

No. 41777-4-II  
(Consolidated with 42017-1-II)

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

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STATE OF WASHINGTON,

Respondent,

v.

JD JONES BARTON,

Appellant.

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

The Honorable Anne Hirsch, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE ..... 1

C. RESPONSE TO ISSUES RAISED ..... 1

The State concedes that the trial court erred in imposing an 18-36 month term of community custody. ..... 1

The State concedes that community custody in this case should be "0" because the trial court imposed a 120 month sentence on each of the Assault in the Second Degree conviction...... 2

Barton should not be allowed to withdraw his guilty plea because his plea was voluntary. ..... 2

D. CONCLUSION..... 5

**Washington Supreme Court Decisions**

In re Personal Restraint of Stoudmire,  
141 Wn.2d 342, 5 P.3d 1240 (2000) ..... 4

State v. Ross  
129 Wn.2d, 916 P.2d 405 (1996) ..... 3

**Statutes and Other Rules**

RCW 9.94A.505 ..... 3

RCW 9.94A.535 ..... 3

RCW 9.94A.701(2)..... 1

RCW 9.94A.701(9)..... 2

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Whether the trial court erred in imposing an 18 – 36 month term of community custody for each of the Assault in the Second Degree convictions.
2. Whether the trial court erred in imposing community custody when Barton's sentence for each of the Assault in the Second Degree convictions was already 120 months.
3. Whether Barton is allowed to withdraw his guilty plea.

B. STATEMENT OF THE CASE.

The State accepts Barton's statement of the case, while noting the following clarification: the sentence for each of the Assault in the Second Degree conviction was 84 months + 36 month enhancement for a total of 120 months. Because the enhancements are to run consecutive to each other, the total amount of time imposed is 156 months.<sup>1</sup>

C. RESPONSE TO ISSUES RAISED

1. The State concedes that the trial court erred in imposing an 18-36 month term of community custody.

The State concedes that Assault in the Second Degree is only a "violent offense" within the meaning of RCW 9.94A.701(2) and therefore only subject to 18 months of community custody.

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<sup>1</sup> Division II Appeal No. 40507-5-II.

2. The State concedes that community custody in this case should be "0" because the trial court imposed a 120 month sentence on each of the Assault in the Second Degree conviction.

The State concedes that pursuant to RCW 9.94A.701(9), the trial court was required to reduce Barton's term of community custody since that in combination with his standard range term of confinement exceeded the statutory maximum. Because the trial court imposed a sentence of 120 months for each Assault in the Second Degree conviction, the proper amount of time on community custody should be zero.

3. Barton should not be allowed to withdraw his guilty plea because his plea was voluntary.

Barton challenges the voluntariness of his guilty plea. Specifically, he argues that his guilty plea was involuntary when the trial court originally sentenced him to above the statutory maximum for each of the Assault in the Second Degree convictions.

The State filed its response to this issue in appeal number 41777-4 that is currently pending with this Court. Barton should not be allowed to withdraw his guilty plea because his plea was voluntary. The sentence of 180 months that Barton originally received was invalid because it exceeded the statutory maximum. Barton argues that his guilty plea was involuntary because the trial

court followed the plea agreement, asking for a firearm enhancement and an exceptional sentence on each conviction of Assault in the Second Degree resulting in 144 months, which is above the statutory maximum.<sup>2</sup> Based on this Court's ruling in appeal number 40507-5, the sentencing error occurred when the trial court followed the recommendation and imposed the exceptional sentence.

RCW 9.94A.505 requires the trial court to impose a sentence within the standard range unless another term of confinement, such as the imposition of an exceptional sentence, applies. As seen through the language of RCW 9.94A.535, a trial court *may* impose an exceptional sentence; however, it is not required. A defendant need not be informed of all possible consequences of a plea, but rather, only the direct consequences. State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A "direct" consequence includes one that "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Id. at 284.

In the present case, the *actual* amount of time the sentencing court imposes as an exceptional sentence is not a "direct" consequence of Barton's plea because the trial court has

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<sup>2</sup>The enhancements ran consecutive resulting in a total sentence of 180 months.

discretion in imposing the sentence. The only direct consequence is the standard range, in case the trial court decided to *only* impose such sentence, and the statutory maximum, which is the maximum amount of time that the trial court may impose if it decided to impose an enhancement or exceptional sentence. During the plea colloquy, Barton was properly advised of both the standard range and maximum sentence. By sentencing Barton to above the statutory maximum, the trial court exceeded its statutory authority, and the sentences are not valid on their face. In re Personal Restraint of Stoudmire, 141 Wn.2d 342, 356, 5 P.3d 1240 (2000). However, even though this error renders the sentence invalid, it does not affect the voluntariness of Barton's plea since he was still properly advised of the direct consequences. Therefore, the proper remedy was for Barton to be resentenced to the statutory maximum, which he has since been resentenced to 120 months on each conviction of Assault in the Second Degree.

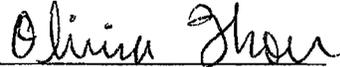
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D. CONCLUSION

For the reasons previously stated, the State respectfully requests this Court to deny Barton's request to withdraw his guilty plea and remand to correct the judgment and sentence.

Respectfully submitted this 2<sup>nd</sup> day of December, 2011.



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Attorney for Respondent

# THURSTON COUNTY PROSECUTOR

**December 02, 2011 - 1:59 PM**

## Transmittal Letter

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