violence act. This act is not intended to broaden the scope of law enforcement power or effectuate any substantive change to any criminal provision in the Revised Code of Washington.

Laws of 2007, ch. 173, § 1.

Bunker had raised the same argument as Allen does in this appeal. Division I cited to Tomlinson v. Clarke, 118 Wn.2d 498, 825 P.2d 706 (1992) for this language:

[W]hen an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial, and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law.

Id., at 510-11.

Division I also found that, even absent the curative amendment, it was clear that the legislature always intended for non-violent and non-threatening contacts to be criminal. For example, RCW 26.50.110(3) provides that violations of an order issued under RCW 26.50, 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW (or valid foreign orders) would *also* constitute contempt of court. RCW 10.99.040 requires that every no-contact order issued contain a warning that violation of the order is a criminal offense. A court “may not interpret any part of a statute as meaningless or superfluous.” State v. Lilyblad, 163 Wn.2d 1, 11, 177 P.3d 686 (2008).

Allen argues that because the statute is ambiguous, the rule of lenity requires that his convictions be reversed and dismissed. In Bunker, the court cited to State v. R.J., 121 Wn. App. 215, 88 P.3d 411 (2004) for this language: “But the rule of lenity does not apply

where statutes can be reconciled in a way that reflects the legislature's clear intent." Id., at 217 n.2.

The ambiguity in former RCW 26.50.110 can be, and was, resolved. The contacts initiated by Allen are criminal and his convictions must stand.

2. The two e-mail messages sent on different days but received by the victim at the same time constitute two units of prosecution and there is no double jeopardy violation.

When a defendant is charged with violating the same statute multiple times, convictions for each charge can withstand a double jeopardy challenge if each charge is a separate unit of prosecution. The first inquiry in determining the proper unit of prosecution is legislative intent as expressed in the statute. The rules of statutory construction are applied if necessary, and if there is any ambiguity, the rule of lenity applies in favor of the defendant. State v. Turner, 102 Wn. App. 202, 206-07, 6 P.3d 1226 (2000). "The first step in determining the unit of prosecution is to examine the statute in question." Id., at 207-08. Even if the legislature has not specified the unit of prosecution, "[t]his in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical

language, are to be read.” Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955).

The statute at issue here is former RCW 26.50.110(1), which, in pertinent part, reads:

(1) Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, *a violation* of the restraint provisions, . . . is a gross misdemeanor except as provided in subsections (4) and (5) of this section. (Emphasis added.)

Subsection (5) makes the violation a Class C felony if the offender has two or more prior convictions for violating a no-contact order.

In State v. Westling, 145 Wn.2d 607, 40 P.3d 669 (2002), the defendant had started a fire in a car that damaged two other cars parked nearby, and was convicted of three counts of second degree arson. He argued double jeopardy, the Court of Appeals affirmed, and the Supreme Court reversed.

[T]he statute refers, in relevant part, to the causing of “*a fire*” that damages “any automobile.” “Any” means “every” and “all.” . . . Thus, under the plain language of the statute, one conviction is appropriate where one fire damages multiple automobiles, i.e., by use of the word “any” the statute speaks in terms of “every” and “all” automobiles damaged by the one fire.

Id., at 612-13, emphasis added, cite omitted. In State v. Root, 141 Wn.2d 701, 9 P.3d 214 (2000), the challenge was to convictions for 73 counts of sexual exploitation of a minor, based upon numerous photographs of children in sexual poses. The Court of Appeals affirmed, and the Supreme Court reversed 49 of the convictions. "The question to be answered is what act or course of conduct has the Legislature defined as the punishable act for sexual exploitation of a minor." Id., at 710. Concluding that the unit of prosecution is each photo session per child, the court said, "The unit of prosecution for RCW 9.68A.040 is engaging in activity that compels, aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, while knowing such conduct will be photographed." Id., at 709.

State v. Davis, 142 Wn.2d 165, 12 P.3d 603 (2000), involved a conviction for two counts of possession with intent to manufacture marijuana. Davis had been operating two grow operations in separate houses in different towns with separate supplies and equipment. The Supreme Court affirmed those convictions, holding that it was the conduct demonstrating an intent to deliver which formed the unit of prosecution, and concluded that a "separate and

distinct' intent to manufacture drugs supports separate units of prosecution under the statute." Id., at 175.

[I]f a defendant's alleged drug manufacturing operations "are sufficiently differentiated by *time, location or intended purpose*," the defendant may be convicted multiple times for possession with intent to manufacture without violating double jeopardy.

Id., at 174, emphasis in original.

In Allen's case, the statute provides that "a violation" constitutes a crime. "A violation" is like "a fire" in Westling, i.e., had Westling set more than one fire there would have been more than one count of arson. Here each e-mail was a separate violation. Allen's situation is similar to that in Root, where the court focused on the activity of the defendant that caused the minor to engage in the sexually explicit conduct. Here there are two instances of the activity of the defendant, two e-mails on separate days, each of which violates the statute. In Davis, the two grow operations were separate, and here the two e-mails were separate, differentiated in time. The fact that the two grow operations in Davis were occurring simultaneously was not a significant factor, and the fact that the victim in Allen's case received the e-mails at the same time should not be significant, either. It was fortuitous that Davis's two grows were discovered at the same time and fortuitous that Allen's victim

checked her e-mail so infrequently that she received both messages at the same time. The unit of prosecution should be based upon what the defendant did, not the victim's actions. In Westling, the defendant set one fire, and the fact that two other vehicles were parked in harm's way did not make it more than one fire. In contrast, Allen sent two messages to his former girlfriend, he intended for her to get two messages, and she did. The statute does not preclude two "contacts" from occurring at the same time, particularly since the intent was that they be received separately, any more than the statute prohibiting possession of marijuana with intent to manufacture precluded two possessions with intent to manufacture in Davis.

In State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999), the defendant was convicted of three counts of rape for three separate penetrations that occurred during the course of one assault. The court held that the unit of prosecution is "sexual intercourse," which is defined as "any penetration of the vagina or anus." Therefore, each penetration constituted a separate crime. Id., at 119. Even where the two contacts occurred during the same event of accessing an e-mail account, they can be considered as separate

in the same way the penetrations were considered separately in Tili.

Allen sent two messages which constitute two units of prosecution, and there is no double jeopardy violation.

3. The fact that Allen did not affirmatively agree to his offender score at sentencing does not preclude the State from presenting proof of the challenged convictions at a remand for resentencing.

Allen argues that three of his five prior convictions must be removed from his offender score because the State did not provide proof of those convictions at sentencing. He relies on State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), State v. McCorkle, 88 Wn. App. 485, 945 P.2d 736 (1997), and In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005). In two of these cases, the issue was the State's failure to prove that out-of-state convictions were comparable to Washington felonies, and in one the State's failure to even mention, let alone prove, an out-of-state conviction that prevented another conviction from washing out.

In Ford, the defendant argued at sentencing that three California convictions should not count toward his offender score because they resulted in civil commitment rather than incarceration. The State did not present any documentation to support its position

that the crimes were comparable to Washington felonies, a position with which the trial court and Court of Appeals agreed. The Supreme Court reversed, remanding for an evidentiary hearing at which the State was allowed to introduce evidence to support the classification of the disputed convictions. It did so because:

[W]hile we necessarily hold that a sentence based on insufficient evidence may not stand, we recognize that a defense counsel has some obligation to bring the deficiencies of the State's case to the attention of the sentencing court. Accordingly, where, as here, the defendant fails to specifically put the court on notice as to any apparent defects, remand for an evidentiary hearing to allow the State to prove the classification of the disputed convictions is appropriate. See McCorkle, 88 Wn. App. at 500. This preserves the purpose of the SRA to impose fair sentences based upon provable facts, yet provides the proper disincentive to criminal defendants who might otherwise purposefully fail to raise potential defects at sentencing in the hopes the appellate court will reverse without providing the State further opportunity to make its case.

Ford, *supra*, at 485-86.

In McCorkle, referred to by the Ford court, the defendant had made general objections at sentencing to the inclusion of out-of-state convictions listed on an FBI rap sheet. This division of the Court of Appeals remanded for resentencing, but permitted the State to produce evidence of the contested convictions because McCorkle had not been specific enough at sentencing to give notice

of his objection. "If McCorkle had been more specific in his objections at the time of sentencing, we would hold the State to the existing record and simply remand for resentencing without consideration of those prior convictions for which proof was insufficient." McCorkle, *supra*, at 499, n. 7.

In Cadwallader, the defendant was sentenced as a persistent offender in 1998. He agreed to the prosecutor's statement of his criminal history, which included a 1978 rape and 1993 robbery as the predicate strike offenses. In 1998, it was understood that convictions for sex offenses would never wash out. In 1999, the Supreme Court decided State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999), in which it held that the 1990 amendment to the SRA removing sex offenses from the wash out provisions of the SRA applied prospectively only, and a rape conviction that had previously washed out was not revived by the amendment. Cadawallader appealed, arguing that the 1978 rape had washed out and he did not qualify as a persistent offender. The State argued that a 1985 theft conviction in Kansas, not previously included in the offender score, interrupted the required five-year period without a conviction, and the rape did not wash out. Even though neither party had know at the time of sentencing that this

Kansas conviction was even relevant, the court reversed and remanded for resentencing without the opportunity for the State to prove the Kansas conviction, since it had failed to mention it at the original sentencing. It held that Ford did not control because of the lack of any mention of the Kansas conviction in the lower court.

Allen's situation is significantly different. None of his convictions were from another state, or even another county. Every single one was in Thurston County. There was no comparability issue for the State to prove.

In 2007, the Supreme Court decided State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007). In that case, the defendant was convicted of first degree unlawful possession of a firearm. Sentencing hearings were set and continued from April until November of 2004. Both sides agreed on the standard sentencing range. At the sentencing on November 5, 2004, Bergstrom asked for another continuance, which was granted, to determine his eligibility for electronic home monitoring. At the continuation of the sentencing hearing on November 17, Bergstrom disputed his offender score on the basis that some of his prior convictions constituted the same course of conduct. His attorney did not agree, but did not make a separate argument. The trial court sentenced

him based on the State's calculation, he appealed, and the Court of Appeals affirmed. The Supreme Court reversed and remanded, and in the opinion set forth a basic framework for resentencing hearings following remand.

First, if the State alleges the existence of prior convictions at sentencing and the defense fails to "specifically object" before the imposition of sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence.

.....

Second, if the defense does specifically object during the sentencing hearing but the State fails to produce *any* evidence of the defendant's prior convictions, then the State may not present new evidence at resentencing.

.....

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after a sentence is imposed.

Bergstrom, *supra*, at 93-94, emphasis in original, internal cites omitted. The court found that the timing of Bergstrom's argument did not put the State on sufficient notice that the State needed to present evidence, and therefore both sides were permitted to present evidence on remand.

Allen argues that nothing occurred at his sentencing for him to object to, and therefore the State should be held to the existing record on remand. On the contrary, the State presented the Prosecutor's Statement of Criminal History [CP 60] and the worksheet from the sentencing manual [CP 59]. During the hearing the prosecutor listed the prior convictions in the presence of the defendant and his attorney. [RP 79]. The court commented on the extensiveness of his criminal history. [RP 81-82] The defendant's attorney signed the judgment and sentence [CP 47-57], in which the criminal history was listed in section 2.2 [CP 48]. If, as Allen acknowledges, the defendant has the obligation to bring to the court's attention any deficiencies in the State's case, Ford, *supra*, at 485, it seems a minimal requirement that, as he is listening to the prosecutor describe his criminal history, listening to the court comment on it, reading the Prosecutor's Statement of Criminal History, and reviewing the Judgment and Sentence which his attorney will sign, and which he signed in other sections, he speak up if he disagrees with the prosecutor's presentation. It is hardly a secret that his standard range depends in large part on his criminal history, and by remaining silent at sentencing but appealing later, it supports the inference that he is, as the Ford court said, hoping that

he can get his sentence reversed and remanded with the State being prohibited from presenting further evidence.

In Bergstrom, the opinion is silent as to whether the defendant's prior convictions were out-of-state or not, and the holding is not based on that factor. The State argues that the goals of justice and the frugal use of increasingly scarce judicial resources weigh in favor of this court finding that Allen did agree to the State's listing of his prior convictions, based upon signing the Judgment and Sentence and failing to object to the Prosecutor's Statement of Criminal History. However, at the very least, Allen falls under the first alternative set forth by the Bergstrom court and remand for resentencing while allowing the State to offer certified judgments and sentences for the prior convictions. There is no basis for remanding while prohibiting the State from proving the convictions which Allen did not dispute below, nor give notice to the State that it would need to produce documentation.

4. The defendant's sentence of fifty months plus nine to eighteen months of community custody could potentially exceed the statutory maximum of sixty months.

Allen argues that a sentencing court cannot impose a sentence that exceeds the statutory maximum, which, in his case, is five years, or 60 months. The State agrees that because he was

sentenced to 50 months confinement and nine to eighteen months community custody, his sentence could potentially exceed the 60-month maximum and the matter should be remanded to clarify that in no circumstance will the total exceed 60 months. The State disagrees, however, that the court is required to sentence him to 50 months confinement and ten months community custody.

Allen contends that the court must give a determinate sentence, which he interprets to mean that the court sets a specific amount of community custody rather than a range. The language of several statutes shows that this argument is incorrect.

RCW 9.94A.030(18) defines a determinate sentence:

“Determinate sentence” means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. *The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.* (Emphasis added.)

In other words, the fact that a court sentences a defendant to a specific number of months does not mean the defendant will serve that number of months, yet it is still a determinate sentence. In reality, the number of months to which the court sentences the

defendant is the maximum number of months he or she will serve in confinement. Community custody is also controlled by statute.

RCW 9.94A.715(1) provides in part:

[T]he 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); (Emphasis added.)

Community custody ranges are set forth in WAC 437-20-010, and provide for various ranges for sex offenses (36 to 48 months), serious violent offenses (24 to 48 months), violent offenses (18 to 36 months), crimes against persons (9 to 18 months) and certain drug offenses (9 to 12 months). The remedy offered by Allen makes these provisions superfluous.

Allen urges this court to disregard the holding in State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004). In that case, following State v. Vanoli, 86 Wn. App. 643, 937 P.2d 1166 (1997), the court held that the solution when the combined terms of confinement and community custody could possibly exceed the statutory maximum is to remand to clarify the judgment and

sentence to allow the sentencing court to set forth the maximum sentence and state that the total cannot exceed that maximum. A similar solution was proposed in State v. Hibdon, 140 Wn. App. 534, 166 P.3d 826 (2007). There, Hibdon was sentenced to the statutory maximum of 60 months for delivery of marijuana. He mistakenly thought he had also been sentenced to twelve months of community custody (which he should have been), and argued that the court must reduce his confinement to 48 months and impose twelve months of community custody, equaling 60 months. The Court of Appeals disagreed, holding that

[A] defendant may be sentenced to a term of confinement for the statutory maximum and also to community placement; in such instances, former RCW 9.94A.120(9)(a) provides that the term of community placement “shall consist entirely of such community custody to which the offender may be come eligible.” For such a sentence to be valid, the judgment and sentence should set forth the statutory maximum and clearly indicate that the term of community placement does not extend the total sentence beyond the maximum. . . . Where the judgment and sentence does not so indicate, an appropriate remedy is to remand for clarification of the sentence. . . .

Id., at 538, cites omitted. Former RCW 9.94A.120 has since been recodified; the relevant current version, with the identical language referred to above, is at RCW 9.94A.705.

Even though there are set community custody ranges for various classifications of crimes, a sentencing court can impose a different period of time as an exceptional sentence. State v. Hudnall, 116 Wn. App. 190, 64 P.3d 687 (2003); In re Pers. Restraint of Smith, 139 Wn. App. 600, 161 P.3d 483 (2007). “[W]hen a statute authorizes community custody, trial courts may impose community custody terms longer or shorter than the amount set by statute as long as the overall sentence does not exceed the statutory maximum.” Hudnall, supra, at 197.

If community custody was intended to be the inelastic, carved-in-stone period of time that Allen asserts, the legislature would not have provided that it fall within a range “or up to the period of earned early release . . . whichever is longer.” RCW 9.94A.715(1). Allen has provided no authority for his proposition that by imposing a range of community custody a court imposes an indeterminate sentence.

Allen appears to argue that his right to good time credits means not just that he can earn early release from confinement, but that the period of earned early release must be free of any State control, in effect subtracting that time from his total sentence. There is no constitutional right to good time; the right is only

statutory. In re Pers. Restraint of Galvez, 79 Wn. App. 655, 657, 904 P.2d 790 (1995).

The statutorily created right to earned early release credits, as set forth in RCW 9.94A.728, creates a limited liberty interest that requires minimal due process. In re Pers. Restraint of Crowder, 97 Wn. App. 598, 600, 985 P.2d 944 (1999). See also, In re Personal Restraint of Taylor, 122 Wn. App. 880, 884, 95 P.3d 790 (2004) (“An inmate has ‘a limited, but protected, liberty interest’ in his good time credit.”); In re Personal Restraint of Ramsey, 102 Wn. App. 567, 575, 9 P.3d 231 (2000) (“The statutory right to already-earned early release credit does create a limited liberty interest protected by the due process clause.”) Allen does not have any right to serve less than the maximum sentence imposed. In re Pers. Restraint of Adams, 132 Wn. App. 640, 649, 134 P.3d 1176 (2006) (“An inmate does not have a protected liberty interest in being released before serving the maximum sentence.”) In other words, Allen has due process rights regarding good time credits, but he does not have the right to be awarded any specific amount of time. Even then, “the nature and scope of the due process rights afforded to inmates is necessarily limited.” In re Pers. Restraint of Johnston, 109 Wn.2d 493, 497, 745 P.2d 864 (1987).

Good time applies to incarceration, not the entire sentence, which includes community custody. In re Pers. Restraint of Taylor, *supra* at 881.

Allen is correct that the court is without authority to grant or restrict his earned early release. In re Pers. Restraint of West, 154 Wn.2d 204, 212, 110 P.3d 1122 (2005). That is not what the court has done in Sloan and similar cases. The Department of Corrections determines the amount of good time. The court determines *what happens to the defendant after he has been released*. The court does control the period of community custody, and a period of community custody that stretches from the time of release from confinement, but does not exceed the statutory maximum, is within the authority of the court.

The State agrees that, pursuant to Sloan, *supra*, Allen's judgment and sentence should be remanded for the trial court to clarify that the total confinement plus community custody shall not exceed 60 months.

5. The defendant's two current convictions should count as separate offenses for purposes of calculating his offender score.

The State agrees with Allen's statement of the law. If two or more offenses are the "same criminal conduct", they should count

as one for purposes of calculating the offender score. RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed in the same time and place, and involve the same victim." Here we have the same intent and the same victim, but not the same time. Allen sent one e-mail in February 12, 2007, and one on February 14, 2007. The fact that the victim received them at the same time, and read them one after the other, does not alter the fact that Allen struck the "send" button on his computer two different times on different days.

For the same reasons that these two offenses should not count as one unit of prosecution, they should not count as one offense for purposes of calculating Allen's offender score.

6. The defendant did not receive ineffective assistance of counsel because his trial attorney did not raise and argue the above issues at trial and/or sentencing.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d

668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989).

To prevail on a claim of ineffective assistance of counsel, a defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance was so deficient that he was deprived "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland,

supra, at 687; State v. Hendrickson, *supra* at 77-78; State v. McFarland, *supra* at 334-35.

In this case, there is no reason to think defense counsel would have prevailed on any of these issues, other than that the total confinement and community custody could possibly exceed 60 months, had he raised them. A review of the record shows that he diligently and effectively represented the defendant, and Allen cannot show that either of the prongs of the above test were met.

D. CONCLUSION.

The two e-mails that Allen sent to his victim, although received at the same time, were sent at different times and meant to be read at different times. It is not illogical that two separate “contacts” can occur one right after the other. Former RCW 26.50.110 clearly does criminalize the contacts at issue here. The prior convictions were properly included in Allen’s offender score, and the two current offenses were properly counted separately. Defense counsel was not so deficient as to constitute ineffective assistance of counsel. The State concedes that the matter should be remanded so the trial court can clarify the judgment and sentence to reflect the statutory maximum and restrict the total sentence from exceeding it.

The State respectfully asks this court to affirm the
defendant's convictions and sentence.

Respectfully submitted this 6th of June, 2008.

Carol La Verne
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Attorney for Respondent

A copy of this document was properly addressed and mailed, postage prepaid, to the
following individual(s) on June 6, 2008.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington
that the foregoing is true and correct. Olympia, Washington.

Date: 6/6/08

Signature: [Handwritten Signature]

03 JUN -9 AM 10:03
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY [Handwritten Signature]
DEPUTY