NO. 48890-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD SHERWOOD MARTELL,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

Appeal from Pierce County Superior Court
Honorable Jerry Costello
No. 15-1-03747-3

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Martell was sentenced to an indeterminate sentence after the Department of Corrections ("DOC") asked the trial court to "correct" Martell's judgment and sentence from a determinate to an indeterminate incarceration period. A plain reading of the statute concerning the sentencing of sex offenders only requires an indeterminate sentence for defendants who were part of a "pattern of criminal street gang activity" (RCW 9.94A.030(37)), which Martell was not a part of. But the trial court concluded that the legislature intended to reference RCW 9.94A.030(38), not subsection (37), and agreed to amend Martell's sentence from determinate to indeterminate.

Martell pled guilty pursuant to a plea agreement to RCW 9.68A.070(2) (possession of depictions of minors engaged in sexually explicit conduct in the second degree) on March 25, 2016. The plea agreement and the initial judgment and sentence entered by the court provided for a "determinate" sentence of 43-months confinement total.

A month later, upon State's motion to amend, despite objection by Martell's trial counsel, the judgment and sentence was amended to include an indeterminate sentence. An "indeterminate" sentence under RCW 9.94A.507(1)(b) is a sentence which sets forth a range of confinement which is later fixed by the Indeterminate Sentencing Board upon review of a defendant's progress in prison.

Martell assigns error to the finding in the final Judgment and Sentence which ordered an indeterminate sentence. (See Warrant of

Commitment/Judgment and Sentence, § 4.5, CP 139). This sentence was (1) contrary to the initial plea agreement of the parties and (2) contrary to law because a plain reading of the statute only provides an indeterminate sentence for defendants engaged in "criminal street gang activity."

II. ASSIGNMENTS OF ERROR

The sentencing court made an error of law when it amended the Martell's judgment and sentence contrary to the plea agreement and to law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court made an error of law in its amendment to the judgment and sentence making the sentence indeterminate, contrary to the plea agreement which provided for a determinate sentence.

2. Whether the trial court erred in not applying the plain language of RCW 9.94A.507(1)(b).

IV. STATEMENT OF CASE

Martell pled guilty pursuant to a plea agreement to RCW 9.68A.070(2) (possession of depictions of minors engaged in sexually explicit conduct in the second degree) on March 25, 2016. (See Warrant of Commitment/Judgment and Sentence, CP 29-42.) Martell had prior sex offense convictions at the time including Rape of a Child First Degree and Child Molestation First Degree from June 4, 2003. (See Warrant of Commitment/Judgment and Sentence, CP 32.)

The plea agreement and the initial Judgment and Sentence entered by the court on March 25, 2016, provided for a "determinate" sentence of

43-months confinement total. CP 35. After Martell started the classification process through the Department of Corrections, Records Management Supervisor, Arrel Dayton, sent out an email to the State and defense stating that he believed Martell was subject to RCW 9.94A.507 because of his prior sex offenses, which requires an indeterminate sentence. (See Defense Memorandum in Opposition of Resentencing, Exhibit 1, CP 47-48.)

The State then noted the matter up for a motion to amend the Judgment and Sentence to order an indeterminate sentence. (See State's Memorandum of Points and Authorities re: Sentencing, CP 71-132.) Defense counsel submitted a memorandum in opposition. (CP 43-70). On April 29, 2016, after oral argument, the sentencing court agreed with the State and ordered an indeterminate sentence for Martell setting forth a range of 43-months minimum to 60-months maximum sentence, to be reviewed pursuant to the Indeterminate Sentencing Board. (See, Warrant of Commitment/Judgment and Sentence, CP 133-146, VRP 35-36.) Martell was sent to prison and now appeals.

V. LEGAL ARGUMENT

A. Law.

1. Standard of Review

A trial court's sentence is reviewed for errors of law or abuse of discretion in deciding what sentence applies. *State v. Kinneman*, 155 Wn.2d 272, 283, 119 P.3d 350 (2005).

When a trial court exceeds its sentencing authority under the Sentencing Reform Act of 1981 (SRA), it commits reversible error. *State v. Bernhard*, 108 Wn.2d 527, 530, 741 P.2d 1 (1987), *overruled on other grounds*, *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989).

2. Statute.

As set forth below, a plain reading of the statute related to the sentencing of sex offenders only requires an indeterminate sentence for those defendants who engaged in a "pattern of criminal street gang activity."

Possession of depictions of minors engaged in sexually explicit conduct in the second degree is a crime pursuant to RCW 9.68A.070(2), and is a sex offense pursuant to RCW 9.94A.030(47).

RCW 9.94A.507, titled "Sentencing of Sex Offenders," specifically sets forth when a defendant shall be sentenced to an indeterminate sentence[1]:

> (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:
>
> (a) Is convicted of: [sets forth crimes not applicable to this defendant]
>
> or
>
> (b) Has a prior conviction for an offense listed in *RCW 9.94A.030(31)(b), and is convicted of any sex offense other than failure to register.

[1] Indeterminate sentence is defined in RCW 9.94A.507 (3)(a): "Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term."

The State and DOC cited subsection (b) above as applicable to Martell's case. Because Martell had two prior sex offenses from 2003, they claimed, subsection (b) applied and he must be sentenced to an indeterminate sentence. (See Defense Memorandum in Opposition of Resentencing, Exhibit 1, CP 47-48.)

However, RCW 9.94A.507(1)(b) references "offenses listed in *RCW 9.94A.030(31)(b)," and upon an investigation of that list, it is apparent that none of the listed offenses were committed by Martell: The footnote associated with the asterisk states as follows:

> Reviser's note: *(1) The reference to RCW 9.94A.030(31)(b) was apparently in error. The reference should be to RCW 9.94A.030(34)(b). RCW 9.94A.030 was subsequently amended by 2010 c 224 § 1 and by 2010 c 274 § 401, changing subsection (34) to subsection (35). RCW 9.94A.030 was subsequently amended by 2011 c 87 § 2, changing subsection (35) to subsection (36). RCW 9.94A.030 was subsequently amended by 2015 c 287 § 1, changing subsection (36) to subsection (37).

But the Reviser's Note aside, Subsection (37) above is actually titled "Pattern of criminal street gang activity."

Martell does not have any prior offenses constituting a "pattern of criminal street gang activity."

Therefore, Martell argues below that 9.94A.507(1)(b) did not apply to him, and that the State and DOC were incorrect that he must serve an indeterminate sentence.

The State argues that the reference to subsection (37) was a clerical error in the footnote and that a plain reading of the statute clearly implies the applicable subsection is presently (38), titled "Persistent Offender"

which specifies any sex offense. (See State's Memorandum of Points and Authorities re: Sentencing CP 72-73). The sentencing court agreed with this assessment at re-sentencing. (VRP 30). The State is correct that if the referenced subsection was (38), then the Appellant's prior offenses would qualify and he would be subject to an indeterminate sentence. However, Martell argues below that such an inference cannot be made by a sentencing court; and that because the statute is not ambiguous, it must be read on its face to mean that only subsection (37) applies.

3. Clerical Mistakes in Statutes.

Statutory construction is a question of law reviewed *de novo*. *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). The primary objective of any statutory construction inquiry is "to ascertain and carry out the intent of the Legislature." *Rozner v. City of Bellevue*, 116 Wnh.2d 342, 347, 804 P.2d 24 (1991).

When interpreting a statute, an appellate court first looks to its plain language. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, the court's inquiry is at an end. *Id.* If after analyzing the plain language, the statute remains subject to multiple interpretations, it is ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). However, a statute is not ambiguous if multiple interpretations of it are conceivable. *W. Telepage, Inc.*, at 608. In such circumstances the statute is possibly unclear in its application to a specific situation, but it is not ambiguous because its language conveys a single meaning. *See* Lawrence M. Solan, Law,

Language, and Lenity, 40 WM. & MARY L.REV. 57, 62–63, 78–79 (1998–99).

Martell argues below that only a single meaning is conveyed from 9.94A.507(1)(b) and it is therefore not ambiguous: it simply says that an indeterminate sentence shall be imposed if a defendant has a prior history of "criminal street gang activity."

4. Unlawful Sentences and Plea Agreements.

While a court may exercise its discretion in sentencing, it must do so within the bounds of the sentencing laws. *State v. Manussier*, 129 Wn.2d 652, 667–68, 921 P.2d 473 (1996) (citing *State v. Ammons*, 105 Wn.2d 175, 181, 713 P.2d 719, 718 P.2d 796 (1986)). By enforcing a sentence outside such bounds, the court would be invading the legislature's prerogative.

In *State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011), the Supreme Court stated that the remedy of specific performance ordering enforcement of a plea agreement is available when the State attempts to retract its offer:

> Our decision should not be read as a criticism of specific performance. When the State reneges on its promised recommendation or charging decision, specific performance remains an appropriate remedy. Specific performance as a remedy for breach of the plea agreement ensures that the State follows through with its promises, and it thus acts as a deterrent against a prosecutor "'play[ing] fast and loose with an accused's constitutional rights.' " *Tourtellotte*, 88 Wash.2d at 585, 564 P.2d 799 (quoting *Courtney v. State*, 1959 OK CR 76, 341 P.2d 610, 612).

Barber went on to state that a plea agreement cannot be enforced if it was illegal: "the same deterrent purpose is not present where the parties agree to an illegal sentence by mutual mistake."

B. Argument.

Here, the sentencing court, the State, and DOC were incorrect that RCW 9.94A.507(1)(b) applied to Martell because he was in fact not part of a "pattern of criminal street gang activity" under that statute's reference to subsection (37) of RCW 9.94A.030. The sentencing court and State appear to assert (VRP 30) that the statute's and the relevant footnote's reference to subsection (37) was simply a "mutual mistake" based on clerical error, and that it should have referenced the "Persistent Offender" subsection currently numerated as subsection (38), as it was in 2010 and 2011. (CP 72.)

But they fail to offer any authority for the proposition that a trial court can correct the legislature's clerical "errors."

The language of the statutes involved is not ambiguous. It is susceptible to only one clear meaning: a sex offender guilty of previous street gang activity should receive an indeterminate sentence.

Indeed, the Revisers Note does not describe an ambiguity, it describes an "apparent" error by the Legislature. The State offers no authority that the Reviser's conclusion that the legislature made a mistake changes the law from what is set forth in plain, unambiguous statutory language.

Where there is no ambiguity, the law is what it says it is. The law is not what a 'reviser' in a footnote concludes what the legislature "apparently meant."

Therefore, the plea agreement originally entered by the parties was lawful and in accord with statute because Martell had no prior history in a

criminal street gang. He was offered and accepted a plea and sentence for a determinate, fixed period of incarceration. The statute's language is unambiguous and it was an error for the trial court to amend Appellant's sentence.

VI. CONCLUSION

The original judgment and sentence and plea agreement should be enforced and the amended judgment and sentence should be vacated.

Respectfully submitted this 7th day of November, 2016.

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