

68135-4

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NO. 68135-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

VERNON McHENRY,

Appellant.

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

The Honorable Ronald L. Castleberry, Judge

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BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 APR 30 PM 4:29

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A. ASSIGNMENTS OF ERROR

1. The court erred in sentencing the appellant to a term of community custody on count 1 that exceeds the proper term under the Sentencing Reform Act (SRA).

2. The court erred in sentencing the appellant to a term of incarceration that exceeds the standard range on counts 2 and 3.

Issues Pertaining to Assignments of Error

1. The SRA sets the community custody term for the appellant's count 1 offense, felony driving while under the influence (felony DUI),<sup>1</sup> at 12 months. Did the court err in sentencing the appellant to 18 months of community custody?

2. The appellant's maximum standard range sentence for counts 2 and 3, bail jumping,<sup>2</sup> was 16 months. The court sentenced the appellant to 18 months on each count. Must this court remand for resentencing within the standard range?

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<sup>1</sup> RCW 46.61.502(6).

<sup>2</sup> RCW 9A.76.170(3)(c).

B. STATEMENT OF THE CASE<sup>3</sup>

The State charged appellant Vernon McHenry with felony DUI as well as two counts of bail jumping for failing to appear at two pretrial hearings on the DUI charge. CP 65-71. A jury convicted McHenry as charged. CP 27-29

The court sentenced McHenry to a standard range term of 45 months of incarceration for DUI.<sup>4</sup> CP 19; 3RP 20. The original judgment and sentence omitted any sentence as to the bail jumping counts. CP 19; 3RP 20 (sentencing court's ruling regarding DUI only). Although the parties recognized that the maximum standard range sentence for bail jumping was 16 months,<sup>5</sup> the court later entered an order modifying the judgment and sentence to impose 18 months of incarceration on each bail jumping count.<sup>6</sup> CP 14.

The court also imposed 18 months of community custody for DUI. CP 20; 3RP 20.

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<sup>3</sup> This brief refers to the verbatim reports as follows: 1RP – 12/12/11; 2RP – 12/13/11; and 3RP – 12/14 and 12/15/11.

<sup>4</sup> The standard range, based on an offender score of six, is 41-54 months of incarceration. RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (crimes included within each seriousness level).

<sup>5</sup> 3RP 12; CP 18.

<sup>6</sup> The court ordered that all counts run concurrently. CP 14.

C. ARGUMENT

THE COURT IMPOSED AN EXCESSIVE TERM OF COMMUNITY CUSTODY ON COUNT 1 AND EXCEEDED THE STANDARD RANGE ON COUNTS 2 AND 3.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Statutory construction is a question of law and is reviewed de novo. In re Pers. Restraint of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

The sentencing court erred in imposing 18 months of community custody the felony DUI count. Under RCW 9.94A.701(2), a court is directed to sentence an offender to 18 months of community custody only if he is convicted of a “violent offense that is not considered a serious violent offense.” Under RCW 9.94A.701(3)(a), however, the court shall sentence an offender to 12 months of community custody upon conviction of “[a]ny crime against persons under RCW 9.94A.411(2).” Felony DUI is specifically listed as a “crime against persons” under RCW 9.94A.411(2), not a “violent offense” under RCW 9.94A.030(54). The court therefore erred in sentencing McHenry to 18 rather than 12 months of community custody. The remedy is remand for imposition of the correct term.

The court also erred in imposing 18-month incarceration terms on counts 2 and 3. Based on McHenry's offender score of four as to those counts, the proper range was 12 months plus one day to 16 months. RCW 9.94A.510; RCW 9.94A.515. Because the court's sentence exceeds the maximum standard range for the bail jumping counts, remand is required for resentencing on those counts.

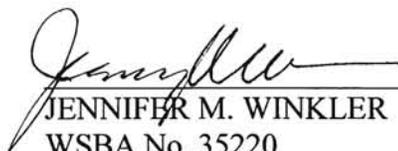
D. CONCLUSION

This Court should remand for the superior court to impose the correct term of community custody on count 1 and to sentence Mr. McHenry within the standard range on counts 2 and 3.

DATED this 30<sup>TH</sup> day of April, 2012.

Respectfully submitted,

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Attorneys for Appellant

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**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 30<sup>TH</sup> DAY OF APRIL 2012, 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] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] VERNON McHENRY  
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2012 APR 30 PM 4: 26

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF APRIL 2012.

x Patrick Mayovsky