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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

MICHAEL J. MORIARTY  
v.  
STATE OF WASHINGTON

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Appeal from the Superior Court of Pacific County

The Honorable Michael Sullivan County Cause No. 15-1-00079-7

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**REPLY BRIEF OF APPELLANT TO RESPONDENT'S CROSS-APPEAL**

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**ORIGINAL**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Respondent's cross-appeal on the issue of imposition of a sentence exceeding the trial court's jurisdiction cannot be reviewed due to lack of a sufficient record.
2. Respondent's cross-appeal on the issue of imposition of a sentence exceeding the trial court's jurisdiction is moot because appellant already served the all of that sentence.

B. STATEMENT OF THE CASE

Moriarty was taken into custody on October 22, 2015, the day before he was sentenced. CP 40. He remained in custody on November 20, 2015, when the court entered findings of fact and conclusions of law. Supp CP 163.

On December 4, 2015, the parties appeared before the court and the cross-appellant informed the court that the sentence imposed on October 23, 2015 was not authorized. Supp. CP 2 64. The cross-appellant had received a letter from the Department of

Corrections informing stating that the court needed to impose a full four month sentence. *Id.*

The court continued the matter until December 11, 2015. Supp CP 2, 3.

Michael Moriarty herein after, respondent, was placed on electronic monitoring [EHM] on 2/1/16. By the time of the State's motion to amend sentence on 12/4/15, respondent has completed all of the 90 days in custody sentence with credit for time served.

On that date, the court entered its decision on sentencing. Supp CP 4. Moriarty was in custody at that time. Supp CP 3. In that order, the Court ruled:

1. The Court would not have imposed 4 months in jail if the Court had been informed by counsel or had known that community service was not an option. Therefore, the Court considers this a mutual mistake or misunderstanding of the law.
2. Therefore, the Court needs to impose a sentence that is in line with the Court's original intention of allowing 30 days converted to community service. The Court now imposes a change to the judgment and sentence to correct this mutual mistake or misunderstanding. Although the defendant has served three months [less any good time], the defendant shall be allowed to enter into 30 days of home monitoring or served [sic] his time in a work-release facility such as Wahkiakum County at defendant's expense.

Supp CP 4. An order amending sentence was entered.  
Supp CP 5. From October 22, 2015 through December 11, 2015, the defendant had served 50 days in custody. With credit for good time, he had served his entire jail sentence of three months. [Note: the low end of the standard range for second degree assault is three months.<sup>1</sup>]

After Moriarty was released from custody, he apparently began his home monitoring and/or work release. The absence of any noncompliance/violence reports in the court file affirms this. *Passim*.

The first and only violation report is undated but faxed to the Pacific County Court on February 16, 2016. Supp CP 6. No action was taken as a result of this report.

Moriarty completed his entire sentence without incident. *Passim*. NO warrant was ever served.

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<sup>1</sup> Appendix A. Sentencing Guideline Scoring Sheet for Second Degree Assault. Mr. Moriarty has no prior convictions.

C. LAW AND ARGUMENT

I. THIS COURT SHOULD DECLINE TO REVIEW  
RESPONDENT'S CROSS APPEAL WHERE RESPONDENT  
HAS FAILED TO PROVIDE A RECORD SUFFICIENT FOR  
THIS COURT'S REVIEW.

When an appellant raises a sentencing issue for the first time on appeal, the trial record must be sufficient to determine the merits of the claim. [T]he appellant bears the responsibility to provide a record showing that ... a closure occurred in the first place." There are no facts in the record supporting the State's claim that the trial court exceeded its jurisdiction when it imposed the sentenced in this case. RAP 2.5; *McFarland*, 127 Wn.2d at 332-34.

There is no dispute that the State may raise for the first time on appeal the lack of trial court jurisdiction. RAP 2.5[a]. However, the State may raise this issue only subject to the law set forth herein.

However, where the cross-appellant, State of Washington, in this case in this case, set up the issue for review then the cross appellant has waived appellate review of the

issue. This is so because a party cannot set up an issue on appeal and then wait in the weeds to raise the issue on appeal. "A party cannot properly seek review of an alleged error which the party invited." *Davis v. Globe Mach. Mfg. Co., Inc.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984); *Washburn v. Beatty Equip. Co.*, 120 Wn.2d 246, 256-57, 840 P.2d 860 (1992).

The doctrine of invited error may apply even if the error is of constitutional magnitude. *In State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990), the Supreme Court refused to review a claim of constitutional error in a jury instruction that the defendant had requested at trial.

In the instant case, cross-appellant set up the motion and sought amendment of the sentence. The trial court granted the motion for amendment of the sentence. There is no record establishing that cross-appellant objected to this amendment. In fact, the amendment is memorialized on cross-appellant's pleading paper with not a single objection interlined therein. It is the duty of the party seeking review to provide the record sufficient for appellate review. RAP 9.2[b]. "A party should arrange for the transcription of all those portions of the

verbatim report of proceedings necessary to present the issues raised on appeal.” *Id.*

Moreover, cross-appellant asserts that on December 11, 2015, when the trial court amended the sentence to convert the 30 days to 240 hours of community service hours to work release, the trial court did this *sua sponte*. Cross-appellant denies making this motion. Cross-appellant’s brief, page 12, fn 4. This assertion is belied by CP 64. CP 64 is “Order Amending Judgment and Sentence. *Id.* This order is written on the pleading paper of the Pacific County Prosecuting Attorney, presumably by the deputy prosecuting attorney, with no objections noted. CP 64. Further, this Order begins, “This cause coming on for hearing *on oral motion of Plaintiff* for an amending the Judgment and Sentence entered herein on October 23, 2015.” *Id.* [emphasis added] As this court readily can see, the order terminated the 30 days [240 hours] of community service and instead converted them to 3 months of confinement and 30 days of electronic home monitoring for a total of four months. CP 64.

Again, there were no timely objections to this order. *Passim*. Further, cross-appellant failed to interlineate any objections he drafted.

Finally, cross-appellant failed to provide the verbatim report of proceedings for this hearing. It is the duty of the appellant to provide the record essential for this court's review. RAP 9.2[b]<sup>2</sup>.

Because cross-appellant has failed to provide a record sufficient for this court's review, this court should decline to review this issue.

However, should this court review this issue, based on the record available, this court conclude that Mr. Moriarty has served at least three months in custody [low end of the standard range] and completed the court ordered work release and/or home monitoring. His sentence is finished.

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<sup>2</sup> Rule of Appellate Procedure [RAP] 9.2[b] provides in pertinent part: "A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on appeal."

II. THE STATE'S SENTENCING ISSUE IS MOOT.

An issue is moot if the moot where 'a court can no longer provide effective relief.'" *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004) (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)).

In this case, whether or not the trial court could order electronic monitoring for 30 days, the trial court did so order and Moriarty completed that sentence. Thus, there is no effective relief this court can grant on this matter.

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D. CONCLUSION

For the reasons set forth above, Mr. Moriarty respectfully asks this court to deny the State's cross-appeal.

DATED this 8<sup>th</sup> day of August, 2016

  
Barbara Corey, WSB #11778

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via USPS a copy of this Document to: Appellate Division Pacific County Prosecutor's Office, and via email to Michael J. Moriarty (only method of communication).

8/8/16  
Date

  
Signature

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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# **APPENDIX A**

# Assault Second Degree

RCW 9A.36.021(2)(a)  
CLASS B – VIOLENT

OFFENDER SCORING RCW 9.94A.525(8)

~~If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven~~  
~~Use General Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 197.~~

**ADULT HISTORY:**

Enter number of serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_  
Enter number of nonviolent felony convictions ..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... x 2 = \_\_\_\_\_  
Enter number of nonviolent felony dispositions ..... x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_  
Enter number of other nonviolent felony convictions ..... x 1 = \_\_\_\_\_

**STATUS:**

Was the offender on community custody on the date the current offense was committed? ..... + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score** (Round down to the nearest whole number)



**SENTENCE RANGE**

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
<b>LEVEL IV</b>	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	61.5m 53 - 70	73.5m 63 - 84

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 27 or for gang-related felonies where the court found the offense involved a minor (RCW 9.94A.833) see page 185 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 188.
- ✓ For sentencing alternatives, see page 176.
- ✓ For community custody eligibility, see page 186.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 182.

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in sentencing cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

# **APPENDIX B**

RAP 9.2  
VERBATIM REPORT OF PROCEEDINGS

(a) **Transcription and Statement of Arrangements.** If the party seeking review intends to provide a verbatim report of proceedings, the party should arrange for transcription of and payment for an original and one copy of the verbatim report of proceedings within 30 days after the notice of appeal was filed or discretionary review was granted. The party seeking review must file with the appellate court and serve on all parties of record and all named court reporters or authorized transcriptionists a statement that arrangements have been made for the transcription of the report and file proof of service with the appellate court. The statement must be filed within 30 days after the notice of appeal was filed or discretionary review was granted. The party must indicate the date that the report of proceedings was ordered, the financial arrangements which have been made for payment of transcription costs, the name of each court reporter or authorized transcriptionist preparing a verbatim report of proceedings, the hearing dates, and the trial court judge. If the party seeking review does not intend to provide a verbatim report of proceedings, a statement to that effect should be filed in lieu of a statement of arrangements within 30 days after the notice of appeal was filed or discretionary review was granted and served on all parties of record.

(b) **Content.** A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. A verbatim report of proceedings provided at public expense will not include the voir dire examination or opening statement unless so ordered by the trial court. If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding. If the party seeking review intends to urge that the court erred in giving or failing to give an instruction, the party should include in the record all of the instructions given, the relevant instructions proposed, the party's objections to the instructions given, and the court's ruling on the objections.

(c) **Notice of Partial Report of Proceedings and Issues.** If a party seeking review arranges for less than all of the verbatim report of proceedings, the party should include in the statement of arrangements a statement of the proceedings the party intends to present on review. Any other party who wishes to add to the verbatim report of proceedings should file within 10 days after service of the statement of arrangements a designation of additional parts and the court reporter or authorized transcriptionist a designation of additional parts of the verbatim report of proceedings and file proof of service with the appellate court. If the party seeking review refuses to provide the additional parts of the verbatim report of proceedings, the party seeking the additional parts may provide them at the party's own expense or apply to the trial court for an order requiring the party seeking review to pay for the additional parts of the verbatim report of proceedings.

(d) **Payment of Expenses.** If a party fails to make arrangements for payment of the costs of the verbatim report of proceedings at the time the verbatim report of proceedings is ordered, the party may be subject to sanctions as provided in rule 18.9.

(e) **Title Page and Table of Contents.** The court reporter or other authorized transcriber shall include at the beginning of each volume of the verbatim report of proceedings a title page and a table of contents.

(1) The title page should include the following:

(A) Case name,

(B) Trial court and appellate cause numbers,

(C) Date(s) of hearings,

(D) Trial court judge(s),

(E) Names of attorneys at trial,

(F) Name, business address and telephone number of each court reporter or other authorized transcriber.

(2) The table of contents shall follow the title page and shall indicate, under the headings listed below, the pages where the following appear:

(A) **Proceedings.** The beginning of each proceeding and the nature of that proceeding;

(B) **Testimony.** The testimony of each witness, the page where it begins, and the type of examination, i.e., direct, cross, re-direct, re-cross, and the page where the plaintiff rests and the defendant rests;

(C) **Exhibits.** The admission into evidence of exhibits and depositions;

(D) **Argument.** The pages where opening statements occur, except as otherwise provided in rule 9.2(b) for verbatim reports of proceedings provided at public expense, and the pages where closing arguments occur;

(E) **Instructions.** All instructions proposed and given. Any other events should be listed under a suitable heading which would help the reviewing court locate separate parts of the verbatim report of proceedings.

(F) **Multiple Days.** If a volume includes hearings from more than one day, there shall be a separate table of contents for each day.

(f) **Form.**

(1) **Generally.** The verbatim report of proceedings shall be on 8-1/2-by 11-inch paper. Margins shall be lined 1-3/8 inches from the left and 5/8 inches from the right side of each page. Indentations from the left margin should be: 1 space for "Q" and "A"; 5 spaces for the body of the testimony; 8 spaces for commencement of a paragraph; and 10 spaces for quoted authority. Typing should be double spaced except that comments by the reporter should be single spaced. The page should have 25 lines of type. Type must be pica type or its equivalent with no more than 10 characters an inch.

(A) **Witnesses Designated/Examination.** Indicate at the top or bottom of each page the name of the witness and whether the examination is on direct, cross, re-direct, re-cross, or rebuttal.

(B) Jury In/Out. Indicate when the jury is present, when the jury leaves, and when the jury returns.

(C) Bench/Side Bar Conferences. Designate whether a bench/side bar conference is on or off the record.

(D) Chamber Conferences. If the conference is recorded, note the presence or absence of persons participating in chamber conferences.

(E) Speaker/Event Identification. Identify speakers and events that occur throughout the proceedings in capital letters centered on the appropriate line. For example: recess/court reconvene; direct examination, cross examination, re-direct examination, re-cross examination, plaintiff rests; defendant's evidence: direct examination, cross examination, re-direct examination, re-cross examination, defense rests; instructions, conference, closing arguments: for plaintiff, for defense, and rebuttal.

(2) Volume and Pages.

(A) Pages in each volume of the verbatim report of proceedings shall be numbered consecutively and be arranged in chronologic order by date of hearing(s) requested in the statement of arrangements.

(B) Each volume of the verbatim report of proceedings shall include no more than 200 pages. The page numbers in the first volume should start with page 1 and continue to 200, as needed, regardless of how many hearing dates are included in the volume. In the second volume of the verbatim report of proceedings and subsequent volume page numbers should start with the next page number in sequence where the previous volume ended. The volumes shall be either bound or fastened securely.

(3) Copies. The verbatim report of proceedings should be legible, clean and reproducible.

[Originally effective July 1, 1976; amended effective July 2, 1976; September 1, 1985; September 1, 1993; December 10, 1993; September 1, 1994; September 1, 1998; December 24, 2002; September 1, 2010; September 1, 2015.]

References

Form 15, Statement of Arrangements; Title 6, Acceptance of Review.