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I. ASSIGNMENT OF ERROR

The trial court erred when it denied Appellant credit for the time he spent on community custody prior to the revocation of his suspended sentence.

II. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Did the trial court err when it denied Appellant credit for the time he spent on community custody prior to the revocation of his suspended sentence, where Appellant spent nearly three years on community custody under DOC supervision as a condition of his suspended sentence, and where the combined terms of confinement and community custody imposed by the court already exceed the statutory maximum?

III. STATEMENT OF THE CASE

On July 25, 2003, Daniel Herbert Pannell pleaded guilty to one count of first degree incest (RCW 9A.64.020) and four counts of second degree child molestation (RCW 9A.44.086). (CP 6-15) Pannell's standard range for was 87-116 months, and the statutory maximum for the crimes was 10 years (120 months). (CP 38)

On August 22, 2003, the court sentenced Pannell under the Special Sex Offender Sentencing Alternative (SSOSA) to 116

months of confinement followed by three years of community custody. (CP 37, 39, 40, 41, 50) The court suspended Pannell's sentence, and directed that Pannell be "placed on community custody under the charge of DOC for the length of the suspended sentence[.]" (CP 41) Because of the length of time already served in custody pending resolution and sentencing, Pannell was released into community custody on the day of sentencing. (CP 35, 41

On May 16, 2006, the State filed a petition alleging that Pannell had violated the terms of his community custody, and asked the court to revoke Pannell's suspended sentence. (CP 53-56) The court granted the State's petition, revoked the suspended sentence, and ordered that Pannell serve 116 months in confinement followed by 3-4 years of community placement. (CP 79-80)

On June 22, 2009, Pannell filed a pro se Motion to Modify under CrR 7.8, asserting that the combined total of his term of incarceration (116 months) and term of community placement (36-48 months) would exceed the 120-month statutory maximum. (CP 82-86)

At a hearing on September 25, 2009, the prosecutor and the

court agreed that the sentence imposed had the potential to exceed Pannell's statutory maximum, and that the Judgment and Sentence should be amended. (RP 5-6; CP 114) But the prosecutor disputed Pannell's assertion that the time he spent on community custody prior to revocation should be counted toward the 120-month statutory maximum. (RP 5-6, 7) The court agreed with the prosecutor, and found that the community custody served under the suspended sentence was not equivalent to "confinement." (RP 7-8)

The court entered an order amending the Judgment and Sentence, which stated:

The total time that Defendant can be under this sentence is 120 months. This includes time spent in the Pierce County Jail[, in] the Department of Corrections & on Community Custody post release from the Department of Corrections.

(CP 123) This appeal timely follows. (CP 124)

IV. ARGUMENT & AUTHORITIES

Under the SSOSA statute, a trial court may suspend an offender's term of confinement and impose "[a] term of community custody equal to the length of the suspended sentence . . . and require the offender to comply with any conditions imposed by [DOC]." RCW 9.94A.670(5)(b). That is what the court did when it originally sentenced Pannell in 2003; the court imposed a 116-

month sentence, ordered that it be suspended, and ordered that Pannell be placed on community custody. (CP 41) Pannell was on community custody and under orders to comply with specific conditions, until the suspended sentence was revoked in 2006.¹ (CP 41, 53-54, 83) When the court revoked the suspended sentence, it imposed 116 months of confinement to be followed by 3-4 years of additional community placement. (CP 80)

However, a trial court may not impose a sentence providing for a term of confinement, community supervision, community placement, or community custody that, when added together, exceeds the statutory maximum for the crime. RCW 9.94A.505(5); RCW 9.94A.701(8); State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004). In his CrR 7.8 motion, Pannell correctly pointed out that the total term of confinement combined with the term of community custody ordered in this case exceeds the 120-month statutory maximum. (CP 84-85)

When a term of confinement and community custody

¹ The trial court "may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment." RCW 9.94A.670(11).

imposed by the trial court has the potential to exceed the statutory maximum for the crime, the trial court must explicitly state that “the combination of confinement and community custody shall not exceed the statutory maximum.” In re Personal Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). The parties and the court all agreed that such an explicit statement was necessary in this case. (CP 114, 123) But the trial court’s order specifically excluded the portion of community custody served by Pannell prior to revocation. (CP 123)

This exclusion exceeded the trial court’s sentencing authority and violated the terms of the Sentencing Reform Act.² A trial court may impose a sentence only as authorized by statute. See In re Personal Restraint of Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008). And the court cannot impose a term of confinement and community custody that punishes an offender in excess of the statutory maximum. RCW 9.94A.505(5); RCW 9.94A.701(8).³

² When a trial court’s decision on a CrR 7.8 motion turns on a question of law, the appellate court reviews the decision *de novo*. See State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

³ RCW 9.94A.505(5) states that “a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime[.]” RCW 9.94A.701(8) states that “[t]he 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[.]”

Nothing in the Sentencing Reform Act (SRA) or SSOSA statute directs a trial court or DOC to deny an offender credit for time spent on community custody if a SSOSA is later revoked.⁴ And the SRA specifically forbids a combined term of confinement and community custody that exceeds the statutory maximum. RCW 9.94A.505(5); RCW 9.94A.701(8). The trial court here exceeded its statutory authority when it denied Pannell credit for the time he spent on community custody before his suspended sentence was revoked. If Pannell does not receive credit for this time, then he will be punished for a length of time that exceeds the 120-month statutory maximum.

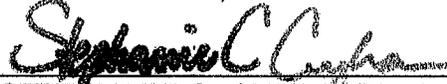
V. CONCLUSION

Pannell has already spent nearly three years under DOC supervision while on court-ordered community custody. The trial court has no authority to deny him credit for that time. Pannell's case should be remanded for entry of a new order amending the the judgment to specify that the combination of confinement and

⁴ The SSOSA statute directs that "[a]ll confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked." RCW 9.94A.670(11) This conforms with other sections of the SRA requiring that an offender receive credit for time spent in confinement prior to sentencing. See RCW 9.94A.505(6). But the SSOSA statute is silent in regards to credit, or lack of credit, for time served in community custody.

community custody (both pre and post-revocation) shall not exceed the 120-month statutory maximum.

DATED: June 7, 2010



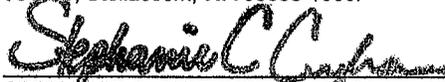
STEPHANIE C. CUNNINGHAM

WSBA No. 26436

Attorney for Daniel H. Pannell

CERTIFICATE OF MAILING

I certify that on 06/07/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Daniel H. Pannell, DOC# 848771, McNeil Island Corrections Center, PO Box 881000, Steilacoom, WA 98388-1000.



STEPHANIE C. CUNNINGHAM, WSBA No. 26436

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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

BY _____
DEPUTY

STATE OF WASHINGTON,
Respondent,

No. 39895-8-II

vs.

DANIEL HERBERT PANNELL,
Appellant.

DECLARATION OF
MAILING PURSUANT
TO RAP 10.10

I, STEPHANIE C. CUNNINGHAM, court-appointed counsel for Appellant DANIEL HERBERT PANNELL, declare as follows:

1. I have received a request from Appellant for a copy of the Verbatim Report of Proceedings.

2. On June 7, 2010, I caused to be placed in the mails of the United States, postage pre-paid, a true and complete copy of the Verbatim Report of Proceedings addressed to:

Daniel H. Pannell, DOC# 848771
McNeil Island Corrections Center
PO Box 881000
Steilacoom, WA 98388-1000

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: June 7, 2010



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Appellant Daniel H. Pannell

cc: Kathleen Proctor, DPA
Daniel H. Pannell, Appellant