

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LESLIE SULLIVAN, III,

Appellant.

No. 41932-7-II

UNPUBLISHED OPINION

Worswick, C.J. — Joseph Leslie Sullivan III appeals a 12-month term of community custody imposed by the sentencing court.<sup>1</sup> Sullivan argues for the first time on appeal that the 12-month term of community custody violates the prohibition on ex post facto laws. He claims that the duration of his community custody violates ex post facto prohibitions because the version of the Sentencing Reform Act in effect on the date of his crimes specified a 9- to 12-month range of community custody but the legislature amended that statute before his sentencing to require a 12-month term of community custody. We reverse and remand for resentencing.

**FACTS**

On August 29, 2008, pursuant to a lawful search incident to arrest based on an outstanding warrant, officers discovered Sullivan possessed three baggies of methamphetamine, two digital scales, glass pipes, and several empty plastic baggies. The State also found 175 grams

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<sup>1</sup> This court affirmed Sullivan’s convictions for unlawful possession of a controlled substance (methamphetamine) with intent to deliver and bail jumping in an unpublished opinion. *State v. Sullivan*, noted at 159 Wn. App. 1023 (2011).

of marijuana in the home where they arrested Sullivan. The State charged Sullivan with unlawful possession of both methamphetamine and marijuana with intent to deliver; the State later added a bail jumping charge. After a stipulated facts bench trial, the sentencing court convicted Sullivan as charged. Based on Sullivan's offender score of six, the sentencing court imposed a total of 110 months of confinement followed by a range of 9 to 12 months of community custody.

Sullivan appealed his unlawful possession of marijuana conviction, which this court reversed for insufficient evidence. Because it reversed one of Sullivan's three convictions, this court remanded to the sentencing court for resentencing. The sentencing court resentenced Sullivan on March 11, 2011, this time just on Sullivan's unlawful possession of methamphetamine with intent to deliver and bail jumping convictions. The sentencing court again calculated Sullivan's offender score as six. Although the sentencing court again imposed 110 months of confinement, it imposed 12 months of community custody, instead of the 9- to 12-month range that it imposed in its previous judgment and sentence.

Sullivan appeals his sentence. For the first time on appeal, Sullivan argues that the sentencing court violated the constitutional prohibition of ex post facto laws when it imposed a 12-month term of community custody on resentencing.

## ANALYSIS

Sullivan argues that the 12-month term of community custody the sentencing court imposed on resentencing under an amended provision of the SRA<sup>2</sup> violates the prohibition on ex post facto laws because the law in effect when he committed these crimes called for a 9- to 12-month range of community custody, the term that the court imposed when it first sentenced him.<sup>3</sup> We agree that the sentencing court violated the constitutional prohibition of ex post facto laws when it imposed a 12-month term of community custody on resentencing.

We review alleged violations of the prohibition of ex post facto laws de novo. *State v. Pillatos*, 159 Wn.2d 459, 469, 474-77, 150 P.3d 1130 (2007). The party disputing the constitutionality of a statute bears the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *State v. Enquist*, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011), *review denied*, 173 Wn.2d 1008 (2012). Thus, Sullivan bears the burden of proving that applying the SRA amendment imposing 12 months of community custody to him, instead of the previous 9- to 12-month range of community custody, is unconstitutional beyond a reasonable doubt. *See Enquist*, 163 Wn. App. at 45; *see also* RCW 9.94A.701; former RCW 9.94A.715(1) (2008).

Both the United States and Washington Constitutions prohibit ex post facto laws. U.S. Const. art. I, § 10; Wash. Const. art. I, § 23. The State violates the prohibition on ex post facto laws when it imposes punishment for conduct that was not punishable at the time committed or

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<sup>2</sup> Chapter 9.94A.

<sup>3</sup> The State argues that we should not consider Sullivan's ex post facto argument because he failed to preserve it for appellate review. But unlawful sentences can be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

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when it increases the quantum of punishment annexed to a crime already committed. *In re Pers.*

*Restraint of Flint*, 174 Wn.2d 539, 545, 277 P.3d 657 (2012); *Pillatos*, 159 Wn.2d at 475.

Consequently, a defendant is properly subject to the punishment in effect at the time he committed

the crime and the State cannot increase the amount of punishment thereafter. *Pillatos*, 159

Wn.2d at 475.

The prohibition against ex post facto laws applies to punitive laws. *State v. Thompson*, 153 Wn. App. 325, 337, 223 P.3d 1165 (2009). But the State does not violate ex post facto prohibitions simply because an offender is at risk of receiving a harsher punishment under procedures enacted after the crime. *Pillatos*, 159 Wn.2d at 476. In order to bring a successful ex post facto claim, a person must show that the law he is challenging (1) is operating retroactively and (2) increases the level of punishment from the level he was subject to on the date of the crime. *Flint*, 174 Wn.2d at 545; see *State v. Ward*, 123 Wn.2d 488, 498, 869 P.2d 1062 (1994).

A. *Retroactivity*

The legislature may expressly provide for a statute to apply retroactively. *Flint*, 174 Wn.2d at 546. Here, the legislature explicitly stated of this amendment:

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the [Department of Corrections], currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

Laws of 2009, ch. 375, § 20. By its terms, the statute operates retroactively. And because the legislature amended the statute after Sullivan committed his offense, the statute operated retroactively to Sullivan. Thus, Sullivan has established the first prong required by *Flint*. 174

Wn.2d at 545.

B. *Quantum of Punishment*

The applicable quantum of punishment increases when a statute makes a formerly discretionary punishment mandatory. *Lindsey v. Washington*, 301 U.S. 397, 401-02, 57 S. Ct. 797, 81 L. Ed. 1182 (1937); *see Flint*, 174 Wn.2d at 550-51, 554. In *Lindsey*, an offender committed grand larceny at a time when the sentencing court had discretion to impose a penalty of imprisonment for at least six months and up to 15 years. 301 U.S. at 398. Before sentencing, the legislature made the maximum penalty mandatory, and the offender then received the required 15-year sentence. *Lindsey*, 301 U.S. at 398-99. Holding that the new law increased the severity of punishment, the United States Supreme Court invalidated the offender's sentence. *Lindsey*, 301 U.S. at 401-02.<sup>4</sup> When a new sentencing law increases the quantum of punishment, the offender's sentence must conform to the laws in effect at the time of the offense. *State v. Hanlen*, 190 Wash. 563, 565, 69 P.2d 806 (1937); *see RCW 10.01.040*.

Here, the SRA amendment increased the quantum of punishment applicable to Sullivan. When Sullivan committed the underlying crimes in August 2008, the SRA imposed a discretionary range of postconfinement community custody of 9 to 12 months. Former RCW 9.94A.505(2)(a)(iii), .715(1), .850(5) (2008); former WAC 437-20-010 (2007). But the legislature amended the SRA in 2009. Laws of 2009, ch. 375, § 5. This amended statute

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<sup>4</sup> When the Court adopted the so-called quantum of punishment test, it discarded *Lindsey's* overly broad statement of the general rule. *See Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 505, 506 n.3, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995); *Flint*, 174 Wn.2d at 545 n.3. But *Lindsey's* holding retains its force. *See Morales*, 514 U.S. at 505, 507.

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imposed a mandatory, 12-month term of community custody. RCW 9.94A.701(3)(c).

Accordingly, on resentencing, the court imposed a 12-month term of community custody. This 12-month term of community custody increased the quantum of punishment to which Sullivan was subject because it made mandatory what was a formerly discretionary punishment. *See Lindsey*, 301 U.S. at 401-02.

We reverse and remand for resentencing in accordance with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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Worswick, C.J.

We concur:

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Hunt, J.

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Van Deren, J.