

FILED

JUN 14 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

85789-0

NO. 28259-7-III

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	APPELLANT'S STATEMENT OF ADDITIONAL
)	GROUND FOR REVIEW (RAP 10.10)
ENRIQUE GUZMAN NUNEZ,)	
)	
Appellant.)	
_____)	

I, Enrique Guzman Nunez, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND ONE

THE SENTENCING COURT EXCEEDED ITS AUTHORITY AND VIOLATED MR. NUNEZ'S CONSTITUTIONAL RIGHTS UNDER THE WASHINGTON STATE AND UNITED STATES CONSTITUTIONS WHEN IT SENTENCED APPELLANT TO A TERM OF CONFINEMENT ABOVE THE GUIDELINE MAXIMUM OF RCW 9.94A.517

A criminal defendant may not be sentenced to a term of confinement and community placement that exceeds the statutory maximum sentence for the convicted offense. Under Washington's Sentencing Reform Act of 1981, this "statutory maximum" is the

top end of the offense's standard sentencing range. State v. Evans, 154 Wash.2d 438, 442, 114 P.3d 627 (2005).

It is familiar learning that the total sentence, including enhancements, remains presumptively limited by the statutory maximum for the underlying offense. State v. Desantiago, 149 Wash.2d 402, 416 (2003); State v. Thomas, 150 Wash.2d 666, 670 (2003).

A court may not order a sentence beyond that authorized by law. In re Pers. Restraint of Carle, 93 Wash.2d. 31, 33, 604 P.2d 1293 (1980). Any such order is invalid on its face. In re Pers. Restraint of Goodwin, 146 Wash.2d 861, 866-67, 50 P.3d 618 (2002). When a judgment and sentence is facially invalid, the proper remedy is remand for correction of the error. Goodwin, 146 Wash.2d at 877, 50 P.3d 618; In re Pers. Restraint of West, 154 Wash.2d 204, 215, 110 P.3d 1122 (2005).

Appellant was convicted of Delivery of a Controlled Substance-Cocaine, and Possession of a Controlled Substance with Intent to Deliver-Cocaine, Within 1000 Feet of a School Bus Route Stop. The statutory maximum was 20 months. See RCW 9.94A.517. In Mr. Nunez's case, the Douglas County Superior Court sentenced Mr. Nunez to 44 months, plus 12 months of Community Custody, for a total of 56 months. See Judgment and Sentence at 10. Said term of imprisonment exceeded the guideline maximum as defined by the Washington State Supreme Court in State v. Evans, supra at 154 Wash.2d 442, of 20 months. The decisions of the Washington

APPELLANT'S STATEMENT (2).

State Supreme Court on issues of State Law are binding on lower courts. State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984), citing Godefroy v. Reilly, 146 Wash. 257, 262 P. 639 (1928); cf. Hutto v. Davis, 454 U.S. 370, 375 (1982). Remand for imposition of a sentence within the guideline maximum is required.

ADDITIONAL GROUND TWO

THE DOUGLAS COUNTY SUPERIOR COURT ABUSED ITS DISCRETION IN ALLOWING EVIDENCE OF UNCHARGED CRIMES AND IN DENYING APPELLANT'S MOTION TO DISMISS SCHOOL BUS ZONE ENHANCEMENT

Discretion is abused when it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In Mr. Nunez's case, defense counsel objected to the State's introduction of any evidence regarding the uncharged/dismissed Chelan County case. See Verbatim Report of Proceedings (VRP-- July 1, 2010) at 52. The Douglas County Superior Court abused its discretion in allowing any evidence of the, at the time, uncharged crime. VRP at 53. See Appendix A.

The Douglas County Superior Court also abused its discretion in denying defense counsel's motion to dismiss the school bus zone enhancement. VRP 296. In Mr. Nunez's case, the alleged measurements were made to the front porch, or the front door. VRP 296. In State v. Clayton, 84 Wn.App. 318, 322, 927 P.2d 258 (1996), a case similar to Mr. Nunez's case, this court held that where the officer measured the distance from the school playground to the defendant's property fence, the record was

devoid of any evidence of the measurement to the EXACT site where the crimes occurred. Id. at 320. Because there is no measurement was ever taken to the exact location where Mr. Nunez allegedly possessed the controlled substances, the Douglas County Superior Court abused its discretion in not dismissing the school bus zone enhancement in count two.

ADDITIONAL GROUND THREE

THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT MR. NUNEZ POSSESSED CONTROLLED SUBSTANCES WITHIN 1,000 FEET OF A SCHOOL BUS ZONE ROUTE AS CHARGED IN COUNT TWO OF THE INFORMATION

Mr. Nunez's defense counsel motioned the trial court to dismiss the school bus zone enhancement because no measurement was taken to the exact location where the alleged possession of controlled substances was presented. VRP 291. The trial court erroneously found sufficient evidence, even after admitting on the record that no measurement was taken to the exact location of the alleged possession. VRP 296. In State v. Clayton, 84 Wn.App. 318, 320, 927 P.2d 258 (1996), this Court held that where no measurement was taken to the EXACT location where the alleged crime occurred, there was insufficient evidence to prove the enhancement. Id. As in Clayton, there was no measurement taken to the exact location where Mr. Nunez allegedly possessed controlled substances as alleged in count two of the information. Dismissal of the school bus enhancement is required.

APPELLANT'S STATEMENT (4).

ADDITIONAL GROUND FOUR

MR. NUNEZ'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL GRANTED UNDER THE WASHINGTON STATE AND UNITED STATES CONSTITUTIONS WAS VIOLATED WHEN THE PROSECUTOR IN CLOSING ARGUMENTS INFORMED THE JURY THAT MR. NUNEZ WAS NOT CREDIBLE

Prosecutors are quasi-judicial officers and must act impartially in the interest of justice. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

A defendant asserting prosecutorial misconduct has the burden of establishing both improper conduct and prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The court engages in a two-step inquiry to determine whether remarks made by a prosecutor constitute misconduct. First, the court must determine whether the prosecutor's remarks were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the remarks were improper, the court must then determine whether there was a substantial likelihood that the comments affected the jury. Id. In Mr. Nunez's case, the prosecuting attorney, during closing arguments, asks the jury to disbelieve Mr. Nunez. VRP 268. Said improper comment was inherently prejudicial and elicited to inflame the jury. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996). Remand is required.

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2
3 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
4 IN AND FOR THE COUNTY OF CHELAN

5 STATE OF WASHINGTON)

6 Plaintiff,)

7 vs.)

8 ENRIQUE GUZMAN NUNEZ)

9 Defendant.)
10

No. 09-1-00142-2

AGREED
ORDER OF DISMISSAL
WITHOUT PREJUDICE

11 IT IS HEREBY ORDERED THAT the above entitled matter is dismissed
12 without prejudice.
13
14
15
16
17

18 DATED this 20 day of May, 2009

19 John Bridges
20 Judge of the Superior Court for the
21 County of Chelan

22 Presented by:

23 James A. Hedberg 16531
24 Deputy Prosecuting Attorney WSBA #

25 Approved as to form for entry this
26 20 day of MAY, 2009

27 John W. Phillips
28 Attorney for Defendant WSBA # 14650

ORDER
CART

ADDITIONAL GROUND FIVE

THE KITTITAS COUNTY SUPERIOR COURT JUDGE EXCEEDED ITS JURISDICTIONAL AUTHORITY IN GRANTING A SEARCH WARRANT TO BE CONDUCTED IN A DOUGLAS COUNTY PROPERTY

Jurisdiction means the power to hear and determine. State ex rel. McGlothern v. Superior Court, 112 Wash. 501, 505, 192 P. 937 (1920). In order to acquire complete jurisdiction, so as to be authorized to hear and determine a cause or proceeding, the court necessarily must have jurisdiction of the parties thereto and of the subject matter involved. State ex rel. New York Casualty Co. v. Superior Court, 31 Wn.2d 834, 839, 199 P.2d 581 (1984).

In Mr. Nunez's case, the Kittitas County Superior Court issued a search warrant to search a property located Douglas County. Said order exceeded the judge's jurisdictional authority and violated Mr. Nunez's rights. Dismissal of the charges with prejudice is required.

Based on the aforementioned arguments and authorities, Mr. Nunez respectfully urges this Honorable Court to dismiss the charges with prejudice, or in the alternative, remand to the Douglas County Superior Court for a new trial.

DATED this 13th day of June, 2010.

Enrique Uribe Guzman
ENRIQUE GUZMAN NUNEZ

NO. 28259-7-III

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DIVISION THREE

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STATE OF WASHINGTON,)
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 v.)
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 ENRIQUE GUZMAN NUNEZ,)
)
 Appellant.)
 _____)

DECLARATION OF SERVICE

Appellant, Enrique Guzman Nunez, declares that on the 13th day of June, 2010, I deposited a copy of Appellant's Statement of Additional Grounds for Review, and Declaration of Service in the internal mail system of the Coyote Ridge Corrections Center, and made arrangements for postage, addressed to:

Ms. Renee S. Townsley
Clerk/Administrator
Court of Appeals, Division Three
500 North Cedar Street
Spokane, Washington 99201

Mr. Eric C. Biggar
Deputy Prosecuting Attorney
Post Office Box 360
Waterville, Washington 98858

Ms. Jan Trasen
Attorney at Law
Washington Appellate Project
Melbourne Tower, Suite 701
1511 Third Avenue
Seattle, Washington 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of June, 2010.

Enrique Nunez Guzman
ENRIQUE GUZMAN NUNEZ

FILED

JUN 14 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

June 13, 2010

Enrique Guzman Nunez DOC#332657
Coyote Ridge Corrections Center
Post Office Box 769 (HA12)
Connell, Washington 99326

Ms. Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 North Cedar Street
Spokane, Washington 99201

RE: COURT OF APPEALS CASE NO. 28259-7-III
State of Washington v. Enrique Guzman Nunez

Dear Ms. Townsley:

Enclosed please find Mr. Nunez's Statement of Additional Grounds for Review, and Declaration of Service concerning the above captioned Court of Appeals case numbers. Please file as appropriate.

Thank you for your expected cooperation in this matter.

Genuinely yours,

Enrique Nunez Guzman

ENRIQUE GUZMAN NUNEZ

Enclosures as stated