

FILED

MAY 29, 2013

Court of Appeals
Division III
State of Washington

31351-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

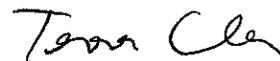
THOMAS NATHAN CALDWELL,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. May the typo which misstates that service fees (or costs) are restitution be remanded for correction?
2. Is the duration of a protection order limited to the statutory maximum limit for confinement and community custody, despite explicit statutory authority which gives the superior court the authority to enter permanent protection orders?
3. Is there any error in the term of community custody where the crime of conviction is a “violent offense” requiring an 18 month term, which is what the Defendant received?

IV. STATEMENT OF THE CASE

The Defendant Thomas Nathan Caldwell was charged with assault

of a child in the first degree and pled guilty to assault of a child in the second degree. CP 4-6, 25-38. In making an Alford plea, he adopted the certificate of probable cause, CP 34. This certificate describes that the Defendant's nine-month-old daughter sustained seven broken ribs. CP 1. Neither parent could explain the injuries. *Id.* Later the Defendant attempted to blame a friend who had watched the infant in the waiting room while the mother was having an eye appointment. CP 2. In a subsequent interview, he claimed he had come home drunk and had tripped and fallen on the baby. *Id.* The baby had cried for almost two hours, but the parents had not taken the child to the hospital. *Id.* Expert opinion was that the injury was most likely to have been caused by shaking and squeezing and not by a crush impact. *Id.*

The Defendant has an offender score of five, which includes criminal convictions of supplying liquor to a minor, felony assault, rape of a child in the first degree, and failure to register as a sex offender. CP 36-37, 41. The Defendant was given notice in the Statement of Defendant on Plea of Guilty that his offense was a "most serious" or strike offense. CP 31. This is so under RCW 9.94A.030(32)(c).

The Defendant challenges details of his sentence: specifically the restitution order, the term of the no-contact order, and the term of

community custody.

V. ARGUMENT

A. THE JUDGMENT CONTAINS A TYPOGRAPHICAL ERROR WHICH MAY BE CORRECTED.

The judgment states that \$54.80 is assessed as restitution to the prosecutor's office. CP 41. It should say that this amount is a witness service fee, i.e. a cost, not restitution. The trial court may correct this item.

B. THE SUPERIOR COURT IS AUTHORIZED TO ENTER PERMANENT PROTECTIONS ORDERS.

The Defendant challenges the duration of the domestic violence protection orders. The orders, which protect mother and child, are permanent. CP 50, 52. There is no error in the duration of the orders.

The Defendant argues that the only statute, which provides instruction as to the permissible length of a protection order, is RCW 9A.20.021. This is incorrect. RCW 9A.20.021 limits "the term of confinement or community custody" to the statutory maximum of the class of felony. A protection order is not confinement or community custody. This statute does not limit the duration of protection orders.

RCW 10.99.050 provides the authority for a no-contact order

resulting from a criminal conviction. *State v. Anaya*, 95 Wn. App. 751, 760, 976 P.2d 1251 (1999). The statute does not restrict the duration of such an order.

Terms of community custody cannot exceed the statutory maximum for the underlying crime. RCW 9.94A.505(5). Therefore, insofar as a no-contact order is a term of community custody, the violation of which could be considered a probation violation, the court's jurisdiction to enforce these orders as crime-related prohibitions would be limited by RCW 9A.20.021 to ten years. *In re Rainey*, 168 Wn.2d 367, 376, 229 P.2d 686 (2010).

However, the superior court has authority for an order of permanent duration, entirely unrelated to a criminal conviction and unfettered by RCW 9A.20.021. The superior court has authority to enter permanent domestic violence protection orders under RCW 26.50, which is what the two separate orders are. CP 51-54.

The domestic violence protection orders are separate documents, although associated with the judgment and sentence. CP 51-54. As the orders themselves indicate, ch. 10.99 RCW and ch. 26.50 RCW provide the authority for the domestic violence protection orders. Therefore, the provisions of these statutes, not the judgment and sentence, control the

duration of the prohibition against his contact with the victims. **And under RCW 26.50.060(3), a court may enter permanent orders of protection.**

While a violation of the order *after the community custody term expires* would no longer be a violation of the criminal judgment, the victims will still be under the protection of the permanent civil order until there is an action to terminate or modify the order. RCW 26.50.130.

Therefore, it is proper to correct the language on page 9 (para. 4.4) of the judgment and sentence (CP 47) while leaving the permanent protection orders intact (CP 51-54).

C. THE COURT MADE NO ERROR IN IMPOSING AN 18-MONTH TERM OF COMMUNITY CUSTODY.

The Defendant complains that he should have received a community custody term of 12 months, rather than 18, because his offense is a crime against a person under RCW 9.94A.411(2). RCW 9.94A.701(3)(a). But his crime is also a violent offense under RCW 9.94A.030(54(a)(ix)). The community custody term for a violent offense is 18 months. RCW 9.94A.701(2). Therefore, the court made no error.

The Defendant argues that the rule of lenity requires the lesser community custody term. This is an improper application of the doctrine.

The rule of lenity requires a court to interpret an ambiguous criminal statute in favor of the defendant absent legislative intent to the contrary. *State v. Mandanas*, 168 Wn.2d 84, 88, 228 P.3d 13 (2010). In determining whether a statute is ambiguous, we apply the rules of statutory construction. This means that the language is to be read as a whole giving effect to all of the language. *State v. McIntyre*, 92 Wn.2d 620, 622, 600 P.2d 1009 (1979). The Defendant's reading violates the rules of statutory construction. He would render the provisions in RCW 9.94A.701(1) and (2) meaningless. Under his reading, every crime against person from a felony DUI to murder in the first degree, regardless of whether it is a sex offense, serious violent offense, or violent offense, should receive a minimal community custody term despite the language in RCW 9.94A.701(1) and (2). Because this reading renders statutory provisions meaningless, it is an improper reading. The statute can only be read meaningfully in one way – requiring an 18-month term for all violent offenses. Therefore, the statute is not ambiguous. The rule of lenity does not apply here.

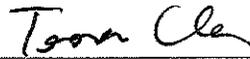
The Defendant received the correct community custody term.

VI. CONCLUSION

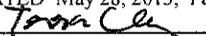
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: May 28, 2013.

Respectfully submitted:



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<p>Dennis W. Morgan <nodblspk@rcabletv.com></p> <p>Thomas Nathan Caldwell #796029 Coyote Ridge Correction Center PO Box 769 Connell, WA 99326</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 28, 2013, Pasco, WA</p>  <p>Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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