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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37790-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

John Booth, Jr.

Appellant.

Lewis County Superior Court

Cause No. 04-1-00325-8

The Honorable Judges David Draper and Nelson Hunt

Appellant's Opening Brief

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FILE 9-3-08

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ASSIGNMENTS OF ERROR

1. The trial court exceeded its sentencing authority.
2. The trial court erred by imposing a sentence in excess of the statutory maximum.
3. The trial court erred by amending Mr. Booth's judgment and sentence without correcting the term of confinement.
4. The trial court erred by denying the relief requested in Mr. Booth's Motion to Vacate, Modify, or Correct.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A sentencing court may not impose a combined term of confinement and community custody that exceeds the statutory maximum for an offense. The court in this case imposed confinement and community custody that exceeds the statutory maximum for Mr. Booth's offense. Does the sentence exceed the trial court's authority?

Assignments of Error Nos. 1-4.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On May 5, 2004, John Booth pled guilty to two counts of Assault in the Second Degree. CP 22-29. One of these counts carried with it a Deadly Weapon Sentence Enhancement. CP 14. The court found that he had 11 points, making his standard range on both counts 63 to 84 months. CP 15. The court sentenced him to 84 months, plus 12 months confinement for the enhancement, for a total of 96 months at the Department of Corrections. CP 18. The court then ordered an additional 18 to 36 months of community custody. CP 18.

On May 1, 2008, Mr. Booth filed a Motion to Vacate, Modify, or Correct. CP 6-13. He argued that his sentence, which totaled 132 months including the community custody, exceeded the 120 month maximum for his offenses. CP 6-13. He urged the court to reduce his sentence, since there was no basis found for an exceptional sentence. CP 6-13.

Without a hearing, the trial court entered an Order Amending Judgment and Sentence, which reads (in part) as follows: "The statutory maximum sentence is 120 months. The total time imposed for both incarceration and community custody shall not exceed 120 months." CP 4. Mr. Booth timely appealed the order. CP 3.

ARGUMENT

I. MR. BOOTH’S SENTENCE IS UNLAWFUL BECAUSE HIS TERMS OF CONFINEMENT AND COMMUNITY CUSTODY EXCEEDED THE STATUTORY MAXIMUM, IN VIOLATION OF FORMER RCW 9.94A.505(5) (2004).

Courts have the power and the duty to correct erroneous sentences, whenever such errors are discovered. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861 at 869, 50 P.3d 618 (2002). The sentence in this case was imposed in violation of the Sentencing Reform Act. The trial court’s Order Amending Judgment and Sentence did not fix the error.

The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn.App. 400 at 409, 101 P.3d 880 (2004). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wn.2d 186 at 194, 102 P.3d 789 (2004). If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra*, at 409; *see also State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006) (“Plain language does not require construction;” *Punsalan*, at 879, *citations omitted*). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

At the time of Mr. Booth's offense, RCW 9.94A.505 governed imposition of sentences, and provided (in relevant part) as follows:

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

- (i) Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range established in [former] RCW 9.94A.510 [2004]...;
- (ii) ...
- (iii) ...[Former] 9.94A.715 [2004], relating to community custody;

...

Former RCW 9.94A.505 (2004)

The phrase "community custody" was defined to mean "that portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to...[former RCW] 9.94A.715 [2004]... served in the community subject to controls placed on the offender's movement and activities by the department..." Former RCW 9.94A.030(5) (2004). A "community custody range" was "the minimum and maximum period of community custody included as part of a sentence under [former] RCW 9.94A.715 [2004], as established by the commission or the legislature under [former] RCW 9.94A.850 [2004], for crimes committed on or after July 1, 2000." Former RCW 9.94A.030(6) (2004).

The community custody provisions applicable in this case were contained in RCW 9.94A.715(1):

When a court sentences a person to the custody of the department for...a violent offense [or] any crime against persons under [former] RCW 9.94A.411(2) [2004]..., the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under [former] RCW 9.94A.850 [2004] or up to the period of earned release awarded pursuant to [former] RCW 9.94A.728 (1) and (2) [2004], 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 [former] RCW 9.94A.728 (1) and (2) [2004]...
Former RCW 9.94A.715(1) (2004).

Additional time was to be imposed for offenders armed with deadly weapons. In such cases, adjustments to the standard range were calculated based on former RCW 9.94A.533, which provides (in relevant part):

(1) The provisions of this section apply to the standard sentence ranges determined by [former] RCW 9.94A.510 [2004]...

...

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in [former] RCW 9.41.010 [2004] and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement...

...

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

...

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter...

...

Former RCW 9.94A.533 (2004).

Two different provisions applied whenever the imposition of community custody or a deadly weapon enhancement created a possibility of increasing the offender's sentence beyond the statutory maximum.

With regard to the deadly weapon enhancement, the sentence was governed by former RCW 9.94A.533(4)(g):

If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

Former RCW 9.94A.533(4)(g) (2004).

The imposition of confinement and community custody that might increase the offender's sentence beyond the statutory maximum was governed by former RCW 9.94A.505(5):

Except as provided under [sections relating to restitution terms], a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

Former RCW 9.94A.505(5) (2004).

Under the plain language of this provision, a court may not “impose” a sentence exceeding the statutory maximum for the offense of conviction. Former RCW 9.94A.505(5) (2004).

In this case, Mr. Booth’s standard range (without enhancements) was calculated to be 63-84 months.¹ CP 15. The addition of a 12-month deadly weapon enhancement increased the standard range to 75-96 months. CP 15. In addition, RCW 9.94A.715(1) required imposition of a mandatory community custody range of 18-36 months. *See* CP 24. The total range of confinement and community custody, including all these factors, was therefore 93 –111 months at the low end, and 114-132 months at the high end.

However, under the plain language of former RCW 9.94A.505(5) (2004), the court was not permitted to impose a sentence exceeding the statutory maximum. The statutory maximum for Assault in the Second Degree, a Class B felony, was 10 years. CP 15; former RCW 9A.20.020(1)(b) (2004). Therefore, the maximum sentence the trial court was permitted to impose consisted of confinement and community custody that totaled 120 months.

¹ Since the amount of time Mr. Booth will actually serve is determined by the length of the sentence on Count I, all calculations will refer to that count.

Given the mandatory community custody range of 18-36 months required by former RCW 9.94A.715(1), the trial court was prohibited from imposing confinement that exceeded 84 months. Since the deadly weapon enhancement “may not be reduced” when a sentence exceeds the statutory maximum, the most confinement the court was permitted to impose (excluding the twelve-month deadly weapon enhancement) was therefore 72 months, slightly less than the middle of the standard range.

The sentencing court imposed a standard range sentence of 84 months, resulting in a total sentence (including confinement, the enhancement, and the community custody range) of 114-132 months. This sentence exceeds the statutory maximum, in violation of former RCW 9.94A.505(5) (2004). Because of this, the sentence must be vacated and the case remanded for imposition of a sentence of 72 months confinement, 12 months additional confinement for the enhancement, and 18-36 months community custody. *In re Goodwin, supra.*

II. THIS COURT SHOULD NOT CONTINUE TO FOLLOW DIVISION I’S DECISION IN STATE V. SLOAN, WHICH WAS BASED ON PRECEDENT ADDRESSING A PRIOR VERSION OF THE SRA.

The trial court, instead of imposing a determinate sentence that complied with former RCW 9.94A, amended the judgment and sentence to add the following language: “The statutory maximum sentence is 120 months. The total time imposed for both incarceration and community

custody shall not exceed 120 months.” CP 4. Presumably this language gives the Department of Corrections discretion to confine Mr. Booth for up to 96 months, and require him to serve additional time on community custody until the total reaches 120 months.

This approach of “clarifying” the sentence was first proposed by Division I in *State v. Sloan*, 121 Wn. App. 220, 87 P.3d 1214 (2004).²

The court in *Sloan* framed its approach as follows:

The maximum punishment for every offense is set by the legislature. The total punishment, including imprisonment and community custody, may not exceed the statutory maximum. Where a defendant is sentenced to the statutory maximum, and also sentenced to community custody, the judgment and sentence should set forth the statutory maximum and clarify that the term of community custody cannot exceed that maximum. *Sloan*, at 221.

The *Sloan* court provided no authority justifying reduction of the mandatory term of community custody while leaving intact the discretionary portion of the sentence (confinement within the standard range).

The *Sloan* approach violates the plain language of former RCW 9.94A.505(5) (2004). Under *Sloan*, a sentencing court may impose a sentence in excess of the statutory maximum so long as it “clarifies” for

² This Court has followed *Sloan*, without explicitly analyzing the issue. See *State v. Vant*, ___ Wn. App. ___, 186 P.3d 1149 (2008).

DOC's benefit that the community custody portion will be reduced to terminate when the statutory maximum is reached.³ Division I reached the result in *Sloan* by focusing on the length of time the offender would actually serve (taking into account early release and terminating supervision when the statutory maximum was reached):

[Sloan] may earn early release credits and transfer to community custody before serving the entire term.... In that event, Sloan will remain in community custody for up to the statutory range of 36 to 48 months, but no longer than the 60-month maximum term. In no event will she serve more than the statutory maximum sentence.
Sloan, at 223.

Sloan was based in part on an earlier Division I case, *State v. Vanoli*, 86 Wn. App. 643, 937 P.2d 1166 (1997). Like *Sloan*, the Court in *Vanoli* focused on the length of time (consisting of confinement, community custody, and community placement) the offender would actually serve, rather than the amount of time the court imposed. The *Sloan* Court summarized *Vanoli* as follows:

[We] held that Vanoli's sentence did not exceed the maximum because prisoners who earn early release credits, and transfer to

³ In *Sloan*, the court believed its position to be self-evident, and required clarification only to avoid confusion: "While we are inclined to give CCOs more credit than this, we recognize that sentences like Vanoli's and Sloan's may generate uncertainty in some circumstances. To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum." *Sloan, supra*, at 223-224.

community custody status in lieu of earned early release, have not yet served the maximum... If Vanoli is released from prison before he serves a full 10 years, because of the number of early release credits he has earned, he will serve the community supervision ordered in his judgment and sentence up to the 10-year maximum. On the other hand, if he earns no early release time and serves the entire sentence, he will be released with no further obligation. "Under neither of these scenarios will Vanoli serve more than the statutory maximum sentence of 120 months."
Sloan, at 223, *citations omitted*.

The problem with *Sloan's* reliance on *Vanoli* is that the governing statutes were amended in the interim. The offender in *Vanoli* was subject to community placement, and a specific statutory provision addressed offenders who were sentenced to community placement in addition to confinement at the statutory maximum:

[T]he court shall in addition to the other terms of the sentence, sentence the offender to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release... When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible... Any period of community custody actually served shall be credited against the community placement portion of the sentence.
Former RCW 9.94A.120(9) (1996)

In 2004, when *Sloan* was decided (and Mr. Booth was sentenced), this section of the Sentencing Reform Act was no longer in effect.⁴ Instead, the governing provision was former RCW 9.94A.505(5) (2004).

Thus, in 2004, the appropriate focus was not on the actual length of confinement and community custody the offender served. Instead, under the plain language of the applicable statute, the court was *prohibited* from imposing a sentence in excess of the statutory maximum, regardless of how much time the offender would actually serve: “a court *may not impose* a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime...” Former RCW 9.94A.505(5) (2004), *emphasis added*.

Even if this result were not compelled by the plain language of the statute, it would be required under the rules of statutory construction. First, the rule of lenity requires this court to adopt the interpretation most favorable to the accused. *State v. Gonzales Flores*, 164 Wn.2d 1 at 17, 186 P.3d 1038 (2008); *State v. Jackson*, 61 Wn.App. 86 at 93, 809 P.2d 221 (1991). The policy underlying the rule of lenity is “to place the burden

⁴ The provision was recodified and applied only to certain offenses committed prior to 2000. See former RCW 9.94A.700 (2004) and former RCW 9.94A.705 (2004).

squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.” *Jackson, supra*, at 93. Applying the rule of lenity, former RCW 9.94A.505(5) must be interpreted in Mr. Booth’s favor to require reduction of sentences above the statutory maximum by reducing the amount of confinement imposed within the standard range, as outlined above, until the aggregate sentence (confinement and community custody) does not exceed the statutory maximum.

Second, this Court presumes “that every amendment is made to effect some material purpose.” *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132 at 134, 587 P.2d 535 (1978); *State v. Krall*, 125 Wn.2d 146 at 149, 881 P.2d 1040 (1994). By amending the SRA to remove the language that applied in *Vanoli*, the legislature signaled its intent to change the law. *See, e.g., State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) (omission of the words “with intent” leads “conclusively to the view that ‘[h]ad the legislature intended to retain guilty knowledge or intent as an element of the crime of possession, it would have spelled it out as it did in the previous statute.’” *Cleppe*, at 378 *citation omitted*.) Thus, for offenses committed in 2004, sentencing courts were not allowed to impose the kind of sentence at issue in *Vanoli*.

Instead, under former RCW 9.94A.550(5), the court was required to impose a sentence that did not – even theoretically—exceed the statutory maximum. Here, the longest sentence the court was permitted to impose was 72 months of standard confinement, 12 months for the deadly weapon enhancement, and 18-36 months of community custody. Because the court imposed a sentence that exceeded the statutory maximum, in violation of former RCW 9.94A.550(5) (2004). The sentence must be vacated, and the case remanded for resentencing.

CONCLUSION

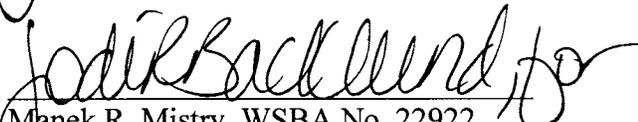
For the foregoing reasons, Mr. Booth's sentence must be vacated. The case must be remanded for resentencing with instructions to impose a standard range sentence no greater than 72 months confinement, in addition to the mandatory 12-month enhancement and the mandatory 18-36 months community custody.

Respectfully submitted on September 3, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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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 3, 2008.

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 3, 2008.



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