

No. 41932-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH SULLIVAN, III,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 08-1-01591-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the imposition of a term of community custody pursuant to a statute passed after the crime was committed but before resentencing following appeal is, under the facts of this case, a manifest constitutional error that may be raised for the first time on appeal.

2. Whether Sullivan was disadvantaged by the imposition of a term of community custody prescribed by a statute passed after the date the crimes were committed.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case, adding the fact that Sullivan did not object to the community custody term imposed during his resentencing on March 11, 2011.

[03/11/11 RP]

C. ARGUMENT.

1. Because Sullivan did not object to the term of community custody imposed at the time of his resentencing, he may raise it for the first time on appeal only if it is a manifest error of constitutional magnitude. He has not shown that it is.

When Sullivan was resentenced following appeal and remand, which occurred on March 11, 2011, the court imposed a term of 12 months community custody. [CP 32] Sullivan did not object. [03/11/11 RP] Because he did not do so, and a claim may be reviewed for the first time only under certain conditions which do not exist here, this court should decline to review his claim.

Rules of Appellate Procedure (RAP) 2.5(a) provides that an appellate court may refuse to review a claim of error not raised in the trial court unless (1) the trial court lacked jurisdiction, (2) there were no facts upon which relief could be granted, or (3) there is a manifest error affecting a constitutional right. The general rule is that issues raised for the first time on appeal will not be considered. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Unless Sullivan can show that the court committed a manifest error affecting a constitutional right, this court should not consider his claim.

The State does not dispute that an ex post facto violation is of constitutional magnitude. It does dispute that Sullivan has established a manifest error.

The exception in RAP 2.5(a)(3) for manifest constitutional error is a narrow one. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). “Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” Id. “Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences . . .” Id. In State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009), the court resorted to Black’s Law Dictionary for the definition of manifest error: “[A]n error that is

plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.” Id., at 99 n. 1.

Sullivan argues that he might have been relieved of his community custody obligation after nine months, but he has no way of knowing that. Speculation is not a “practical and identifiable consequence” that makes an error manifest. He might just as easily have been required to complete the entire twelve months, and thus the amended sentence makes absolutely no difference. He was on notice from the day of his first sentencing that twelve months of community custody was a possibility. He has not, and cannot, show manifest error and therefore this court should decline to consider his claim.

2. A law violates the ex post facto clause of the constitution only when it imposes a punishment beyond what was prescribed when the crime was committed. Because Sullivan was subject to a term of up to 12 months of community custody under the statute in place when the crimes were committed, he is not subject to greater punishment under the current statute.

The State does not dispute that at the time Sullivan committed these crimes, the court was required to impose a 9- to 12-month term of community custody, as was done at the original

sentencing. Sullivan has cited to the correct statutes in his opening brief at 5. In 2009, the legislature changed the required terms of community custody so that a definite term of 12 months must be imposed. LAWS OF 2009, ch. 375. The State also agrees with Sullivan that the act was made retroactive, subject to constitutional restraints. Id., at § § 10 and 20. The act gave the Department of Corrections (DOC) authority to recalculate the term of community custody for those offenders confined or serving a term of community custody at the time the legislation took effect, specifically directing that the recalculation not extend the term of community custody beyond that to which an offender was already subject. Id., § 9.

The ex post facto analysis is essentially the same under both the Washington and United States constitutions. State v. Edwards, 104 Wn.2d 63, 70, 701 P.2d 508 (1985). Both of those constitutions forbid any law which increases the “quantum of punishment annexed to the crime when it was committed.” State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). The law may not make the punishment “more burdensome.” Id., at 497. A statute runs afoul of the ex post facto prohibition if it (1) is substantive as opposed to procedural; (2) applies retroactively; and

(3) “disadvantages the person affected by it.” *Id.*, at 498. A reviewing court looks both at the legislative intent and the actual effect of the statute. *Id.*, at 499.

The State does not dispute that community custody is punishment. The new statute is clearly substantive (as well as procedural) and was explicitly made retroactive. The legislative purpose was to “simplify and improve” the sentencing and supervision of offenders. LAWS OF 2009, ch. 375, § 10. The legislature did not intend to disadvantage any offender; in § 9 it directed the Department of Corrections to recalculate the community custody terms for those offenders already serving their sentences, but DOC may not “extend a term of community custody beyond that to which an offender is currently subject.” In § 10, the legislature specifically limited any actions taken to those “constitutionally permissible.”

It is not the case, however, that Sullivan was disadvantaged by the imposition of 12 months of community custody pursuant to the 2009 amendments to the Sentencing Reform Act. His original sentence included a 9- to 12-month range, and in the second sentencing he did not receive more than was permissible under the former statute. He argues that DOC might have imposed only nine

months and thus he is suffering a greater penalty. The State disagrees.

“[C]ritical to relief under the *Ex Post Facto* Clause is not an individual’s right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.”

Ward, 123 Wn.2d at 496 (citing to In re Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991)).

The 12-month term of community custody was not beyond what was prescribed by the statutes in place at the time Sullivan committed his crime, and he had “fair notice” that he was facing a maximum of 12 months of community custody. Therefore he was not disadvantaged by the second sentence, and the statute is not an ex post facto violation.

D. CONCLUSION.

Sullivan did not object to the term of community custody in the lower court, and cannot establish a manifest error on review. The court should not consider his claim. Even if the court chooses to consider it, however, he has not suffered any prejudice as a

result of the 2009 amendments to the SRA, and his sentence should be affirmed.

Respectfully submitted this 22^d day of September, 2011.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief on the date below as follows:

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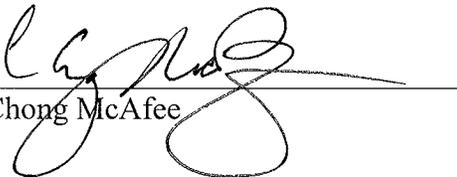
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via email to:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 23^d day of September, 2011, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

September 23, 2011 - 8:22 AM

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