

FILED
MAY 15, 2012
Court of Appeals
Division III
State of Washington

No. 303772

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JEROME CURRY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE JEROME LEVEQUE

BRIEF OF APPELLANT

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I. Assignments of Error

- A. The resentencing court erred when it entered a “*Brooks* notation” in the resentencing order, in violation of RCW 9.94A.701(9).
- B. Mr. Curry’s Sixth Amendment right to the assistance of counsel was violated when he was denied the opportunity to have counsel present at his resentencing hearing.
- C. Mr. Curry’s right to a speedy resentencing was violated with a 3-month delay between remand and resentencing.

Issues Related to Assignments of Error

1. Did the Court Violate RCW 9.94A.701(9) When It Entered A “*Brooks* Notation” In The Resentencing Order?
2. Was Mr. Curry’s Sixth Amendment Right To The Assistance Of Counsel Violated When He Was Denied Counsel At The Resentencing Hearing, A Critical Stage Of Proceedings?
3. Was Mr. Curry’s Right To A Speedy Sentencing Violated After A 3-month Delay Between The Date Of Remand And Resentencing?

II. Statement of Facts

On September 14, 2009, a felony judgment and sentence was entered based on a jury verdict finding Mr. Curry guilty of violation of a domestic violence no contact order and second-degree malicious mischief-domestic violence. CP 24. At that sentencing hearing, Mr. Curry represented himself, but defense counsel who had been appointed by the court as standby counsel was present with him at counsel table. RP 3. The court sentenced Mr. Curry to a total confinement of 54 months, and 12-months of community custody. CP 28. He appealed. In its unpublished opinion of November 16, 2010, this Court accepted the State's concession that the ordered community service obligation combined with the term of confinement exceeded the statutory maximum of 60 months for a class C felony (RCW 9A.20.021(1)(c)). This Court held the appropriate remedy was remand to the trial court:

“to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).”

CP 43; *State v. Curry*, 2010 WL 4608773.

This Court denied reconsideration on December 15, 2010. After denial of a petition for review, a mandate was issued and the matter was remanded on June 23, 2011, to the superior court with instructions to place the matter on the next available motion calendar to amend the sentence. CP 42.

On June 20, 2011, Mr. Curry filed a motion to correct judgment and sentence in the superior court. CP 37-41. On June 27, 2011, superior court Judge Michael Price sent a letter to Mr. Curry advising him that his motion had been received but the matter was at the Court of Appeals and the court did not have jurisdiction. CP 37.

Two months later, on August 26, 2011, a letter was sent to Mr. Curry from Judge Moreno's court, acknowledging his letter of August 22, 2011, requesting a date for resentencing. The letter indicated his request was forwarded to Judge Leveque's court. CP 53.

On October 6, 2011, Mr. Curry was present for the resentencing hearing before Judge Leveque. RP 27. At the hearing, the court asked Mr. Curry if he had had an opportunity to review the new sentencing order and suggested it was a good idea for him to do so. RP 27. When asked if he had any comments or

statements he wished to make before resentencing, Mr. Curry stated, “I kind of want to get this over with but I kind of want to try to get some legal advice on this matter if I can, or legal help or...”. RP 28. The court responded, “You might recall when we were together some time ago you made the request to represent yourself, and I spent some time going over the wisdom of that decision...And I think I may have mentioned, and if I didn’t that I wouldn’t represent myself and I know a little bit about the law but I think it’s such a bad idea. The next thing I said is I can’t give you legal advice, I just can’t do that. So it’s good to get it but right now you’re representing yourself and that’s where we are.” RP 28.

In its oral ruling, the court ordered the top of the standard range, a 54- month sentence with community custody, not to exceed the maximum term of 60 months. Mr. Curry objected on the basis that the court was obligated to set the length of term not the Department of Corrections. RP 29.

The court entered a written order “clarifying the judgment and sentence section 4.2” ordering: “The Judgment and Sentence entered is clarified to reflect that the combined terms of confinement and community custody shall not exceed the statutory maximum.” CP 54. Mr. Curry appealed. CP 59.

III. Argument

A. The Resentencing Court Erred When It Entered A
“Brooks Notation” In The Resentencing Order, In
Violation Of RCW 9.94A.701(9).

Whether a sentence is legally erroneous is reviewed *de novo*. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009). A trial court only possesses the power to impose sentences provided by law. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

Prior to July 26, 2009, when a sentencing court imposed a sentence that included community custody, under former RCW 9.94A.715(4), the Department of Corrections determined when an offender was to be discharged from community custody. *Brooks*, 166 Wn.2d at 672. In cases where the imposition of community custody would extend the sentence beyond the statutory maximum, the DOC was required by the SRA to release the offender on or before the date the offender would have served the statutory maximum. *Id.*

With the passage of RCW 9.94A.701(9), the community custody term specified under the law “*shall be reduced by the court*

whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." *State v. Boyd*, 2012 WL 1570830 Wash at *1. (emphasis added).

Here, Mr. Curry was originally sentenced to 54 months of incarceration and under RCW 9.94A.701(3)(a), to 12 months of community custody. Recognizing the sentence was in error because it extended the sentence beyond the statutory maximum of 60 months this Court remanded for correction. The resentencing court ordered the standard "*Brooks* notation," directing the Department of Corrections that the total terms of confinement and community custody must not exceed the statutory maximum. However, because Mr. Curry was sentenced on September 9, 2009, after RCW 9.94A.701(9) was enacted, a sentencing court is no longer able to make the form of judgment notation approved in *Brooks*. *State v. Winborne*, 273 P.3d 454 ,455 (2012).

In a very similar case, Tishawn Winborne was convicted of violating a domestic violence no-contact order. Like Mr. Curry, he was required to be sentenced to a term of community custody in addition to a term of confinement based on the classification of the crime. Similar to Mr. Curry, the imposed sentence of confinement

and community custody exceeded the statutory maximum. The sentencing court made the standard “*Brooks* notation” directing the Department of Corrections that the total terms must not exceed the statutory maximum. *Id.*

This Court held that the legislature “clearly and intentionally” outlined the three components in RCW 9.94A.701(9): (1) impose term of confinement (2) impose term of community custody; (3) reduce the term of community custody if necessary. *Id.* at 458. This Court reasoned that a *Brooks* notation has no other objective but to prevent the reduction of community custody called for by the statute and preserve a substitution of community custody for earned release time. *Winborne* 273 P.3d at 455.

It is the duty of the trial court, not the Department of Corrections, to reduce the term of community custody to avoid a sentence in excess of the statutory maximum. *Boyd*, 2012 WL 1570830 at *2. With of the enactment of RCW 9.94A.701(9), a court entering a *Brooks* notation exceeds its sentencing authority under the SRA.

Here, because the resentencing court entered a *Brooks* notation it committed reversible error and the appropriate remedy is to remand for resentencing in accordance with RCW 9.94A.701(9):

A 54 month sentence with a 6 month term of community custody.

Winborne 273 P.3d at 458.

B. Mr. Curry's Sixth Amendment Right To The Assistance Of Counsel Was Violated When He Was Denied Counsel At His Resentencing Hearing.

The Sixth Amendment to the United States Constitution guarantees the assistance of counsel to a criminal defendant. U.S. Const. Amend. 6, Wash. Const. Art. 1 §22. A reviewing court closely monitors any limitations on constitutional rights. *State v. Ulestad*, 127 Wn. App. 209, 214, 111 P.3d 276 (2005)

A defendant has a right to counsel at every critical stage and it is well-established that a defendant is entitled to counsel during the sentencing phase of the case. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)). The purpose is to ensure that an accused does not suffer an adverse judgment or lose the benefit of procedural protections because of ignorance of the law. *State v. Tinkham*, 74 Wn. App. 102, 109, 871 P.2d 1127 (1994).

During Mr. Curry's trial, although he opted to proceed pro se, the court appointed standby counsel. *Curry*, 2010 WL 4608773 at *1, RP 3. Additionally, at the original sentencing hearing on

September 10, 2009, standby counsel sat with Mr. Curry at counsel table. RP 3. At the resentencing hearing on October 6, 2011, Mr. Curry told the court he wanted legal advice on the resentencing issue. RP 28. The court responded that since Mr. Curry had been granted pro se status at trial, he had to remain pro se at the resentencing. RP 28.

Once the court has appointed standby counsel his role is “to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary” *State v. Bebb*, 108 Wn.2d 515,525, 740 P.2d 829 (1987) quoting, *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Part of the role of standby counsel is to provide technical information and advice. *State v. Pugh*, 153 Wn. App. 569, 580, 222 P.3d 821 (2009). This is exactly what Mr. Curry requested of the court at his resentencing hearing. Mr. Curry was entitled to, and then denied the assistance of standby counsel at the resentencing.

When counsel is either totally absent or prevented from assisting an accused during a critical stage of a criminal proceeding, it is presumed the defendant was denied his constitutional right to counsel. *United States v. Cronin*, 466 U.S.

648, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). An outright denial of the right to counsel is presumed prejudicial and warrants reversal without a harmless error analysis. *State v. Harrell*, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996). It is presumed prejudicial because the error is structural in nature. *Id.*

Further, where the act to be done, in this case a correction of the sentence to comply with the statutory maximum, involves the exercise of discretion or judgment of the court, performance of that duty is not merely ministerial. *City of Bothell v. Gutschmidt*, 78 Wn. App. 654, 662-63, 898 P.2d 864 (1995). Here, the court's action in correcting the sentence was not a mere ministerial function: this was a discretionary decision that affected the length of incarceration and community custody. Additionally, both the resentencing court and the prosecutor misapplied the law in reasoning that a *Brooks* notation was sufficient clarification, when in fact RCW 9.94A.701 (9) was the governing statute.

Mr. Curry is entitled to an accurate resentencing with standby counsel to assist him in ensuring a fair proceeding and legally correct sentence.

C. Mr. Curry's Right To A Speedy Resentencing Was Violated
With A 3-Month Delay Between Remand And Resentencing.

A defendant has a statutory and a Sixth Amendment right to speedy sentencing, which applies to resentencing after a successful appeal. U.S. Const. Amend. 6; RCW 9.94A.500(1); See *State v. Rich*, 160 Wn. App. 647, 652, 248 P.3d 596 (2011); *State v. Modest*, 106 Wn. App. 660, 24 P.3d 1116, rev. denied, 145 Wn.2d 1010 (2001). While no specific rule governs the timeliness of a resentencing hearing, if a sentencing delay is “purposeful or oppressive,” it violates a defendant’s Sixth Amendment right to a speedy trial. *State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983); *Pollard. V. United States*, 352 U.S. 354, 361, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957). “In general, a convicted defendant should not be subjected to needless and uncertain delay before a new sentence is imposed after remand by an appellate court. Our criminal justice system is not served when the offender is not promptly resentenced.” *Modest*, 106 Wn. App. at 664.

Mr. Curry was sentenced to 54 months of incarceration on September 10, 2009 and was to receive credit for time served prior to sentencing. CP 28. By statute, he is allowed to receive up to 1/3 early release time credit. RCW 9.94A.729(3)(d). Thus, Mr. Curry’s incarceration may only be about 36 months, with a potential release date of September 2012.

In determining whether there has been a violation, the reviewing court balances the length and reason for the delay, the defendant's assertion of his right to a speedy sentence, and the extent of prejudice to the defendant. *State v. Rupe*, 108 Wn.2d 734, 742, 743 P.2d 210 (1987); *Modest*, 106 Wn. App. at 663.

Here, there is no record of the reason it took slightly over 3 months before Mr. Curry was resentenced. Mr. Curry twice asserted his right to a speedy sentence by bringing a motion to the superior court and inquiring two months later why he had not yet been resentenced. CP 37, 53.

In general, a prejudicial error is one which affects or presumptively affects the final result of a trial. *State v. Martin*, 73 Wn.2d 616, 627, 440 P.2d 429 (1980). The nature of the custody ultimately imposed is relevant to a determination of actual prejudice. *State v. Edwards*, 93 Wn.2d 162, 167, 606 P.2d 1224 (1980). Here, Mr. Curry was incarcerated and left wondering whether the term of incarceration and community custody would be corrected and whether and how the determinate length for each would be imposed. Further, he is now required to appeal the resentencing because it was incorrectly done and he may be released from incarceration before this appeal is completed. To

provide effective relief, Mr. Curry requests that this Court, on remand, instruct the superior court to release him from custody immediately if he has not already been released.

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Curry respectfully requests this Court to instruct that his sentence be corrected and he be immediately released from incarceration.

Dated this 15th day of May 2012.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Jerome Curry, 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 Brief of Appellant was sent by first class mail, postage prepaid on May 15, 2012, to Jerome Curry, DOC # 323160, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362 ; and emailed per agreement between the parties to Mark Erik Lindsey, Spokane County Prosecutor, at kowens@spokanecounty.org.

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