

REC'D

OCT 18 2011

King County Prosecutor
Appellate Unit

NO. 67057-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

FEISAL OMAR,

Appellant.

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

The Honorable Theresa Doyle, Judge

Brief of Appellant

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E. Madison Street
Seattle, WA 98122
206-623-2373

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 18 PM 4:40

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING PROBATION THAT EXCEEDS THE MAXIMUM TERM OF SENTENCE.....	3
D. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Postsentence Review of Leach,
161 Wn.2d 180, 184, 163 P.3d 782 (2007) 3

State v. Butterfield,
12 Wn. App. 745, 747, 529 P.2d 901 (1974) 3

State v. Parent,
___ Wn. App. ___, ___ P.3d ___, WL 4912853
(No. 65375-0-I, filed July 25, 2011) 3, 4

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.95.210 1, 3

A. ASSIGNMENT OF ERROR

The court exceeded its statutory sentencing authority in imposing probation beyond the maximum term of sentence.

Issue Pertaining to Assignment of Error

Under RCW 9.95.210, a sentencing court may suspend a sentence for a term not to exceed the maximum term of sentence or two years, whichever is longer. The court here suspended two consecutive sentences of 365 days. The conditions included two-180 day jail terms and two 24-month periods of probation, all to run consecutively. Did the trial court exceed its authority in imposing probation that exceeded the maximum term of the suspended sentence?

B. STATEMENT OF THE CASE

On January 26, 2011, the King County Prosecutor charged appellant, Omar Feisal with first-degree theft- domestic violence. CP 1. On March 1, 2011, Omar pleaded guilty to an amended information charging him with one count of third-degree theft – domestic violence and one count of fourth-degree assault – domestic violence. CP 7-19. Omar stated:

On or about January 23, 2011, in King County, WA, I committed the crimes of assault 4 – DV and theft 3 – DV by intentionally assaulting Mekdes Haile, with whom I had previously dated, and also by wrongfully obtaining Mekdes

Haile's purse, with an intent to deprive her of the property, and the value of that property did not exceed \$250.

CP 13. In the plea agreement, Omar also stipulated the facts set forth in the certification for determination of probable cause are real and material facts for purposes of sentencing. CP 17.

After a colloquy, the court found Omar's plea was made freely, knowingly, intelligently, and voluntarily, and found there was a factual basis for the plea. RP 10. The court accepted Omar's plea and found him guilty. RP 10; CP 23.

As per the plea agreement, at sentencing the State recommended suspended sentences of 12 months and 24 months probation on each count. RP 13. Omar generally agreed except he argued for a 364-day sentence and against the requirement that he obtain domestic violence treatment. RP 14.

The court rejected the agreed recommendation, calling it a "slap on the wrist." RP 16. It imposed the 364-day suspended sentence, but as a condition, required Omar to serve 180 days in jail on each count, to be served consecutively for a total of 360 days confinement. RP 16-17.

Additionally, the court imposed 24 months of probation on each count to be served consecutively for a total of four years. CP 30. The court also

required Omar to participate in domestic violence treatment. RP 17. Omar timely filed notice of appeal. CP 32.

C. ARGUMENT

THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING PROBATION THAT EXCEEDS THE MAXIMUM TERM OF SENTENCE.

The court's authority to impose and suspend sentences is strictly limited to that granted by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Butterfield, 12 Wn. App. 745, 747, 529 P.2d 901 (1974). RCW 9.95.210 permits a court to suspend a misdemeanor sentence, "for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer." In this case, the maximum term of sentence imposed is the two 365 day sentences, for a total of 2 years. CP 31. Therefore, the maximum possible duration of the conditions of suspended sentence is two years. The trial court exceeded this statutory limit when it imposed 48 months of probation. Even if the statute is ambiguous as to the maximum term, that ambiguity must be construed in Omar's favor. State v. Parent, ___ Wn. App. ___, ___ P.3d ___, WL 4912853 (No. 65375-0-I, filed July 25, 2011).¹

Parent is analogous to this case in all material respects. Parent also received two suspended one-year misdemeanor sentences followed by two

¹ Originally an unpublished decision, this Court granted a motion to publish on October 17, 2011.

two-year probation terms, all running consecutively. Id., slip op. at 2. On appeal, Parent argued the four years of probation exceeded the maximum term of sentence. Id., slip op. at 4. The state argued the maximum term of sentence was to be applied individually to each count, rather than cumulatively. Id., slip op. at 4. This court held the statute is ambiguous, strictly construed it in Parent's favor, and reversed the consecutive terms of probation. Id., slip op. at 5. Omar's consecutive two-year terms of probation should likewise be reversed.

D. CONCLUSION

For the foregoing reasons, Omar requests this Court reverse his sentence and remand for resentencing within the statutory limits.

DATED this 18th day of October, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)

Respondent,)

v.)

FEISAL OMAR,)

Appellant.)

COA NO. 67057-3-1

DECLARATION 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 18TH DAY OF OCTOBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FEISAL OMAR
C/O FRANCIS MWALE
600 146TH AVENUE NE, APT. 72
BELLEVUE, WA 98007

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF OCTOBER, 2011.

x Patrick Mayovsky

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 OCT 18 PM 4:40