FILED

Feb 3, 2012
Court of Appeals
Division III
State of Washington

NO. 29817-5-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ANDREW ROBERT MCCLURE
Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT
IN AND FOR THE COUNTY OF LINCOLN

THE HONORABLE JOHN STROHMAIER, Judge

AMENDED BRIEF OF RESPONDENT

Jeffrey S. Barkdull, WSBA #18690
Prosecuting Attorney
Attorney for Respondent/ Plaintiff
P.O. Box 874
450 Logan Street
Davenport, WA 99122
(509) 725-4040

TABLE OF CONTENTS

Page

A. APPELLANT'S ASSIGNMENTS OF ERROR 2

B. APPELLANT'S ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 2

C. RESPONDENT'S ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 2

D. STATEMENT OF THE CASE. 3

E. ARGUMENT. 3

F. CONCLUSION. 4

STATUTES

RCW 9.41.040 3

RCW 9.41.045 3

RCW 9.41.098 4

RCW 9.94A 3

RCW 9.94A.633 4

RCW 9.94A.701 2

RCW 9.94A.716 4

RCW 9.94A.737 4

A. APPELLANT'S ASSIGNMENTS OF ERROR

1. The Appellant contends trial court erred in imposing community custody of 36 months as part of the sentence.

2. The Appellant contends trial court erred in imposing a certain condition of community custody as part of the sentence.

B. APPELLANT'S ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Does a sentencing court lack 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?

2. Does a sentencing court exceed its statutory authority by imposing a certain condition of community custody that is neither authorized by statute nor crime-related?

C. RESPONDENT'S ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Respondent does not raise any issue pertaining to Appellant's first Assignment of Error.

2. Respondent raises an issue with respect to Appellant's second

Assignment of Error, specifically, whether that assignment of error is contrary to Washington statutory law.

D. STATEMENT OF THE CASE

Respondent adopts the Appellant's Statement of the Case as if set forth fully herein.

E. ARGUMENT

Respondent has reviewed the Brief of Appellant, dated November 28, 2011 and the legal authorities cited therein. Respondent concedes that the sentencing court lacked statutory authority to impose a condition of community custody of 36 months as part of the sentence.

Respondent has reviewed the Brief of Appellant, dated November 28, 2011 and the legal authorities cited therein. Respondent does not concede that the sentencing court lacked statutory authority to impose a condition of community custody that is neither authorized by statute nor crime-related.

RCW 9.41.045 provides as follows:

> As a sentence condition requirement, offenders under the supervision of the department of corrections pursuant to chapter 9.94A. RCW shall not own, use or possess firearms or ammunition. In addition to any penalty imposed pursuant to RCW 9.41.040 when applicable, offenders found to be in

> actual or constructive possession of firearms or ammunition shall be subject to the appropriate violation process and sanctions as provided for in RCW 9.94A.633, and RCW 9.94A.716, or 9.94A.737. Firearms or ammunition owned, used, or possessed by offenders may be confiscated by community correction officers and turned over to the Washington State Patrol for disposal as provided in RCW 9.41.098. (Emphasis added for clarity).

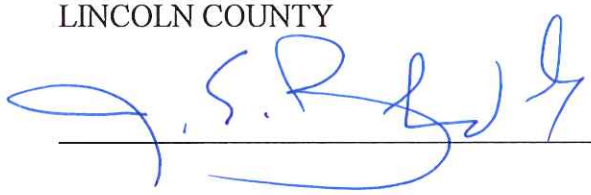
The above-referenced statute was overlooked by counsel when preparing its Reply Brief.

F. CONCLUSION

Respondent concedes Appellant's first issue and this matter should be remanded for re-sentencing on that issue. However, based upon the language of RCW 9.41.045, supra, Respondent respectfully requests that the second issue raised by Appellant should be decided in favor of Respondent by this Court. The State requests that this Court affirm the decision of the trial court with respect to Appellant's second issue.

Dated this 3 day of February, 2012

Respectfully submitted,
JEFFREY S. BARKDULL, WSBA #18690
PROSECUTING ATTORNEY
LINCOLN COUNTY



Certificate of Mailing

I, Sandi Rodenbough, do hereby certify and declare that I am the administrative assistant to the Prosecuting Attorney for Lincoln County, and that I deposited in the U. S. Post Office in the City of Davenport, Lincoln County, Washington, on the date below, a properly stamped and addressed envelope(s) containing a true and correct copy of: Amended Brief of Respondent, directed to the following:

Mr. Andrew Robert McClure (#348280)
Airway heights Corrections Cente4r
PO Box 2049
Airway Heights, WA 99001

Susan Marie Gasch
Gasch Law Office
PO Box 30339
Spokane, WA 99223-3005,

Dated: 2-3-2012

Sandi Rodenbough
SANDI RODENBOUGH