

69924-5

69924-5

No. 69924-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONNIE W. DURRETT,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Donnie Durrett was convicted of one count of failure to register as a sex offender. At sentencing, the trial court did not impose a fixed term of community custody as required by statute but instead included a notation on the judgment and sentence that stated: “The total term of incarceration and community custody cannot exceed a combined term of 60 months.” On appeal, the Court of Appeals held the sentence was erroneous and ordered the trial court on remand “to enter a term of community custody consistent with” the statute.

On remand, the trial court amended the judgment and sentence and imposed a new term of community custody without holding a hearing or providing Mr. Durrett or his attorney an opportunity to be heard. Mr. Durrett had a constitutional right to a hearing at which he could be present, represented by counsel, because the trial court had authority on remand to reconsider the length of the sentence.

Therefore, the case must be remanded for resentencing.

B. ASSIGNMENTS OF ERROR

1. Mr. Durrett’s state and federal constitutional right to be present was violated when the trial court imposed a new term of

community custody on remand without providing him an opportunity to be present.

2. Mr. Durrett's constitutional right to counsel was violated when the court imposed a new term of community custody on remand without providing him an opportunity to be assisted by counsel.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A criminal defendant has a constitutional right to a full resentencing hearing at which he may be present, represented by counsel, if the trial court has authority on remand to reconsider the length of the sentence it earlier imposed. Were Mr. Durrett's constitutional rights violated where the trial court had authority on remand to reconsider the sentence but did not hold a resentencing hearing at which Mr. Durrett and his attorney could be present?

D. STATEMENT OF THE CASE

On September 17, 2007, Donnie Durrett was charged by amended information with two counts of failure to register as a sex offender, former RCW 9A.44.130(11)(a) (2006). CP 6-7. Following a jury trial, Mr. Durrett was convicted of the two counts as charged. CP 14. At sentencing, the trial court found the standard sentence range for each count was 43 to 57 months. CP 15. The court sentenced Mr.

Durrett to 43 months on each count, to be served concurrently. CP 17-18. The court also imposed 36 to 48 months of community custody and included the following notation on the judgment and sentence: “The total term of incarceration and community custody cannot exceed a combined term of 60 months.”¹ CP 17.

Mr. Durrett appealed, arguing that (1) his two convictions for failure to register based on the same “unit of prosecution” violated his constitutional right to be free from double jeopardy, and (2) the trial court violated the Sentencing Reform Act (SRA) by failing to impose a fixed term of community custody. The Court of Appeals agreed with both arguments. CP 26. Thus, the Court vacated one of the convictions and remanded to the trial court “for resentencing on a single count of failure to register and entry of a sentence consistent with Linerud.” CP 36 (citing State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008) (holding sentence that included variable term of community custody with notation requiring the Department of Corrections (DOC) to calculate sentence to ensure it did not exceed statutory maximum was indeterminate sentence in violation of SRA),

¹ The statutory maximum sentence for failure to register as a sex offender is 60 months. Former RCW 9A.44.130(11)(a) (2006); RCW 9A.20.021(1)(c).

overruled by In re Pers. Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), superseded by Laws 2009, ch. 375, § 5, as recognized in State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012)).

Meanwhile, Mr. Durrett had been released from custody, having served the entire incarceration portion of his sentence. See 10/21/11RP 3-4 (deputy prosecutor asserts that, according to CCO, Mr. Durrett was released in September 2009 and, as of October 2011, had only about two months left of community custody).

On August 10, 2011, Mr. Durrett was booked into jail pending his resentencing. Sub #120.

A resentencing hearing was held October 21, 2011. Mr. Durrett was present in custody and represented by counsel. 10/21/11RP 2. A new judgment and sentence was filed. CP 38-47. The court imposed 43 months confinement on a single count of failure to register. CP 38, 41. Again, the court did not impose a fixed term of community custody but instead imposed a variable term as indicated by the following notation entered on the judgment and sentence: “The total term of incarceration and community custody cannot exceed a combined term of 60 months.” CP 42.

That same day, the court found Mr. Durrett had served his sentence and ordered him released from custody. Sub #124.

Soon thereafter, on October 25, 2011, Mr. Durrett was convicted by jury verdict of an additional count of failure to register, under a separate cause number arising from an unrelated incident. CP 87. At sentencing, the court imposed 60 months incarceration. CP 90. The court ordered that the sentence on the 2011 case be served concurrently with the sentence on the current, 2007 case. CP 91.

Mr. Durrett appealed his 2007 judgment and sentence for the second time. Again, he argued that the trial court erred by failing to impose a fixed term of community custody. Once more, the Court of Appeals agreed. CP 182-84. The Court “remand[ed] to the trial court to enter a term of community custody consistent with RCW 9.94A.701(9).” CP 182 (citing State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012) (holding trial court, not DOC, has obligation to reduce term of community custody to avoid sentence in excess of statutory maximum)). The mandate, issued October 19, 2012, directed that the case be “mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.” CP 181.

On December 11, 2012, the trial court amended the judgment and sentence and imposed a new term of community custody without holding a hearing and without affording Mr. Durrett an opportunity to be present or be represented by counsel. CP 198 (“Order Amending Judgment and Sentence as to Term of Community Custody Only”). The court ordered “that the judgment and sentence dated October 21, 2011, is amended as follows: The following language in ¶ 4.7(c) is stricken: ‘The total term of incarceration and community custody cannot exceed a combined term of 60 months.’ The total term of community custody imposed under ¶ 4.7(c) is 17 months.” CP 198.

E. ARGUMENT

The trial court violated Mr. Durrett’s constitutional rights to be present and be represented by counsel by imposing a new term of community custody without affording Mr. Durrett or his attorney an opportunity to be heard

1. A criminal defendant has a constitutional right to a resentencing hearing on remand, at which he may be present, represented by counsel, whenever the trial court has authority to reconsider the length of the original sentence imposed.

A criminal defendant’s right to be present at sentencing derives from the federal and state constitutions and court rule. Const. art. I, § 22 (“In criminal prosecutions the accused shall have the right to appear

and defend in person, or by counsel”); U.S. Const. amend. XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law”); CrR 3.4(a) (“The defendant shall be present . . . at the imposition of sentence”).

The constitutional right to be present extends to any stage of the criminal proceedings where the defendant’s “substantial rights might be affected.” State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975); see also Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934) (defendant must “be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge”).

The right to be present applies at any resentencing proceeding where the court has discretion to determine the length of the new sentence. State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007).

A criminal defendant also has a constitutional right to the assistance of counsel at every “critical stage” of the proceedings. Const. art. I, § 22; U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the

Assistance of Counsel for his defence”); State v. Heddrick, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). A critical stage is “one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.” Heddrick, 166 Wn.2d at 910 (internal quotation marks and citation omitted).

Sentencing is a “critical stage” at which the constitutional right to counsel applies. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); Gardner v. Florida, 430 U.S. 348, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

The right to counsel at sentencing is also specifically provided by court rule. CrR 3.1(a) (“The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise”); CrR 3.1(b)(2) (“A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review”).

The right to counsel applies whenever the trial court considers any matter in connection with the defendant's sentence, which includes

resentencing. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

The complete denial of counsel at a critical stage such as sentencing is presumptively prejudicial and requires automatic reversal. Heddrick, 166 Wn.2d at 910; United States v. Cronin, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The denial of counsel at a sentencing proceeding is presumed prejudicial any time the trial court had legal authority to impose a more lenient sentence than it actually did:

Obviously, where the precise sentence for a particular offense is mandatorily fixed by law such that its imposition is merely a ministerial ceremony, with no discretion to be exercised by the sentencing judge, the absence of counsel at such a proceeding could not *possibly* be prejudicial. In that rare and narrow circumstance, the legal presumption of prejudice due to the absence of counsel would not apply. Whenever the sentencing proceeding is more than ministerial, however, the presence of counsel is essential to guide the sentencing court in the exercise of its power and discretion, and to protect the rights and interests of the defendant; the absence of counsel is therefore legally presumed to be prejudicial if the sentencing court had the legal authority to impose a more lenient sentence than it actually did.

Golden v. Newsome, 755 F.2d 1478, 1483 n.9 (11th Cir. 1985).

2. Mr. Durrett's constitutional rights to be present and to the assistance of counsel were violated because the trial court had authority on remand to reconsider the length of the standard-range sentence.

The Court of Appeals held Mr. Durrett's sentence was illegal because the trial court had not imposed a fixed term of community custody as required by statute. CP 182-84. When a person is convicted of a "sex offense" that is not sentenced under the indeterminate sentencing scheme provided in RCW 9.94A.507, the trial court must impose a three-year fixed term of community custody. RCW 9.94A.701(1)(a). If the term of community custody, in combination with the term of confinement, exceeds the statutory maximum for the crime, the SRA requires the trial court to reduce the term of community custody. RCW 9.94A.701(9) ("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.").

In State v. Boyd, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012), the Washington Supreme Court held that RCW 9.94A.701(9) requires *the sentencing court*, not DOC, to reduce the term of community

custody to avoid a sentence in excess of the statutory maximum. The sentencing court does not comply with the statute's requirements by including a notation on the judgment and sentence that states the total term of confinement and community custody cannot exceed the statutory maximum. Id. If the court does not reduce the term of community custody so that the total sentence does not exceed the statutory maximum, the sentence is illegal, notwithstanding such a notation on the judgment and sentence. Id.

Boyd held that, when a sentence that violates RCW 9.94A.701(9) is reversed on appeal, the trial court has authority on remand to resentence the offender. The Supreme Court reversed Boyd's illegal sentence and "remand[ed] to the trial court to either amend the community custody term or *resentence Boyd . . . consistent with RCW 9.94A.701(9).*" Boyd, 174 Wn.2d at 473 (emphasis added). Thus, the Supreme Court recognized that the trial court had authority on remand to reconsider the length of the sentence.

Boyd is consistent with a well-established body of case law that provides that a sentencing court has authority to reconsider the length of a sentence on remand following an appeal if the error on appeal is "directly related" to the length of the sentence. For instance, when a

trial court imposes an exceptional sentence but miscalculates the offender score, resulting in an incorrect standard range, the court has authority on remand to reconsider the exceptional sentence because it is “directly related to a correct determination of the standard range.” State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992). A trial court cannot properly determine whether an exceptional sentence is justified, and what length of sentence to impose, if the offender score is not correctly calculated. Id.; see also, e.g., State v. Rowland, 160 Wn. App. 316, 334, 249 P.3d 635 (2011), aff’d, 174 Wn.2d 150, 272 P.3d 242 (2012) (“When a sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand for resentencing is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway.”).

This basic principle applies to other kinds of sentencing errors that result in the reversal of a sentence on appeal. If the error is indivisible from the length of the sentence originally imposed, in that the trial court determined the length while having in mind an erroneous assumption about what the law required, the court has authority on remand to reconsider the sentence. E.g., State v. Kilgore, 167 Wn.2d 28, 41, 216 P.3d 393 (2009) (trial court had authority to revisit

Kilgore's exceptional sentence on remand even though standard-range sentence did not change after two counts were reversed on appeal); State v. Harrison, 148 Wn.2d 550, 559, 61 P.3d 1104 (2003) (after sentence reversed due to prosecution's breach of plea agreement, trial court had authority on remand to reconsider exceptional sentence "because the original sentencing was tainted by the State's breach"); State v. Broadaway, 133 Wn.2d 118, 135-36, 942 P.2d 363 (1997) (trial court had authority to reconsider standard-range sentence on remand after sentence reversed because it did not provide for required one-year term of community placement; court must have correct term of community placement in mind because "in many cases it will assist the trial court in assessing the overall sentence"); Brooks v. Rhay, 92 Wn.2d 876, 877-78, 602 P.2d 356 (1979) (sentence reversed after trial court erroneously ordered sentence to run concurrently with previously imposed sentence; trial court had authority on remand to reconsider length of sentence because "sentence is indivisible in that the court set sentences upon the assumption they would be served concurrently"); State v. Hibdon, 140 Wn. App. 534, 539, 166 P.3d 826 (2007) (trial court had authority on remand to reconsider standard-range sentence

after sentence reversed on appeal due to court's failure to impose required term of community placement).

This case is controlled by these authorities because a sentencing court's error in failing to impose a fixed term of community custody is "directly related" to the determination of how much prison time to impose. See Collicott, 118 Wn.2d at 660. Prior to the passage of RCW 9.94A.701(9), when a term of incarceration, combined with the term of community custody, exceeded the statutory maximum, the trial court could decline to impose a fixed term of community custody and simply enter a notation on the judgment and sentence providing that the total term of incarceration and community custody could not exceed the statutory maximum. See In re Pers. Restraint of Brooks, 166 Wn.2d 664, 667 n.1, 211 P.3d 1023 (2009), superseded by Laws 2009, ch. 375, § 5, as recognized in Boyd, 174 Wn.2d at 472-73. If the offender earned early release credits while in prison, he could then potentially serve the rest of his sentence in community custody up to the statutory maximum. Id. at 669. In such a case, it would be up to the DOC, not the trial court, to determine the total amount of community custody to impose. Id. Thus, at the initial sentencing, the trial court would impose a standard-range sentence knowing that, even if the offender earned

early release credits and did not serve the entire term of incarceration in prison, he could potentially serve the remainder of the sentence, up to the statutory maximum, on community custody.

Under the current statutory scheme, the trial court must impose a fixed term of community custody at the time of sentencing. RCW 9.94A.701. If the term of incarceration, in combination with the term of community custody, exceeds the statutory maximum, the trial court, and not DOC, is required to reduce the term of community custody. RCW 9.94A.701(9); Boyd, 174 Wn.2d at 472-73. As a result, the amount of time an offender spends on community custody is no longer affected by the amount of earned early release credits he earns in prison. If the offender earns early release credits and does not serve his entire term of incarceration, it is possible he will complete the term of community custody before the statutory maximum has expired. A trial court might well take this into consideration in determining where in the standard range to sentence the offender, or even whether to impose an exceptional sentence.

Thus, a trial court's determination of the standard-range sentence is "directly related" to, and indivisible from, any error in failing to impose a fixed term of community custody. For that reason,

under the authorities cited above, a court has authority on remand to reconsider the length of the standard-range sentence if the sentence is reversed on appeal due to the court's failure to impose a fixed term of community custody.

The Court of Appeals mandate in this case expressly provided the trial court with authority to reconsider the length of Mr. Durrett's standard-range sentence. When an illegal sentence is reversed on appeal, the trial court's authority to resentence on remand is determined by the scope of the appellate court's mandate. Kilgore, 167 Wn.2d at 42; Collicott, 118 Wn.2d at 660.

Here, the appellate court's mandate stated the case was remanded to the trial court "for further proceedings in accordance with the attached true copy of the decision." CP 181. The Court's decision relied on Boyd and held that the trial court erred by failing to impose a fixed term of community custody that, together with the term of incarceration, did not exceed the statutory maximum. CP 182 (citing Boyd, 174 Wn.2d 470). The opinion "remand[ed] to the trial court to enter a term of community consistent with RCW 9.94A.701(9)." CP 182.

As in Boyd, the scope of the Court’s mandate authorized the trial court to resentence Mr. Durrett and reconsider the length of the sentence. Boyd, 174 Wn.2d at 473 (authorizing court on remand either to amend community custody term or resentence Boyd); CP 181-82. Mr. Durrett was therefore entitled to a resentencing hearing at which he could be present, represented by counsel. Heddrick, 166 Wn.2d at 910; Rupe, 108 Wn.2d at 741; Davenport, 140 Wn. App. at 932.

3. Had Mr. Durrett been given an opportunity to be present with the assistance of counsel, he might have persuaded the trial court to impose a more lenient sentence.

A criminal defendant has a constitutional right to be present at any proceeding where his presence has a relation “to the fullness of his opportunity to defend against the charge.” Snyder, 291 U.S. at 105-06. He has the right to the assistance of counsel at any proceeding “where the outcome of the case is . . . substantially affected.” Heddrick, 166 Wn.2d at 910. Here, it is reasonable to conclude the outcome of the proceeding might have been different had Mr. Durrett and his attorney been given an opportunity to be heard.

Mr. Durrett’s standard sentence range was 43 to 57 months. CP 15. At his resentencing in October 2011, following his first appeal, the trial court imposed a low-end sentence of 43 months. CP 38, 41. The

court explicitly indicated a desire to be lenient with Mr. Durrett. Mr. Durrett explained to the court at length that being on DOC supervision was very burdensome for him. 10/21/11RP 17-20. The court initially indicated it would impose 57 months incarceration, the high end of the range, leaving a “minimal amount of community custody once he is released.” 10/21/11RP 21-22. It was only after Mr. Durrett explained he had already served the 43 months the court initially imposed that the court decided to re-impose the same sentence, so that Mr. Durrett would not have to serve any additional prison time. 10/21/11RP 22. Thus, the court imposed “[f]orty-three months, with no more than the statutory maximum on community custody.” 10/21/11RP 22.

As of September 2009, Mr. Durrett had served his entire 43-month term of incarceration. 10/21/11RP 3-4. He served an additional two months in jail awaiting his resentencing. Sub #120, 124. In addition, as of the resentencing in October 2011, Mr. Durrett had served almost all of his term of community custody. 10/21/11RP 3-4.

When the mandate was issued in October 2012 following Mr. Durrett’s second appeal, he was serving time in prison after being convicted in 2011 of failure to register in an unrelated case under a separate cause number. CP 90. The trial court in the 2011 case had

ordered that the sentence be served concurrently with the sentence imposed in the current, 2007 case. CP 91.

Thus, as of October 2012, when the trial court amended the judgment and sentence and imposed the new term of community custody, a high-end standard-range sentence would have been more lenient than the 43-month sentence Mr. Durrett originally received. Mr. Durrett had already served more than 43 months solely on this cause number. He had served many additional months on the 2011 case, which was ordered to be served concurrently with his sentence on this case. Mr. Durrett cannot receive credit for that excess incarceration time against his term of community custody. State v. Jones, 172 Wn.2d 236, 243-44, 257 P.3d 616 (2011). Thus, it would be to his benefit to receive a standard-range sentence at the high end of the range, against which he could credit the excess incarceration time he has served.

Given the court's stated desire in October 2011 to treat Mr. Durrett with leniency, Mr. Durrett and his attorney should have been given an opportunity to argue for leniency at a resentencing hearing following the second appeal. Mr. Durrett should have been given an opportunity to explain to the court that a sentence at the high end of the

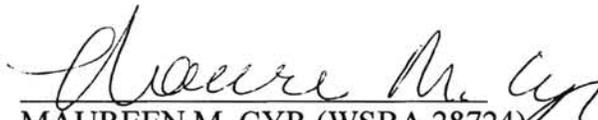
range would benefit him. It is reasonable to believe the court would have been receptive to this argument.

In sum, Mr. Durrett's constitutional rights to be present and to the assistance of counsel were violated when the court entered a new term of community custody without providing him and his attorney an opportunity to be heard. Snyder, 291 U.S. at 105-06; Heddrick, 166 Wn.2d at 910. The error is presumed prejudicial and requires automatic reversal and remand for resentencing. Heddrick, 166 Wn.2d at 910; Cronic, 466 U.S. at 658-59.

F. CONCLUSION

Mr. Durrett's constitutional rights to be present and to the assistance of counsel were violated when the court entered a new term of community custody without providing him or his attorney an opportunity to be heard. The case must be remanded for resentencing.

Respectfully submitted this 16th day of October, 2013.


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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69924-5-I
v.)	
)	
DONNIE DURRETT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF OCTOBER, 2013, 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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	()	HAND DELIVERY
	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF OCTOBER, 2013.

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