

NO. 33443-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ELUTERIO MORFIN-CAMACHO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Carrie L. Runge, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural Facts</u> .....	1
2. <u>Substantive Facts</u> .....	2
C. <u>ARGUMENTS</u> .....	3
1. THE TRIAL COURT ERRED IN ACCEPTING MORFIN-CAMACHO'S WAIVER OF COUNSEL WITHOUT FIRST CONFIRMING HE UNDERSTOOD THE RISKS HE FACED AS A RESULT OF THE CHARGES, INCLUDING THE MAXIMUM PENALTIES.....	3
2. THE COURT ERRED BY IMPOSING AN AGGRAVATED EXCEPTIONAL SENTENCE FOR POSSESSION OF METHAMPHETAMINE.....	6
D. <u>CONCLUSION</u> .....	7

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

In re Detention of J.S.  
138 Wn. App. 882, 159 P.3d 435 (2007)..... 3

In re Postsentence Review of Leach  
161 Wn.2d 180, 163 P.3d 782 (2007) ..... 6

State v. Bahl  
164 Wn.2d 739, 193 P.3d 678 (2008)..... 6

State v. C.D.C.  
145 Wn. App. 621, 186 P.3d 1166 (2008)..... 7

State v. Coley  
180 Wn.2d 543, 326 P.3d 702 (2014)..... 3

State v. Ford  
137 Wn.2d 472, 973 P.2d 452 (1999)..... 6

State v. Madsen  
168 Wn.2d 496, 229 P.3d 714 (2010)..... 3

State v. Moen  
129 Wn.2d 535, 919 P.2d 69 (1996)..... 6

State v. Smith  
144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 294 (2001)..... 6

OTHER JURISDICTIONS

Bellevue v. Acrey  
103 Wn.2d 203, 691 P.2d 957 (1984)..... 4

State v. Silva  
108 Wn. App. 536, 31 P.3d 729 (2001)..... 3, 4, 5

**TABLE OF AUTHORITIES**

Page

FEDERAL CASES

Faretta v. California  
422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)..... 3, 4

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.52.030 ..... 1, 5

RCW 9.94A.517 ..... 6

RCW 9.94A.518 ..... 6

RCW 9.94A.535 ..... 6

RCW 69.50.4013 ..... 1, 5

U.S. Const. amend. VI ..... 3

U.S. Const. amend. XIV ..... 3

Const. art. I, § 22..... 3

A. ASSIGNMENTS OF ERROR

1. The court erred in accepting appellant's waiver of counsel.
2. The court imposed an erroneous sentence.

Issues Pertaining to Assignments of Error

1. Did the trial court err in accepting appellant waiver of counsel without first engaging in a colloquy that established appellant understood the maximum penalty he faced if convicted?

2. Did the trial court impose a sentence in excess of its authority when it imposed a sentence one day longer than the top of the standard range despite no aggravating factors being charged or proven?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Franklin County prosecutor charged appellant Eluterio Morfin-Camacho with second degree burglary and unlawful possession of methamphetamine. CP 57-58; RCW 9A.52.030; RCW 69.50.4013. A jury trial was held April 8-10, 2015, before the Honorable Carrie L. Runge. 2RP 1-267.<sup>1</sup>

Morfin-Camacho was convicted as charged. CP 18-19; 2RP 264. The court subsequently imposed sentences of 29 months for the burglary

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<sup>1</sup> There are three volumes of verbatim report of proceedings referenced as follows: 1RP - March 17, 2015 (pretrial) & May 7, 2015 (sentencing); and 2RP - two-volume consecutively paginated set for the dates of April 8, 9 & 10, 2015 (trial).

and 12 months and a day for the possession of methamphetamine. CP 5-17; 1RP 20. Morfin-Camacho appeals. CP 2-3.

2. Substantive Facts

Morfin-Camacho was arrested for burglary in the early morning of January 31, 2015, outside a store in Pasco after the owner, Mauro Ramirez, reported seeing Morfin-Camacho, without permission, in the fully-fenced area at the back of the store. 2RP 26-28, 49, 51, 55-60. Following his arrest and jailing, methamphetamine was found in Morfin-Camacho's underwear during a strip search. 2RP 133, 153-54.

During a March 17, 2015 pretrial hearing, Morfin-Camacho informed the court he wished to discharge appointed counsel and proceed pro se. 1RP 2. Before ruling on Morfin-Camacho's request, the court engaged him in a colloquy, which included inquiring about any past legal training, and whether he understood the potential penalties he faced if convicted. 1RP 2-5. In reply, Morfin-Camacho claimed he had a "JD", that he understood that he would be held to the same procedural and evidentiary standards as the prosecution's attorney, and that he understood he faced up to 29 months confinement if convicted. 1RP 2-5.

C. ARGUMENTS

1. THE TRIAL COURT ERRED IN ACCEPTING MORFIN-CAMACHO'S WAIVER OF COUNSEL WITHOUT FIRST CONFIRMING HE UNDERSTOOD THE RISKS HE FACED AS A RESULT OF THE CHARGES, INCLUDING THE MAXIMUM PENALTIES.

The trial court's colloquy in response to Morfin-Camacho's request to proceed pro se was inadequate because it failed to ensure the resulting waiver of counsel was knowing, voluntary and intelligently. Specifically, the court failed to ensure Morfin-Camacho was aware of the maximum penalties he faced if convicted, which was up to 10 years confinement for the burglary and up to five years confinement for the methamphetamine possession. This failure requires reversal and remand for a new trial.

The state and federal constitutions guarantee an accused the right to counsel at all critical stages of a criminal proceeding. These provisions also guarantee the right to self-representation. U.S. Const. amend. 6, 14; Const. art. 1, § 22; Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Coley, 180 Wn.2d 543, 559-60, 326 P.3d 702 (2014); State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). The state constitutional right to self-representation "is absolute" and its violation is reversible error. In re Detention of J.S., 138 Wn. App. 882, 890-891, 159 P.3d 435 (2007).

Before a trial court may accept a waiver of counsel, however, the court must ensure the accused knows the risks inherent in self-representation. Bellevue v. Acrey, 103 Wn.2d 203, 211, 691 P.2d 957 (1984). This is usually accomplished through a colloquy. Silva, at 540 (citing Acrey, at 211). "There is no formula for determining a waiver's validity, but the preferred method is a court's colloquy with the accused on the record detailing at a minimum the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused's defense." Silva 180 Wn. App. at 539 (footnotes omitted). Absent a colloquy, a defendant's waiver of counsel "may still be valid if a reviewing court determines from the record that the accused was fully apprised of these factors and other risks associated with self-representation that would indicate that he made his decision with his 'eyes open.'" 108 Wn. App. at 840 (quoting Acrey, 103 Wash.2d at 211 (quoting Faretta, 422 U.S. at 835)).

In Silva, the defendant had just completed a trial and "had displayed exceptional skill" as a litigator. Silva, 108 Wn. App. at 540. He had represented himself in trials twice before. He knew the standard range sentence for the offenses. Nonetheless, this Court held Silva's waiver of his right to counsel invalid, because the trial court failed to inform Silva of

the five-year maximum penalty attached to the class C felonies at issue there. Silva, at 541-42.

As in Silva, the trial court here failed to advise Morfin-Camacho of the maximum penalties he faced if convicted of the charged offenses, which was five years for the drug possession and 10 years for the burglary.<sup>2</sup> Instead the court had the prosecutor inform Morfin-Camacho what the standard ranges were, but not the maximum possible penalty. 1RP 3-4. Nor does the record provide a basis to conclude Morfin-Camacho was aware of these potential penalties beforehand. Although it is true the charging document states burglary is "A CLASS B FELONY" and drug possession is "A CLASS C FELONY," nowhere in the record generated prior to sentencing does it indicate the maximum penalties for these offenses. CP 57; see CP 5 & 7 (judgment and sentence sets forth both the felony classification and maximum penalty for the offenses)

As in Silva, the court failed to ensure Morfin-Camacho was aware of the five-year and 10-year maximum penalties associated with the charge crimes. Absent such knowledge, Morfin-Camacho's waiver of counsel was not knowing, voluntary and intelligent, and was therefore

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<sup>2</sup> Second degree burglary is a class B felony, and therefore subject to a 10-year maximum sentence. RCW 9A.52.030(2); RCW 9A.20.021(1)(b). Possession of methamphetamine is a class C felony and therefore subject to a five-year maximum sentence. RCW 69.50.4013(2); RCW 9A.20.021(1)(c).

invalid. Reversal and remand for a new trial is required. Silva, 108 Wn. App. at 542.

2. THE COURT ERRED BY IMPOSING AN AGGRAVATED EXCEPTIONAL SENTENCE FOR POSSESSION OF METHAMPHETAMINE.

The standard range sentence for Morfin-Camacho's methamphetamine possession is 6 months and a day to 12 months. CP 7; RCW 9.94A.517 & .518. The trial court, however, imposed 12 months and a day. CP 12; 1RP 20. There being no aggravating circumstances proved upon which the court could rely on to impose an aggravated exceptional sentence, remand for resentencing is required.

A court's authority to impose sentence is limited by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Smith, 144 Wn.2d 665, 673-75, 30 P.3d 1245, 39 P.3d 294 (2001); State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996). A court may impose a sentence outside the standard range only when there are "substantial and compelling reasons" to do so, and must file written findings and conclusions in support of such a sentence. RCW 9.94A.535.

[I]llegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A trial

court commits reversible error when it exceeds its sentencing authority.  
State v. C.D.C., 145 Wn. App. 621, 625, 186 P.3d 1166 (2008).

Here, the trial court imposed a sentence for drug possession that exceeds the standard range by one day. CP 12; 1RP 20. There are no written findings of fact and conclusions of law supporting such a departure. The trial court likely simply misspoke by grafting onto the high end of the standard range (12 months) the "and a day" aspect of the low end of the range. Remand to correct this error is warranted.

D. CONCLUSION

Morfin-Camacho's waiver of counsel was invalid because it was made without an adequate understanding of the risks and consequences of proceeding to trial pro se. Therefore, reversal and remand for a new trial is necessary. In the alternative, remand for resentencing is required to correct the excessive sentence for the drug possession conviction.

DATED this 30<sup>th</sup> day of November 2015.

Respectfully Submitted,

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State v. Eluterio Morfin-Camacho

No. 33443-1-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 30<sup>th</sup> day of November, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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**Signed** in Seattle, Washington this 30<sup>th</sup> day of November, 2015.

X  \_\_\_\_\_