No. 489139

IN THE COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

SOPHEAP CHITH, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE KATHERINE STOLZ

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Mr. Chith incorporates the assignments of error presented in his opening brief.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Mr. Chith incorporates the issues relating to assignments of error presented in his opening brief.

II. STATEMENT OF FACTS

Mr. Chith incorporates the statement of facts presented in his opening brief.

III. ARGUMENT

A. The Trial Court Erred When It Sentenced Mr. Chith Outside The Statutory Maximum on Counts 1, 2, 8 and 9.

Mr. Chith acknowledges and accepts the State's concession that the court incorrectly sentenced him on both counts eight and nine. (Br. of Resp. pp.4-5).

RCW 9.94A.533(3)(g) provides:

> 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 firearm 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.

If the total sentence exceeds the maximum sentence provided for in RCW 9A.20.021(1), then the underlying sentence, not the enhancement, must be reduced. *State v. DeSantiago,* 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

Therefore, here, for count 8, the term of confinement cannot exceed 60 months. The 18 month enhancement must be included in the 60 month calculation. RCW 9A.20.021; RCW 26.50.110(4). For count 9, the term of confinement, which includes the 36 month enhancement, cannot exceed a maximum of 120 months. RCW 9A.20.021; RCW 9A.56.070(2).

The State also agrees that the trial court is not authorized to impose a community custody that would exceed the maximum term of confinement prescribed by law. (Br. of Resp. p.4). However, the State goes on to contend that the court did not impose the listed community custody on counts 1, 2, and 8 under § 4.6 because the boilerplate community custody box was not checked by the court. (Br. of Resp. p.5).

4.6 [ ] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[ ] **COMMUNITY CUSTODY** (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) _____ 36 months for Serious Violent Offenses

Count(s) I and II 18 months for Violent Offenses

Count(s) VIII 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a

CP 64.

At the resentencing hearing, the state's attorney recommended community custody, exactly as was written on the judgment and sentence:

> …Last time he got a 228-month sentence. So that's what I'm asking in terms of sentence.
>
> There is 18 months of community custody on Counts 1 and 2; 12 months of community custody on Count 8. I would ask the Court to impose standard legal financial obligations. There is a restitution order that hasn't been disturbed. So that includes $500 crime victim penalty assessment, $200 filing fee, $100 DNA testing. I would ask the Court to order that the defendant register with the County firearm offender.

(4/15/16 RP 12).

Moreover, further down in the same section of the judgment and sentence, the court ordered the following conditions for community custody supervision:

The court orders that during the period of supervision the defendant shall:

[ ] consume no alcohol.

[X] have no contact with: see § 4.3

[X] remain [X] within [X] outside of a specified geographical boundary, to wit: per DOC

On remand, the court should be instructed to clarify whether it did or did not intend to impose the community custody time and conditions listed in § 4.6. If it did intend to impose the stated length of community custody, then it must further reduce the time of confinement for counts 1, 2, and 8 as a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crimes as provided in chapter 9A.20 RCW. RCW 9.94A.505(5); RCW 9.94A.701(9); *State v. Zavala-Reynoso,* 127 Wn.App. 119, 124, 110 P.3d 827 (2005). If the court did not intend to impose community custody on those counts, Mr. Chith respectfully asks this Court to direct the trial court to simply correct the judgment and sentence by removing the listed counts and conditions.

B. The Judgment and Sentence Should Be Corrected To Amend The Scrivener's Errors.

Mr. Chith incorporates the arguments in his opening brief, asking for correction of the scrivener's errors in the judgment and sentence.

IV. CONCLUSION

The facts and authorities in this case require a remand to the trial court with instructions to dismiss with prejudice count 3 and to correct the unauthorized imposition of sentences outside the statutory maximum, as well as correction of scrivener's errors.

Dated this 13th day of April 2017.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Sopheap Chith, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on April 13, 2017 to:

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Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Reply Brief to Pierce County Prosecuting Attorney Michelle Hyer at PCpatcecf@co.pierce.wa.us.

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