

No. 33724-3-III

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

STATE OF WASHINGTON,

Appellant,

v.

SCOTT MONTGOMERY NICHOLAS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 12-1-00107-5

BRIEF OF APPELLANT

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PROSECUTING ATTORNEY

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The trial court erred in determining on remand that the original 120 month sentence plus the twelve month term of community custody created an exceptional sentence.

B. STATEMENT OF THE CASE

The defendant was found guilty of Violation of the Uniform Controlled Substances Act, possession with intent to manufacture or deliver a controlled substance, methamphetamine, by a Jury on September 7, 2012.

A sentencing hearing was held on October 15, 2012. The defendant had an offender score of 9, and a standard range of 60+ - 120 months. This was a subsequent conviction, which made the maximum term 240 months under RCW 69.50.408. The trial court sentenced the defendant to 120 months of total confinement, and community custody for the longer of the period of early release or 12 months. The Judgement and Sentence reflecting this sentence was entered on the same day.

A Notice of Appeal was filed on October 15, 2012. The Appellant's Opening Brief argued jury instruction issues and that the trial court erred in imposing a variable term of community custody. The state conceded the issue of community custody.

The Court of Appeals issued an opinion affirming the convictions but remanding to the trial court to impose a fixed term of community

custody.

On July 20, 2015, the matter was heard by the trial court. The state informed the trial court that the matter was here on remand from the Court of Appeals with an order for the trial court to impose a fixed term of community custody. (Opinion from 31218-6-III). For the first time, the defense argued that if the trial court imposed a term of community custody of 12 months, combined with the sentence of 120 months, it would be an exceptional sentence. The matter was set to argue on the issue of an exceptional sentence. (VRP 4-5). The issue was not whether the combination of the term of confinement of 120 months plus the term of community custody exceeded the statutory maximum; but rather that the combination of the two created an exceptional sentence.

On August 17, 2015, a hearing was held. The trial court ruled that the 120 months term of confinement combined with the community custody created an exceptional sentence. Without aggravating circumstances, the court could not impose an exceptional sentence and re-sentenced the defendant to 108 months plus the 12 months of community custody. (VRP 14)

An order modifying the sentence to reflect 108 months of confinement and a fixed term of 12 months community custody was entered on August 20, 2015.

The state filed a timely notice of appeal on August 21, 2015.

C. ARGUMENT

1. The trial court erred in determining on remand that the original 120 month sentence plus the twelve month term of community custody created an exceptional sentence.

The defendant was found guilty of the crime of Violation of The Uniform Controlled Substances Act, possession with intent to manufacture or deliver a controlled substance, methamphetamine by a jury on September 7, 2012.

The defendant's offender score was 9, making his standard range 60+ to 120 months. He was sentenced on October 15, 2012 to the high end, 120 months after a sentencing hearing.

He was also sentenced to a term of community custody. The terms of community custody are governed by RCW 9.94A.701.

RCW 9.94A.701(3)(c) reads:

“(3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: (c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000” (emphasis added).

Community custody is set by statute, and is separate from the standard range term of confinement. RCW 9.94A.030(51) defines “total confinement” to mean “confinement inside the physical boundaries or a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.” The referenced RCW's refer to work camps.

Community custody is clearly separate from the standard range term of confinement.

The term of community custody is further governed by RCW 9.94A.701(9):

“The term of community custody specified by this section 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 as provided in RCW 9A.20.021.”

The defendant was convicted of a Class B felony, which normally has a statutory maximum of 120 months. In this case, the defendant has multiple convictions for the Violation of the Uniform Controlled Substances Act, including a prior conviction for Unlawful Possession of a Controlled Substance with the Intent to Deliver. RCW 69.50.408 states that “Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.” *In re Cruz*, 157 Wn. 2d 83, 134 P.3d 1166 (2006) clarifies that the statutory maximum is doubled and not the standard range sentence.

The defendant was sentenced within his standard range, 120 months. The defendant was sentenced to a term of community custody, as authorized by statute. The standard range sentence combined with his term of community custody was not in excess of the statutory maximum, because the statutory maximum was 240 months, as established by RCW 69.50.408.

RCW 9.94A.535 defines an exceptional sentence as a sentence imposed “outside the standard sentence range.” In this case, the defendant was not sentenced to a range outside the standard range. He was sentenced to the high end of his standard range, 120 months.

A standard range sentence does not include the term of community custody. Community custody is separate, set by a separate statute, RCW 9.94A.701. That statute references the “standard range sentence combined with the term of community custody.” There is clearly a separation. The term of community custody combined with the time of confinement can not create an exceptional sentence. The only requirement is that the combination of each cannot exceed the statutory maximum.

If community custody contributed to the sentence in determining what the standard range is, there would be no need for the provision that the standard range and the community custody combined cannot exceed the statutory maximum. It also would be nearly impossible to sentence a sex offender who is subject to the indeterminate sentencing board to any standard range, because the community custody range is life. That alone would almost always fall outside any standard range.

Case law continually discusses standard range sentences in terms of time of confinement separately from the term of community custody. One example of this is *State v. Jones*, 172 Wn.2d 236, 257 P. 3d 616 (2011). In that case, the appellant was sentenced by the trial court to an exceptional

sentence of 130 months of incarceration and 36 months of community custody. The fact that the two are separated clearly shows that the two are not considered together to contribute to Mr. Jones' term of incarceration. In a personal restraint petition, Mr. Jones' successfully argued that his offender score was calculated incorrectly. Mr. Jones was resentenced to a period of 51 months of incarceration and 36 months of community custody; however, at the time of the resentencing, he had already served 81 months. The trial court ordered release on credit for time served; however, the trial court did not credit the excess 30 months of incarceration towards his term of community custody. The court of Appeals upheld, holding that the term of community custody was defined as time when the offender is actually in the community. *State v. Jones*, 172 Wn.2d at 244.

State v. Bruch, 182 Wn.2d 854, 346 P.3d 724 (2015) also discusses the standard range as separate from community custody. In *Bruch*, the defendant's standard range was 87-116 months. The defendant was sentenced to 116 months, and 4 months of community custody. This did not exceed the maximum penalty of 120 months. There was no exceptional sentence. *Bruch* is factually similar to the case at hand. Each defendant was sentenced to the max time allowed under their standard range sentence, and each were sentenced to a term of community custody. It cannot be an exceptional sentence when the sentence is within the standard range.

It is clear that the term of confinement and term of community

custody are meant to be considered separately. A standard range sentence applies to the term of confinement inside a facility, and does not include the term of community custody.

Because the term of confinement was not an exceptional sentence, it should not have been amended.

2. A motion to modify the Judgment and Sentence was time-barred and not properly before the Court.

The defendant filed his Notice of Appeal on October 15, 2012. In that appeal, the defendant raised two issues: 1) a jury instruction issue; and 2) that a variable term of community custody was wrongfully imposed. At no time did the appellant raise the issue that the trial court wrongfully imposed an exceptional sentence.

The Court of Appeals issued a mandate to remand to sentence the defendant to a fixed term of community custody. The mandate did not address resentencing the time of confinement.

It is true that the trial court may exercise discretion in deciding whether to exercise independent judgement on an issue which was not the subject of appeal. *State v. Barberio*, 121 Wn. 2d 48, 50-51, 846 P.2d 519 (1993). RAP 12.2 states that after a mandate is issued, “the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issue already decided by the appellate court.”

In this case, the motion to amend the Judgement and Sentence based on the fact that the original sentence was an exceptional sentence was not timely, and therefor not authorized by statute or court rule.

RCW 10.73.090 states that “No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.” Collateral attack is defined in section 2 as “any form of postconviction relief other than a direct appeal.”

Here, the defendant motioned that the term of confinement be changed, arguing that the original sentence was an exceptional sentence with no aggravating factors. That motion should have been brought within a year, and/or raised on Appeal, but was not and is therefore not timely.

RCW 10.73.100 specifies which circumstance are not time-barred. They include: (1) newly discovered evidence; (2) if the statute the defendant was convicted of was unconstitutional; (3) the conviction was barred by double jeopardy; (4) the evidence presented at trial was insufficient to support the conviction; (5) the sentence imposed was in excess of the court’s jurisdiction; or (6) there has been a significant change in the law. In the case at hand, none of the exceptions are present, and the motion was been time barred.

D. CONCLUSION

The Court should remand for re-sentencing, imposing the original term of confinement and a fixed term of community custody.

Respectfully submitted this 30th day of November, 2015.

KLICKITAT COUNTY
PROSECUTING ATTORNEY

A handwritten signature in black ink, appearing to read "Erika George", written over a horizontal line.

ERIKA GEORGE
WSBA No. 43871
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,
Plaintiff,

COURT OF APPEALS NO. 33724-3-III

v.

SCOTT MONTGOMERY NICHOLAS,
Defendant.

DECLARATION OF SERVICE

I, Erika George, declare under penalty of perjury under the laws of the State of Washington that on the 30th day of November, 2015, I served a copy of the following documents as set forth below:

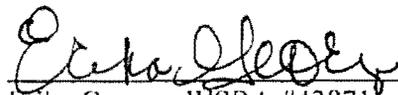
**CHRISTOPHER LANZ
ATTORNEY AT LAW
P.O. BOX 1116
WHITE SALMON, WA 98672**

by means of: via Email, per agreement

OTHER:
Brief of Appellant

Pages: 12

DATED this 30th day of November, 2015.



Erika George, WSBA #43871
Deputy Prosecuting Attorney