IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NICHOLAS DANIEL HACHENEY, Appellant.	No. 38015-3-II UNPUBLISHED OPINION

Van Deren, C.J. — Nicholas Hacheney appeals his sentence for first degree murder.[1] At trial, a jury convicted him of aggravated first degree murder in the course of an arson,[2] but in his prior appeal our Supreme Court reversed in part and remanded for resentencing without the aggravating factor. He now argues that the trial court abused its discretion at resentencing by refusing to consider evidence that he rejected a pretrial plea bargain. In his statement of additional grounds for review (SAG),[3] he also contends that the trial court erred by imposing an exceptional sentence exceeding the statutory maximum in violation of *Blakely*.[4] We dismiss the

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[1] RCW 9A.32.030.

[2] Former RCW 10.95.020(11)(e) (1995).

[3] RAP 10.10.

[4] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

standard range sentence challenge without reviewing the merits. While his SAG argument is meritless, we nevertheless remand for the trial court to resentence him to the statutorily correct period of community custody.

FACTS

On December 26, 1997, Hacheney killed his wife by holding a plastic bag over her head; he then set fire to the family home and left on a hunting trip with friends. At trial, the jury found him guilty of aggravated first degree murder in the course of an arson and the trial court sentenced him to life imprisonment without the possibility of release.

On appeal, our Supreme Court held that the evidence did not support the jury's aggravated circumstance finding because Hacheney committed the arson after completing the murder. *State v. Hacheney*, 160 Wn.2d 503, 524, 158 P.3d 1152 (2007), *cert. denied*, __ U.S. __, 128 S. Ct. 1079, 169 L. Ed. 2d 820 (2008). The court affirmed his conviction but vacated the aggravating circumstance and remanded for resentencing for first degree murder. *Hacheney*, 160 Wn.2d at 520.

At resentencing, the trial court determined that the standard range sentence was between 240 and 320 months. Emphasizing that Hacheney committed premeditated murder, the State recommended a sentence at the top of the standard range. The decedent's brother read a prepared statement and echoed the State's sentencing recommendation.

Hacheney requested a low end sentence of 240 months, arguing that if he had accepted the State's plea offer that included a seven year sentence, he likely would have completed serving his entire sentence by the date of his resentencing hearing. The State objected to the trial court's consideration of prior plea negotiations because they were not admissible under the "Real Facts"

doctrine.[5] Report of Proceedings (RP)[6] at 20. Hacheney replied that his rejection of the plea offer demonstrated his innocence. The trial court was "hesitant to consider any plea negotiations" and ruled that such evidence was not relevant unless Hacheney was seeking an exceptional downward sentence of seven years. RP at 21.

In resentencing Hacheney, the only factor that the trial court found dispositive was that Hacheney murdered his wife:

> That is the most intimate relationship that any of us on earth can imagine, and implicit in that finding by the jury is a violation of the most intimate trust and love.
>
> Based on that violation, and that violation alone, I am sentencing Mr. Hacheney to 320 months in prison. That will, of course, be followed by 24 to 48 months of community custody and the standard financial obligations.[7]

RP at 25-26.

Hacheney appeals.

ANALYSIS

I. Appealability of Standard Range Sentence

Hacheney claims that the trial court abused its discretion by refusing to consider evidence that he rejected a pretrial plea bargain before handing down a standard range sentence. The State contends that Hacheney's challenge is prohibited by statute. We agree with the State.

As a general rule, a defendant cannot appeal a standard range sentence. Former RCW

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[5] Under one version of the "real facts" doctrine, a trial court may only make sentencing decisions based on facts which were "admitted, acknowledged, or proved in a trial or at the time of sentencing." *State v. Reynolds*, 80 Wn. App. 851, 857, 912 P.2d 494 (1996) (quoting former RCW 9.94A.370(2) (1996), *recodified as* RCW 9.94A.530, Laws of 2001, ch. 10, § 6, at 38).

[6] All references to the report of proceedings refer to the resentencing hearing of June 20, 2008.

[7] Based on statutory language that the trial court read aloud, the trial court appears to have relied, in part, on the current sentencing statutes instead of the applicable 1997 versions.

9.94A.210(1) (1989), *recodified as* RCW 9.94A.585,[8] Laws of 2001, ch. 10, § 6, at 38; *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). But appellate review is available if the trial court failed to comply with constitutional requirements or procedural requirements of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. *Osman*, 157 Wn.2d at 481-82.

In *State v. Mail*, 121 Wn.2d 707, 709-10, 854 P.2d 1042 (1993), a defendant appealed his standard range sentence, arguing that the trial court abused its discretion by considering the facts of his earlier assault conviction. Our Supreme Court rejected his appeal, holding that the SRA did not limit the consideration of such information and barred any appeal of standard range sentences unless a defendant demonstrated that "the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so."[9] *Mail*, 121 Wn.2d at 712, 714.

Here, the applicable SRA mandated procedures are those provided in former RCW 9.94A.110 (1988), *recodified as* RCW 9.94A.500, Laws of 2001, ch. 10, § 6, at 38, and former RCW 9.94A.370(2) (1996), *recodified as* RCW 9.94A.530, Laws of 2001, ch. 10, § 6, at 38. *See State v. Sanchez*, 146 Wn.2d 339, 353-54, 46 P.3d 774 (2002); *Mail*, 121 Wn.2d at 713; David Boerner, Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981, § 6.5, at 6-5 (1985). Former RCW 9.94A.110 stated in part:

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[8] "[S]entencing courts must 'look to the statute in effect at the time [the defendant] committed the [current] crimes' when determining defendants' sentences." *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (some alterations in original) (quoting *State v. Delgado*, 148 Wn.2d 723, 726, 63 P.3d 792 (2003)). Accordingly, we consider the 1997 statutory language to resolve this appeal.

[9] In *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986), our Supreme Court indicated in dicta that a defendant was not precluded from challenging the procedure by which a trial court imposed a standard length sentence. The *Mail* court then defined the scope of the *Ammons* procedural error exception. 121 Wn.2d at 711-12.

> The court shall consider the presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

In addition, former RCW 9.94A.370(2) provided in part:

> In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence.

Thus, to appeal his sentence, Hacheney "must show either that the trial court refused to consider information mandated by [former] RCW 9.94A.110, or that [he] timely and specifically objected to the consideration of certain information and that no evidentiary hearing was held." *Mail*, 121 Wn.2d at 713. Of course, any broader exception to this statutory bar would "end up swallowing the clear rule of [former] RCW 9.94A.210(1)." *Mail*, 121 Wn.2d at 713.

Hacheney's decision to reject a pretrial plea offer is not information that the trial court must consider under former RCW 9.94A.110. The sentencing court must consider only presentence reports, if any; victim impact statements; criminal history; and arguments from the prosecutor, defense counsel, defendant, and victim's representative. *See* former RCW 9.94A.110. Moreover, the State objected to evidence of plea negotiations but never disputed its accuracy, so no evidentiary hearing was necessary. *Mail*, 121 Wn.2d at 713.

Furthermore, "[a] trial court's decision regarding the length of a sentence within the standard range is not appealable because 'as a matter of law there can be no abuse of discretion.'" *Mail*, 121 Wn.2d at 710 (quoting *State v. Ammons*, 105 Wn.2d 175, 182, 713 P.2d 719, 718 P.2d

796 (1986)). The *Mail* court concluded, "It is almost self-evident that, while cloaking his arguments in 'procedure', the ultimate objective of this petitioner in seeking resentencing is to receive a lower sentence within the standard range." 121 Wn.2d at 714. The same is true here. Hacheney fails to demonstrate that the trial court refused to consider necessary information under former RCW 9.94A.110 and we, therefore, dismiss his appeal without reviewing the merits.

II. Statement of Additional Grounds For Review Issue

In his SAG, Hacheney claims that the trial court erred by imposing an exceptional sentence exceeding the statutory maximum in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). According to Hacheney, community custody counts as imprisonment under a *Blakely* analysis, so the trial court exceeded the standard range maximum of 320 months by imposing 320 months and an additional 24 to 48 months of community custody. We disagree but nevertheless remand to the trial court to resentence him to the statutorily mandated period of community custody under the applicable 1997 SRA.

We reject Hacheney's argument that the top of the standard sentencing range is the statutory maximum sentence for the purposes of determining whether the combined terms of confinement and community custody exceed that maximum. The statutory maximum for that purpose is the statutory maximum defined in chapter 9A.20 RCW. Former RCW 9.94A.120(13) (1997), *recodified as* RCW 9.94A.505, Laws of 2001, ch. 10, § 6, at 38; *State v. Thompson*, 143 Wn. App. 861, 871, 181 P.3d 858, *review denied*, 164 Wn.2d 1035 (2008). *Blakely* requires that a jury decide any fact, other than a prior conviction, that increases the penalty for a crime beyond the "'prescribed statutory maximum.'" 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The "statutory maximum" is the

"maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303.

Although Hacheney's conviction, without additional findings, supports the imposition of his standard range sentence and community custody, it does not support a sentence including 24 to 48 months of community custody. Former RCW 9.94A.120(9)(b)[10]; former RCW 9.94A.310 (1997), *recodified as* RCW 9.94A.510, Laws of 2001, ch. 10, § 6, at 38. First degree murder is a class A felony. RCW 9A.32.030(2). The maximum allowable sentence for a class A felony is life imprisonment. Former RCW 9A.20.021(1)(a) (1982). But sentences for such offenses included community custody for 24 months or up to the period of earned early release, whichever is longer. Former RCW 9.94A.120(9)(b); former RCW 9.94A.030(4) and (5) (1997). Thus, we hold that the trial court erred by imposing a sentence of 24 to 48 months of community custody.

We dismiss Hacheney's standard range sentence challenge and remand to the trial court to impose the correct period of community custody under former RCW 9.94A.120(9)(b) and

[10] Former RCW 9.94A.120(9)(b) provided, in part:

> When the court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, or a serious violent offense, vehicular homicide, or vehicular assault, committed on or after July 1, 1990, but before July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned release in accordance with [former] RCW 9.94A.150 (1) and (2), whichever is longer.

A "serious violent offense" includes first degree murder. Former RCW 9.94A.030(31)(a) (1997).

former 9.94A.030(4) and (5).

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Bridgewater, J.