

COURT OF APPEALS  
DIVISION II

NO. 37188-0-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

vs.

EDWARD M. MATOS,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Richard A. Strophy, Judge  
Cause No. 07-1-011512-8

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to suppress evidence seized as a result of the warrantless inventory search of the trunk of the vehicle Matos was driving.
02. The trial court erred in permitting Matos to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence seized as a result of the warrantless inventory search of the trunk of the vehicle Matos was driving.
03. The trial court erred in not taking count IV from the jury for lack of sufficiency of the evidence that Matos possessed the marijuana found in the trunk of the vehicle.
04. The trial court erred in denying Matos a fair trial where Deputy Ditrich testified that Matos had intentionally run into him.
05. The trial court erred in permitting Matos to be represented by counsel who provided ineffective assistance by failing to properly object to Deputy Ditrich's testimony that Matos had intentionally run into him.
06. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of assault in the third degree, count II.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the warrantless inventory search of the trunk of the vehicle was unlawful and the evidence should be suppressed? [Assignment

of Error No. 1].

02. Whether the trial court erred in permitting Matos to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence seized as a result of the warrantless inventory search of the trunk of the vehicle Matos was driving? [Assignment of Error No. 2].
03. Whether there was sufficient evidence to support Matos's criminal conviction for unlawful possession of marijuana? [Assignment of Error No. 3].
04. Whether Matos was denied a fair trial where Deputy Ditrich testified that Matos had intentionally run into him? [Assignment of Error No. 4].
05. Whether the trial court erred in permitting Matos to be represented by counsel who provided ineffective assistance by failing to properly object to Deputy Ditrich's testimony that Matos had intentionally run into him? [Assignment of Error No. 5].
06. Whether, as a matter of law, the trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of assault in the third degree, count II? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Edward M. Matos (Matos) was charged by first amended information filed in Thurston County Superior Court on August

27, 2007, with malicious mischief in the first degree, count I, assault in the third degree, count II, attempting to elude, count III, unlawful possession of marijuana with intent to deliver, count IV, and unlawful possession of oxycodone, count V, contrary to RCWs 9A.48.070(1)(b), 9A.36.031(1)(g), 46.61.024, 69.50.401(1)(2)(c) and 69.50.4013(1). [CP 6-7].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8-9].

Trial to a jury commenced on December 19, the Honorable Richard A. Strophy presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 154]. Matos was found guilty as charged on all but count IV, for which he was found guilty of possession of marijuana. Timely notice of this appeal followed sentencing. [C 21-24, 27, 61, 68].

02. Substantive Facts: Trial<sup>1</sup>

02.1 Attempting to Elude: Count III

On August 17, 2007, at approximately one in the morning, Deputy Malcolm McIver began following a vehicle after it exited a tavern parking lot and then made an illegal turn. [R 17-18].

McIver was in uniform and driving a fully marked patrol vehicle equipped

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<sup>1</sup> The counts are presented in nonsequential order for the purpose of simplifying the presentation of the case.

with lights and siren. [RP 20]. The car of interest, which was occupied by two individuals who appeared to be reaching down and looking around, did not stop after McIver activated his lights and siren, and ran another stop sign, increased its speed beyond the marked limit and moved into the oncoming lanes of traffic before making a violent turn into a parking lot. [RP 21-25]. “Both the doors came open and the driver and the passenger both began running from the car.” [RP 28]. Matos was the driver. [RP 28, 32].

#### 02.2 Assault Third Degree: Count II

McIver and Deputy Rod Ditrich, who had also arrived at the scene in a separate fully marked patrol vehicle, began the pursuit of Matos. At one point, “Mr. Matos lower(ed) his head and shoulder and ran into Deputy Ditrich, and both of them went to the ground.” [RP 29]. Matos got free and ran another 15 to 20 feet before McIver arrested him. [RP 29-31, 75].

McIver confirmed that after Matos had run into Ditrich, he tripped and stumbled, giving McIver the opportunity to overtake him, which he did. [RP 44].

Ditrich testified that Matos, after assuming a football position and looking straight at him from a distance of five feet, “lowered his head and shoulder and ran into me.” [RP 79, 100]. Ditrich suffered a sprained

ankle. [RP 80-81]. The encounter lasted “(a) matter of seconds.” [RP 96].

02.3 Malicious Mischief First Degree: Count I

After being placed in the back of McIver’s patrol car, Matos kicked the back driver’s side window out of the car. [RP 35-36]. As a result, McIver’s patrol vehicle was taken out of service. [RP 56].

02.4 Possession of Marijuana: Count IV

39.1 grams of marijuana was located in the trunk of the vehicle Matos had been driving. [RP 41, 47, 67, 69].

02.5 Possession of Oxycodone: Count V

A cellophane wrapper containing pills that subsequently tested positive for oxycodone was found in Matos’s pocket. [RP 60-63, 82].

D. ARGUMENT

01. THE WARRANTLESS INVENTORY SEARCH OF THE TRUNK OF THE VEHICLE WAS UNLAWFUL AND THE EVIDENCE OBTAINED DURING HE SEARCH SHOULD BE SUPPRESSED.

01.1 The Record

A claimed manifest error affecting a

constitutional right may be raised for the first time on appeal where, as here, an adequate record exists.

[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.

State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998) (court accepts review of search and seizure issue raised for first time on appeal where record is sufficiently developed for court to determine whether a motion to suppress clearly would have been granted or denied). “Where the alleged constitutional error arises from trial counsel’s failure to move to suppress, the defendant ‘must show the trial court likely would have granted the motion if made....’” Contreras, 92 Wn. App. at 312 (quoting State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995)).

The record here is sufficient for review; it fully shows that deputy McIver, after arresting Matos, conducted an inventory search of the locked trunk of the vehicle he had been driving:

I then requested a tow to the scene to remove his vehicle from the parking lot of Great Floors, and prior to doing that we have to fill out a Washington State Tow Form that requires us to take an inventory search of the vehicle. So I proceeded to take an inventory of the car which was clean except for some clothing, like a sweatshirt and some jackets. I did an inventory search of the trunk of the vehicle.

....  
Inside the trunk of the car was a large amount of men's clothing and just miscellaneous items in there, but in the far left, backhand corner of the trunk was a large, one-gallon, zip-lock bag full of suspected marijuana.

[RP 40].

During closing, Matos argued that the marijuana found in "the locked trunk" was out of his control. [RP 142].

#### 01.2 Overview

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and art. I, § 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). One exception to the warrant requirement is an inventory search. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). Under both constitutional provisions, the State bears the burden of proving that a warrantless search is valid under a recognized exception to the warrant requirement. State v. Parker, 139 Wn.2d at 496.

#### 01.3 Art. I, § 7 of the Washington Constitution

When a violation of both federal and state

constitutions is alleged, the state constitutional claim will be examined first. Munns v. Martin, 131 Wn.2d 192, 199, 930 P.2d 318 (1997) (citing State v. Hendrickson, 129 Wn.2d at 69. In order to enable courts to determine whether greater protection under the state constitution is warranted in a particular case, our Supreme Court has set forth six nonexclusive criteria in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).<sup>2</sup> If this criteria are present, a court must decide the case on independent state constitutional grounds, which afford more protection to individuals from searches and seizures by government than the Fourth Amendment to the United States Constitution. See State v. Carter, 127 Wn.2d 836, 847, 904 P.2d 290 (1995) (citing cases); also see State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990). Since Gunwall involved comparing the same constitutional provisions as those to be examined here, it is necessary to examine only the fourth and sixth Gunwall factors as they apply to this case. Boland, 115 Wn.2d at 576-77.

The fourth Gunwall factor is “preexisting bodies of law, including statutory law.” Gunwall, 106 Wn.2d at 61-62. A person’s right to be free from unreasonable governmental intrusion into one’s private affairs

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<sup>2</sup> The Gunwall factors are: (1) the textural language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 58.

encompasses automobiles and their contents. State v. Parker, 139 Wn.2d at 494; State v. Hendrickson, 129 Wn.2d 61, 69 n.1, 917 P.2d 563(1996). Moreover, it is well settled that under art. I, § 7 of the Washington Constitution, “the search incident to arrest exception to the warrant requirement is narrower than under the Fourth Amendment.” State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

The sixth Gunwall factor is “matters of particular state or local concern.” Gunwall, 106 Wn.2d at 61-62. The question under this factor becomes, is the subject matter local in character, or does there appear to be a need for national uniformity? In State v. Johnson, *supra*, the court held that privacy interests protected by art. I, § 7 include ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’ Johnson 128 Wn.2d at 446 (quoting State v. Boland, 115 Wn.2d at 577) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)); also see State v. Mendez, 137 Wn.2d 208, 217, 970 P.2d 722 (1999)(the sixth Gunwall factor leads to the conclusion that Const. art. I, § provides greater protection to privacy than the fourth Amendment). In State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998), our Supreme Court determined that art. I, § 7 of the Washington Constitution prohibits the warrantless search of a locked trunk on an automobile.

Since it is well established that art. I, § 7 provides greater protection of a person's right to privacy than the Fourth Amendment, State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998), this court should review the issues presented here under independent state grounds, thus affording Matos greater protection of his right to privacy than guaranteed by the federal constitution.

Art. I, § 7 of the Washington Constitution provides:

No person shall be disturbed in his private affairs,  
or his home invaded, without authority of law.

#### 01.4 Scope of Inventory Search

The scope of an inventory search is "limited to those areas necessary to fulfill its purpose"; that is, "limited to protecting against substantial risks to property." State v. Houser, 95 Wn.2d 154, 155, 622 P.2d 1218 (1980). In Washington, police may not open and examine a trunk "absent a manifest necessity for conducting such a search." Id at 156 (no great danger of theft to property left in trunk). And this is true even if a latch located inside the passenger compartment could open the trunk. State v. White, 135 Wn.2d 761, 765-67, 958 P.2d 982 (1980).

#### 01.5 Application of Law to Facts

There was no showing, nor could there have been, of a “manifest necessity” for conducting the search of the trunk of the vehicle in this case. Deputy McIver testified that the search was conducted merely as part of the standard operating procedure. A motion to suppress the evidence (marijuana) seized in the trunk of the vehicle Matos was driving would have been granted, and any evidence seized or obtained through the exploitation of this illegality is tainted and therefore inadmissible as “fruits of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992). The evidence should be suppressed and Matos’s conviction for possession of marijuana reversed and dismissed.

02. MATOS WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO PROPERLY MOVE TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF THE TRUNK OF THE VEHICLE MATOS WAS DRIVING.<sup>3</sup>

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of

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<sup>3</sup> While it is submitted that this issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to move to suppress evidence, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to move to suppress the evidence, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable

probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to move to suppress the evidence, there would have been insufficient evidence to convict Matos of possession of marijuana.

Counsel's performance was deficient because he failed to move to suppress the evidence on the grounds argued herein, which was highly prejudicial to Matos, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for possession of marijuana.

03. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD MATOS'S CRIMINAL CONVICTION FOR POSSESSION OF MARIJUANA FOUND IN THE TRUNK OF THE VEHICLE.

03.1 Legal Overview

03.1.1 Sufficiency Of The Evidence

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt

beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

#### 03.1.2 Actual Or Constructive Possession Of Controlled Substance

Possession may be actual or constructive. State v. Escheverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). “Actual possession occurs when the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Mere proximity is not enough to establish possession. State v. Potts, 93 Wn. App. 82, 88, 969 P.2d 494 (1998) (citing State v. Robinson,

79 Wn. App. 386, 391, 902 P.2d 652 (1995)). For example, in State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990), the court found that the defendant's presence in a room where drugs were found plus his fingerprint on a plate that appeared to contain a controlled substance plus his rising from a chair when the police broke through the front door was insufficient to establish actual possession. Spruell, 57 Wn. App. at 388-89.

### 03.2 Application of Law to Facts

The State had the burden to prove that Matos was in possession of the marijuana found in the trunk of the vehicle. And given that there is nothing in the record from which to argue that he was in physical custody of this marijuana, the issue is whether the evidence supports a finding of constructive possession. It does not.

To prove that Matos constructively possessed the marijuana, the State was required to prove that he had dominion and control over the drug, for it is not a crime to have dominion and control over a car, and mere proximity, arm length or otherwise, is not enough to establish dominion and control over a controlled substance. State v. Potts, 93 Wn. App. at 88.

Matos was not responsible for what was in the car. He was not the registered owner and his name did not appear on the bill of sale for the vehicle. [RP 48]. No fingerprints connected him to the marijuana. And

there was no indication he had any way of even getting inside the trunk and no indication that any of his property was found therein. Though men's clothing was found in the car, there was absolutely no evidence presented that linked the clothing to Matos, not even a comparison of sizes.

The totality of this evidence, or lack thereof, would not permit a reasonable jury to infer that Matos had dominion and control over the marijuana, with the result that this conviction for possession of marijuana must be reversed and dismissed.

04. MATOS WAS DENIED A FAIR TRIAL WHERE DEPUTY DITRICH TESTIFIED THAT MATOS HAD INTENTIONALLY RUN INTO HIM.

No witness may testify as to an opinion on the guilt of a defendant, whether directly or inferentially. See State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Such testimony invades the province of the jury to weigh the evidence and to decide the credibility of witnesses. Id. The goal in prohibiting a witness from expressing an opinion about a defendant's guilt or innocence is to avoid having the witness tell the jury what result to reach. State v. Baird, 83 Wn. App. 477, 485, 922 P.2d 157 (1996).

A witness cannot give an opinion on the guilt of the defendant because such evidence violates the defendant's right to a jury trial that includes the jury's independent determination of the facts. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). An improper opinion as to the guilt of a defendant invades the province of the jury and is an error of constitutional magnitude. State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), petition for review denied, 124 Wn.2d 1018 (1994). Issues of constitutional magnitude may be raised for the first time on appeal. State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); RAP 2.5(a)(3).

As instructed in this case, an assault is an intentional touching or striking of another person or an act done with intent to inflict bodily injury or an act done with intent to create in another apprehension and fear of bodily injury. [CP 43]. The State argued that Matos intentionally assaulted Deputy Ditrich by running into him. [CP 12; RP 147].

The court further instructed the jury that “(a) person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.” [CP 44; court's instruction 14].

Matos objected when Deputy Ditrich testified that Matos “intentionally ran right into me.” [RP 77-78]. “Objection, Your Honor, to

the witness characterizing my client's intent." After the parties approached the bench, and the prosecutor indicated he thought he could ask a clarifying question, the court stated, "Rephrase the question." [RP 78]. Following several more questions, in response to a question to describe how Matos had postured himself, Ditrich offered that Matos "intentionally lowered his shoulder and his heard," before Matos's counsel again objected "to what my client intentionally did. Calls for speculation." [RP 79]. The prosecutor then asked his witness to "(j)ust describe what (Matos) did rather than what he intended to do." [RP 79]. The court did not rule on the objection and Matos did not request that the comments be stricken from the record.

Error of constitutional magnitude is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). On the other hand, the erroneous admission of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Regardless of the analytic prism employed, under either standard, admitting the testimony here at issue was not harmless. There is

reasonable doubt the jury would have reached the same verdict without this evidence. For the same reason, the evidence materially affected the outcome of the trial. The error was of major significance and not harmless.

Intent was the core issue. It was the only disputed element regarding the assault charge. That was Matos's argument. It was the decisive issue: Did Matos intentionally assault Deputy Ditrich by running into him? During closing, Matos highlighted that merely because he ran into Deputy Ditrich while trying to get away, did not prove that he intended to assault anyone and in no manner facilitated his flight. [RP 140]. He stumbled. Deputy McIver quickly apprehended him. And no evidence was presented that Ditrich took any sort of defensive action in anticipation of a pending assault. It all happened in a "matter of seconds." [RP 96]. There was a paucity of evidence that Matos's intended anything other than removing himself from the officers' presence, which he failed to accomplish. Ditrich's testimony amounted to an improper opinion as to Matos's guilt. And its impact, the actual prejudice, cannot be denied, especially since police officers' testimony carries an "aura of reliability." State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001).

Accordingly, Matos was denied his constitutional right to a fair trial, with the result that this court should determine that the error here at

First, the record does not reveal any tactical or strategic reason why trial counsel would have allowed Ditrich's testimony that Matos had intentionally run into him to be presented to the jury. It was completely inculpatory and did not support any defense theory of the case. Second, if counsel had properly objected, it is likely the objection would have been sustained, and the testimony would have been excluded as an impermissible opinion on the guilt of the defendant, i.e., that he, the defendant, intended to assault a law enforcement officer.

As previously set forth, Ditrich's testimony was highly prejudicial and was the critical issue for the jury to determine in deciding whether Matos was guilty of assault in the third degree. Without this testimony, the outcome of the trial likely would have been different, since the jury would have been left to its independent determination of whether Matos's contact with Ditrich was the result of an intentional act.

Matos was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for assault in the third degree.

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06. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF ASSAULT IN THE THIRD DEGREE, COUNT II.

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack and “that a defendant cannot agree to punishment in excess of that which the Legislature has established.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score,” the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

A sentencing court “may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5); State v. Hudnall, 116 Wn App. 190, 195, 64 P.3d 687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004)(the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Nothing in the statute grants the sentencing court the authority to speculate that a defendant will earn early release and to impose a sentence beyond the statutory maximum based on that speculation. If the Legislature had so intended, it would have made that provision.

In addition to sentencing Matos to 57 months for assault in the third degree, the trial court impose 9 to 18 months’ community custody. [CP 85]. As this sentence exceeds the statutory maximum sentence of five years imprisonment, or a \$10,000 fine, or both, See RCW 9A.36.031; RCW 9A.20.021(1)(c), this court should remand for resentencing within the five-year statutory maximum for assault in the third degree, a class C felony.

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E. CONCLUSION

Based on the above, Matos respectfully requests this court to reverse and dismiss his convictions for assault in the third degree and possession of marijuana and to remand for resentencing consistent with the arguments presented herein.

Dated this 3<sup>rd</sup> day of July 2008.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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