

67927-9

67927-9

No. 67927-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONNIE WAYNE DURRETT,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE

APR 30 2012

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

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A. ASSIGNMENT OF ERROR

The trial court erred by not imposing a fixed term of community custody.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

When a person is convicted of felony failure to register as a sex offender, the Sentencing Reform Act (SRA) requires the court to impose a fixed 36-month term of community custody. If the term of community custody, when added to the standard-range sentence imposed, exceeds the statutory maximum, the court is required to reduce the term of community custody. Did the trial court err in not imposing a fixed term of community custody for Mr. Durrett's conviction for felony failure to register as a sex offender?

C. STATEMENT OF THE CASE

Donnie Durrett was charged and convicted following a jury trial of two counts of felony failure to register as a sex offender, former RCW 9A.44.130(11)(a).¹ CP 4-5, 14. The State alleged the crime was a felony because Mr. Durrett had two prior convictions for failure to register as a sex offender. CP 6.

¹ The crimes allegedly occurred between December 6, 2006, and January 23, 2007. CP 4-5.

Mr. Durrett appealed, arguing his two convictions violated the constitutional prohibition against double jeopardy. CP 25-37. This Court agreed and vacated one of the convictions. CP 26. The Court remanded for resentencing on a single count of felony failure to register as a sex offender. CP 26.

On October 21, 2011, Mr. Durrett was resentenced to one count of felony failure to register as a sex offender. CP 45-54. The trial court imposed a standard-range sentence of 43 months. CP 48. The court also imposed community custody but did not impose a fixed term. CP 49. Instead, the court hand-wrote on the judgment and sentence, “The total term of incarceration and community custody cannot exceed a combined term of 60 months.” CP 49.

D. ARGUMENT

THE TRIAL COURT ERRED BY NOT IMPOSING A
FIXED TERM OF COMMUNITY CUSTODY

A trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

Here, the SRA authorized the trial court to impose only a fixed term of community custody. RCW 9.94A.701(1)(a) provides: “If an offender is sentenced to the custody of the department for one of the

following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years: (a) A sex offense not sentenced under RCW 9.94A.507.” The crime in this case, felony failure to register as a sex offender based on a prior conviction for failure to register, is a “sex offense” for purposes of the SRA. RCW 9.94A.030(46)(a)(v).

Had the court imposed a three-year term of community custody, the total sentence would have exceeded the statutory maximum. The court imposed a standard-range sentence of 43 months. CP 48. The statutory maximum for the crime is five years. RCW 9A.20.021(1)(c).

The court attempted to avoid imposing a sentence in excess of the statutory maximum by hand-writing on the judgment and sentence, “The total term of incarceration and community custody cannot exceed a combined term of 60 months.” CP 49. But the court’s hand-written notation is not effective under the SRA. Instead, the court was required to impose a definite, fixed term of community custody. The court was required to reduce the term of community to the extent it exceeded the statutory maximum when added to the term of incarceration imposed.

RCW 9.94A.505(5) provides 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 as provided in chapter 9A.20 RCW.” RCW 9.94A.701(9) specifically directs:

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.

(emphasis added).

The statutory scheme creates a mandatory three-step process. State v. Winborne, __ Wn. App. __, 273 P.3d 454, 458 (2012). First, the court imposes the term of confinement. Then, the court imposes the term of community custody. Then, the court reduces the term of community custody if, when it is added to the term of confinement, the total sentence exceeds the statutory maximum. Id.

Here, the court did not follow the three-step process. The court was required to reduce the term of community custody to the extent the total sentence exceeded the statutory maximum of five years. Id.

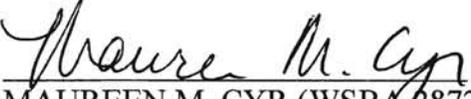
The court’s notation on the judgment and sentence is “contrived” and not effective. Id. “It transforms the term of community custody into a variable term, contrary to the clear intent of the” statute. Id. Therefore, the court erred by not imposing a fixed term of community custody. Id.

A court commits reversible error when it exceeds its sentencing authority under the SRA. Id. The remedy is to remand for resentencing. Id. Therefore, Mr. Durrett must be resentenced.

E. CONCLUSION

The court erred by not imposing a fixed term of community custody. Mr. Durrett must be resentenced.

Respectfully submitted this 30th day of April 2012.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

--- P.3d ----, 2012 WL 1134897 (Wash.)
(Cite as: 2012 WL 1134897 (Wash.))

H

Supreme Court of Washington,
 En Banc.
 STATE of Washington, Respondent,
 v.
 Michael Edward CATON, Petitioner.

No. 86532–9.
 April 5, 2012.

Background: Defendant was convicted in the Superior Court, Lewis County, Richard Lynn Brosey, J., of failure to report as sex offender. Defendant appealed. The Court of Appeals, 163 Wash.App. 659, 260 P.3d 946, affirmed. Defendant petitioned for, and was granted review.

Holding: The Supreme Court held that evidence was insufficient to support conviction.

Reversed.

West Headnotes

[1] Criminal Law 110 ⚡1144.13(3)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings
 Not Shown by Record
110k1144.13 Sufficiency of
 Evidence
110k1144.13(2) Construc-
 tion of Evidence
110k1144.13(3) k. Con-
 struction in favor of government, state, or prosecution. Most Cited Cases

Criminal Law 110 ⚡1159.2(7)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Ver-
 dict
110k1159.2 Weight of Evi-
 dence in General
110k1159.2(7) k. Reasona-
 ble doubt. Most Cited Cases

In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State, deciding whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.

[2] Criminal Law 110 ⚡1144.13(4)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings
 Not Shown by Record
110k1144.13 Sufficiency of
 Evidence
110k1144.13(4) k. Evidence
 accepted as true. Most Cited Cases

Criminal Law 110 ⚡1144.13(5)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings
 Not Shown by Record
110k1144.13 Sufficiency of

--- P.3d ----, 2012 WL 1134897 (Wash.)
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9A.44.130(11)(a) (2008). At a bench trial, the superior court found Caton guilty and sentenced him to 50 months in prison. As indicated, the Court of Appeals affirmed.

[1][2] ¶ 5 In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State, deciding whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. McKague*, 172 Wash.2d 802, 805, 262 P.3d 1225 (2011). A claim of insufficient evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. *State v. Kintz*, 169 Wash.2d 537, 551, 238 P.3d 470 (2010).

[3] ¶ 6 At issue, is the interpretation of former RCW 9A.44.130(7), which provided in part:

All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. An offender who complies with the ninety-day reporting requirement with no violations for a period of at least five years in the community may petition the superior court to be relieved of the duty to report every ninety days ... Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.^[FN1]

*2 ¶ 7 The information charged Caton with violating the statute by “knowingly and

unlawfully ... failing to report in person to the Lewis County Sheriff's office on the required day for the 90 day reporting requirement.” CP at 1. The superior court found that Caton failed to report on the date specified by the sheriff and thus determined that he was guilty of violating former RCW 9A.44.130(7) as charged.

¶ 8 But former RCW 9A.44.130(7) did not clearly make it a criminal offense to fail to report on the date specified by the sheriff. The statute at the outset only required offenders to “report, in person, every ninety days to the sheriff of the county where he or she is registered.” Although the second sentence stated that “[r]eporting shall be on a day specified by the county sheriff's office,” the statute went on to state that an offender who complied “with the ninety-day reporting requirement with no violations for a period of at least five years in the community may petition the superior court to be relieved of the duty to report every ninety days.” Former 9A.44.130(7). The gravamen of the offense is failure to report every 90 days, not failure to report on a specific date. To the extent the statute can be read as making it an offense to not report on the sheriff's specified date, even if the offender reports within the 90-day period, it is ambiguous. It is further ambiguous as to the event triggering the 90-day reporting period. *State v. Kintz*, 169 Wash.2d at 562, 238 P.3d 470 (statute is ambiguous if it remains subject to multiple interpretations subject to multiple interpretations after analyzing its plain language). In this circumstance, the rule of lenity requires the statute to be construed in favor of the defendant, absent clear legislative intent to the contrary. *Id.*

¶ 9 Interpreting the statute in this manner, the State did not prove that Caton failed to

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> DONNIE DURRETT 241083 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584 | <input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF APRIL, 2012.

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710