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Court of Appeals
Division II
State of Washington
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NO. 57498-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

SEAN LEONARD,

Respondent.

Appeal from the Superior Court of Pierce County
The Honorable Jennifer Durcan Andrews

No. 21-1-00531-2

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a State's appeal from an exceptional sentence below the standard range for a conviction of second degree assault. The exceptional sentence consisted of electronic home monitoring. Electronic home monitoring, however, is not available for violent offenses, including assault in the second degree. The judgment and sentence must be vacated, and the matter remanded for a new sentencing hearing.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by imposing an alternative confinement term of electronic home monitoring on a defendant convicted of a violent offense. CP 17.

B. The trial court erred by denying the State's timely motion to reconsider the unlawful imposition of electronic home monitoring. CP 40.

III. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

A. When a defendant is convicted of a violent offense, does RCW 9.94A.734 prohibit a judge from imposing a sentence of electronic home monitoring?

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IV. STATEMENT OF THE CASE

Sean Leonard was charged by information with second degree assault. CP 1. He was convicted of this charge by a jury. CP 3; CP 33, FOF 1. When the matter proceeded for sentencing, Leonard requested an exceptional sentence downward in the form of electronic home monitoring. CP 4; CP 33 FOF 4; RP 5-6. Leonard identified three substantial and compelling grounds for an exceptional sentence below the standard range: (1) Leonard neither intended nor anticipated the ultimate resulting injury; (2) the victim was a willing participant or provided the assault; and (3) the victim did not wish to see Leonard receive jail time. CP 7-8. The trial court agreed with Leonard that an exceptional sentence was warranted on these grounds. CP 34, FOF 3; CP 34-35, COL 1. The State does not challenge this determination on appeal.

The State opposed Leonard's request for electronic home monitoring on the grounds that assault in the second degree is a "violent offense," RCW 9.94A.030(58)(a)(viii), and RCW

9.94A.734 prohibits home detention for offenders convicted of a violent offense. RP 7. The trial court overruled the State's objection and imposed a sentence of electronic home monitoring. CP 35, COL 3; CP 17. The trial court determined that a case first cited orally by defense counsel during the sentencing hearing,[1] *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1005 (1987), authorized the imposition of partial confinement for a violent offense. CP 35, COL 2.

The State filed a timely motion to reconsider the imposition of electronic home monitoring. CP 37; CrR 8.2; CR 59(b). The memo explained that statutory changes since the 1987 *Pascal* decision rendered that case inapplicable. *Id.*

The trial court, relying upon a pre-2013, unpublished court of appeals decision,[2] determined that once it found an exceptional sentence was appropriate, it may impose electronic

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[1] *Compare* CP 4-11, with RP 9.

[2] GR 14.1(a) only permits the citing of "unpublished opinions of the Court of Appeals filed on or after March 1, 2013."

home monitoring as an alternative to full-time incarceration. CP 40-41.

The State filed a timely notice of appeal. CP 42.

V. ARGUMENT

An Exceptional Sentence May Not Include an Element that the Legislature Has Not Authorized for the Crime of Conviction

In Washington, the Sentencing Reform Act, chapter 9.94A RCW, prescribes the authority to sentence in felony cases. *State v. Skillman*, 60 Wn. App. 837, 839, 809 P.2d 756 (1991). The SRA limits the trial court's sentencing authority to that expressly found in the statutes. *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 117, 308 P.2d 763 (2013). A sentence that is beyond the trial court's statutory authority is an invalid sentence that must be vacated. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 136, 267 P.3d 324 (2011); *State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985).

Exceptional mitigated sentences are authorized, to some extent, by the legislature in most SRA cases. *See* RCW

9.94A.535. An exceptional mitigated sentence allows the trial court to reduce the duration or length of the sentence. *Skillman*, 60 Wn. App. at 839. An exceptional sentence, however, does not allow a court to include particular elements of a sentence that are not otherwise authorized for that crime. *Id.*, citing D. Boerner, *Sentencing in Washington*, § 9.22(a) (1985).

Electronic Home Monitoring (EHM) is authorized as an alternative to confinement under RCW 9.94A.734. However, the statute specifically excludes certain classes of convictions, including convictions defined as "violent offenses." RCW 9.94A.734(1)(a). "Violent offenses" includes "Assault in the second degree." RCW 9.94A.030(58)(a)(viii). EHM, therefore, is not an authorized component for either a standard or exceptional sentence for assault in the second degree. *Skillman*, 60 Wn. App. at 839. *See also State v. Moriarty*, COA No. 48337-8-II, 2017 WL 1326645 at *9-10 (Wash. App. Apr. 11, 2017)

(unpublished)[3] (EHM may not be imposed upon someone convicted of second degree assault). The trial court, therefore, exceeded its authority by imposing an exceptional sentence consisting of EHM.

Leonard's sentence must be vacated, and the case remanded for the imposition of a statutorily authorized sentence. Leonard's completion of the unauthorized sentence poses no barrier to the imposition of a lawful sentence on remand. *See, e.g., State v. Pascal*, 108 Wn.2d 125, 131- 135, 736 P.2d 1065 (1987) (resentencing to correct erroneously imposed lenient sentence is not barred by double jeopardy even as to individuals who have already completed the erroneous sentence).

VI. CONCLUSION

The State respectfully requests that this court vacate the unauthorized term of electronic home monitoring and remand this matter to the trial court for resentencing.

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[3] This case is cited pursuant to GR 14.1(a). The opinion is not binding on this Court and may be accorded such persuasive values as this Court deems appropriate.

This document contains 938 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 30th day of August, 2022.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the respondent true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

8/30/2022	*s/Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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