

FILED

FEB 13, 2012

Court of Appeals
Division III
State of Washington

No. 29817-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ANDREW ROBERT MCCLURE,
Defendant/Appellant.

APPEAL FROM THE LINCOLN COUNTY SUPERIOR COURT
Honorable John F. Strohmaier

REPLY BRIEF OF APPELLANT (AMENDED)

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A. ACCEPTANCE OF STATE'S CONCESSION ON ISSUE 1 AND ACKNOWLEDGEMENT THAT STATE IS CORRECT THAT ISSUE 2 SHOULD BE RESOLVED IN STATE'S FAVOR.

Issue 1. The sentencing court did not have the statutory authority to impose a sentence of community custody of 36 months where only 18 months is authorized for the offense under RCW 9.94A.701, the statute authorizing community custody.

By Amended Brief of Respondent, the State concedes this issue and agrees that the matter should be remanded for resentencing to a term of 18 months. Amended Brief of Respondent at pp. 2–4. Mr. McClure accepts the State's concession.

Issue 2. The sentencing court violated due process and exceeded its statutory authority by imposing a certain condition of community custody that is neither authorized by statute nor crime-related.

Mr. McClure challenged a portion of the sentencing condition “[t]hat the defendant shall] not own, use, or possess firearms or ammunition”; in particular, that RCW 9.41.040 only prohibits a convicted felon from owning, possession or having in his control a *firearm*. Brief of Appellant at pp. 4–5 (citing CP 52, ¶ 4.2(B) (6)). Appellant was unaware, and the State correctly points out, that where a felony offender is under the supervision of the Department of Corrections, RCW 9.41.045 imposes a mandatory sentence requirement that extends the prohibition to include

ammunition. Amended Brief of Respondent at pp. 2–4. Mr. McClure therefore agrees that this issue should be resolved in the State’s favor.

B. CONCLUSION

The matter should be remanded for resentencing, to correct the term of community custody to 18 months. The trial court’s imposition of the condition prohibiting ammunition as well as firearms should be affirmed. It further appears that Mr. McClure has not filed a Statement of Additional Grounds for Review. Thus, undersigned counsel requests that the Court issue the mandate immediately so that resentencing may take place.

Respectfully submitted on February 12, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 13, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant (amended):

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