# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>DANIEL EUGENE GRILE,<br><br>Appellant. | No. 41604-2-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Penoyar, J. — Following his guilty pleas to two counts of third degree child rape, the trial court sentenced Daniel Grile to 60 months' incarceration and 36 months' community custody on the first count and 24 months' incarceration and 36 months' community custody on the second count, be served consecutively. Grile argues that his sentence was improper because the first count's combined sentence totals more than 60 months, the standard range and statutory maximum. He also challenges the trial court's imposition of several legal financial obligations (LFOs). We agree with Grile that his sentence was improper and reverse and remand for resentencing. With one exception, we decline to review Grile's LFO challenges because the State has not yet sought enforcement of them. We review and accept the State's concession that the trial court's $800 crime lab fee was improper because RCW 43.43.690(1) authorizes imposing only a $100 crime lab fee per convicted offense.

### FACTS

Grile pleaded guilty to two counts of third degree child rape for two separate instances when he had intercourse with his 15-year-old stepdaughter. He also stipulated to two aggravating factors—that he used a position of trust, confidence or fiduciary responsibility to facilitate the

crime and that the offense involved an invasion of the victim's privacy—for the purposes of a possible exceptional sentence.

Sentencing occurred on December 10, 2010. Because of Grile's offender score, the standard sentencing range for each count is the statutory maximum: 60 months. On the first count, the trial court imposed a standard range sentence of 60 months in prison. On the second count, the trial court imposed a downward exceptional sentence of 24 months in prison. The court ordered that the sentences run consecutively, for a total of 84 months in prison. The trial court also imposed 36 months' community custody on each count. The community custody order included a provision stating that the incarceration time plus the community custody for that count would not "exceed the statutory maximum." Clerk's Papers at 28. The second count's community custody runs consecutive to the first count's community custody. The end result is that the court sentenced Grile to 84 months in prison and 72 months' community custody.

The trial court also ordered Grile to pay LFOs totaling $2,863.69. The LFOs included an $800 crime lab fee, a $150 incarceration fee, a $773.69 court appointed attorney fee, and a $240 sheriff's service fee. Grile appeals.

## ANALYSIS

### I. Confinement and Community Custody

Grile first argues that the trial court erred in the first count's sentence because the total sentence exceeds the 60 month statutory maximum. The State agrees that the term of confinement and the community custody term together cannot exceed the statutory maximum, but argues that the sentencing language allows the Department of Corrections (DOC) to recalculate the sentence. Because our Supreme Court has held that the sentencing court must reduce the

community custody term to comply with that requirement, we reverse and remand for resentencing.

RCW 9.94A.701(1)(a) authorizes courts to impose a three-year term of community custody for each sex offense. Subsection (9), however, requires the court to reduce the community custody term when the combination of the incarceration term and the community custody term exceeds the statutory maximum:

> 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.

Previous versions of this statute allowed the DOC to recalculate community custody terms to make sure that the combination did not exceed the statutory maximum. *See State v. Franklin*, 172 Wn.2d 831, 840-42, 263 P.3d 585 (2011) (DOC shall recalculate sentences occurring before RCW 9.94A.701(a) was amended to require courts to recalculate sentences); *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 672, 211 P.3d 1023 (2009) (holding same). But our Supreme Court has held that, for sentences occurring after July 26, 2009, the effective date of the amendments, the trial court, not DOC, must reduce the community custody term to avoid a sentence in excess of the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

Here, the sentence exceeded the statutory maximum. Grile was convicted of two Class C Felonies—the statutory maximum is five years each. RCW 9A.44.079(2); RCW 9A.20.021(1)(c). On the first count, the court imposed 60 months in prison, the standard range, and 36 months' community custody. The sentence exceeds the statutory maximum. Viewed differently, the total sentence resulted in 84 months' confinement and 72 months' community custody. That 156

month term exceeds the combined 120 month statutory maximum. The sentence exceeds the statutory maximum. Because this sentence occurred after July 2009, we reverse and remand for resentencing so that the sentence for each count does not exceed 60 months. *See Boyd*, 174 Wn.2d at 473.

II. The LFO Challenges

Grile challenges several of the LFOs. He argues that the trial court erroneously ordered him to pay an $800 crime lab fee because RCW 43.43.690(1)[1] provides that courts can assess a crime lab fee of only $100 per convicted offense. He also challenges the sufficiency of the evidence, arguing that (1) there is no evidence that he spent time in jail to justify the $150 incarceration fee, (2) there is no evidence that the actual cost of appointed counsel was $773.69, (3) there is no evidence of the true cost of the $240 Sheriff service fee, and (4) there was no evidence that Grile had the ability to pay. The State concedes that the crime lab fee should be $200. The State argues that the remaining challenges are not properly before this court. We hold that Grile's LFO challenges are not properly before us because the State has not yet sought to enforce them. In light of the State's concession, we review only Grile's challenge to the crime lab fee and reverse and remand with instructions to impose the correct fee.

[1] RCW 43.43.690(1) provides:

> When a person has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court shall levy a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted. Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.

Challenges to LFOs are not properly before us if there is no evidence that the State has sought to enforce the LFOs. *State v. Hathaway*, 161 Wn. App. 634, 651, 251 P.3d 253 (2011); *see also State v. Bunch*, 168 Wn. App. 631, 633, 279 P.3d 432 (2012). In *Hathaway*, the defendant challenged a jury demand fee because it exceeded the statutory maximum. 161 Wn. App. at 651. We held that the appeal was not properly before us because there was no evidence that the State had enforced the LFOs, citing *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009).[2] *Hathaway*, 161 Wn. App. at 651. Reasoning that the question was purely legal and that justice would be better served, the *Hathaway* Court nonetheless exercised its discretion under RAP 1.2(c), waived the rules, and reviewed the LFO challenge. 161 Wn. App. at 651-52.

Here, like in *Hathaway*, there is no evidence that the State has sought to enforce the LFO, so his challenges are not properly before this court on appeal as a matter of right. In light of the State's concession on the crime lab fee and because the issue is purely legal, we exercise its discretion under RAP 1.2(c) and accept the State's concession. RCW 43.43.690(1) plainly requires that a trial court can only impose a $100 crime lab fee per offense, and Grile pleaded guilty to only two offenses. We accept the State's concession and reverse and remand with instructions to impose the correct crime lab fee. But because the remaining challenges are fact-specific, we decline to review them.

[2] There, Smits appealed a trial court's decision denying his motion to terminate his LFOs. *Smits*, 152 Wn. App. at 518-19. Division One held that the decision could not be appealed because it was not a final judgment, reasoning that the order to pay LFOs in the judgment and sentence is conditional and that RCW 10.01.160(4) allows a defendant to petition to modify or waive LFOs at any time. *Smits*, 152 Wn. App. at 523. The court also suggested that the appeal was barred by RAP 3.1 because the State had not yet sought payment. *Smits*, 152 Wn. App. at 525.

We reverse and remand for resentencing and to correct the crime lab fee.

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.

Penoyar, J.

We concur:

Armstrong, J.

Hunt, J.