

FILED
Oct 29, 2012
Court of Appeals
Division III
State of Washington

NO. 30798-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

MIGUEL CARRILLO-DENIZ,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. The trial court erred in imposing a term of thirty-six (36) months community custody on Miguel Carrillo-Deniz.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Are RCW 9.94A.701(1)(a) and RCW 9.94A.701(3)(a) contradictory and/or ambiguous; and, if so, does the rule of lenity apply?

STATEMENT OF CASE

An Information was filed on March 29, 2011 charging Mr. Carrillo-Deniz with third degree rape. (CP 1)

The Information was supported by a probable cause affidavit filed that same date. (CP 3)

Mr. Carrillo-Deniz's trial date was continued pursuant to stipulation. He entered a guilty plea to the charge on September 8, 2011. (CP 5; CP 6; CP 7)

The guilty plea, the Pre-Sentence Investigation and the Judgment and Sentence reference and/or impose community custody of thirty-six (36) months. (CP 22; CP 54)

Mr. Carrillo-Deniz's guilty plea was originally based upon an offender score of zero (0). The prosecuting attorney subsequently discovered that he had been convicted of a felony in Oregon. He was sentenced with an offender score of one (1). Mr. Carrillo-Deniz's standard sentencing range increased from six (6) to twelve (12) months to twelve plus (12+) to fourteen (14) months. (CP 35)

Mr. Carrillo-Deniz filed a motion to withdraw his guilty plea on February 15, 2012. Findings of Fact and Conclusions of Law denying the motion were entered on May 10, 2012. (CP 48; CP 67)

Mr. Carrillo-Deniz filed his Notice of Appeal on April 12, 2012. (CP 66)

SUMMARY OF ARGUMENT

An ambiguity exists in RCW 9.94A.701 insofar as the imposition of a term of community custody on a sex offense which is also a crime against persons. The rule of lenity applies due to this ambiguity. Mr. Carrillo-Deniz's Judgment and Sentence needs to be modified.

ARGUMENT

RCW 9.94A.505(1) states: "When a person is convicted of a felony, the court shall impose punishment as provided in this chapter."

Mr. Carrillo-Deniz pled guilty to third degree rape - a felony.

RCW 9.94A.505(2)(a) states, in part:

The court shall impose a sentence as provided in the following sections and as applicable in the case:

- (i) ...
- (ii) RCW 9.94A.701 and 9.94A.702, relating to community custody;
- (iii) ...
- (ix) RCW 9.94A.507, relating to certain sex offenses

RCW 9.94A.507 does not apply to third degree rape. Thus, community custody must be determined in accord with the provisions of RCW 9.94A.701 and RCW 9.94A.702.

The Judgment and Sentence imposes thirty-six (36) months of community custody on Mr. Carrillo-Deniz.

RCW 9.94A.701 provides, in part:

- (1) If an offender is sentenced to the custody of the Department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:
 - (a) A sex offense not sentenced under RCW 9.94A.507; ...
 - ...
- (3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for 1 year when the court sentences the person to the custody of the Department for:
 - (a) Any crime against persons under RCW 9.94A.411(2)

Third degree rape is a sex offense. Third degree rape is also a crime against persons under RCW 9.94A.411(2).

Postsentence Review of Childers, 135 Wn. App. 37, 41, 141 P.3d 831 (2006) recognizes that courts “impose [...] community custody pursuant to RCW 9.94A.710 [now RCW 9.94B.070] and RCW 9.94A.715 [now repealed].”

Mr. Carrillo-Deniz contends that RCW 9.94A.701(1)(a) and RCW 9.94A.701(3)(a) are contradictory. They create an ambiguity in sentencing for purposes of imposing community custody. A Court’s authority to impose community custody is statutory. Where the statute is ambiguous the rule of lenity applies.

If language in a statute is subject to only one interpretation, then [the] inquiry ends. [Citations omitted.] Language is deemed unambiguous when it is not susceptible to two or more reasonable interpretations. [Citations omitted.] If a criminal statute is ambiguous, the rule of lenity requires us to construe the statute in favor of the defendant absent legislative intent to the contrary. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005) (citing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998); *State v. Roberts*, 117 Wn.2d 576, 585, 817 P.2d 855 (1991)).

State v. Kintz, 169 Wn.2d 537, 548, 238 P.3d 470 (2010).

Mr. Carrillo-Deniz is entitled to have his Judgment and Sentence modified to reflect a correct community custody term of one (1) year as opposed to three (3) years.

The only other potential issue that could exist is whether or not the trial court's Findings of Fact and Conclusions of Law concerning Mr. Carrillo-Deniz's motion to withdraw his guilty plea are supported by the record. *See: State v. Codiga*, 162 Wn2d 912, 928, 175 P.3d 1082 (2008).

CONCLUSION

Where a statute is ambiguous and a trial court has a choice of community custody terms, the individual being sentenced is entitled to application of the rule of lenity for the lowest term of community custody.

Mr. Carrillo-Deniz should be resentenced to one (1) year of community custody as opposed to three (3) years.

DATED this 28th day of October, 2012.

Respectfully submitted,

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DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	YAKIMA COUNTY
Plaintiff,)	NO. 11 1 00303 9
Respondent,)	
)	CERTIFICATE OF SERVICE
)	
v.)	
)	
MIGUEL CARRILLO-DENIZ,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 28th day of October, 2012, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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