Supreme Court No. 89243-1

Court of Appeals No. 43437-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington
Respondent

vs.

Clinton Allen Prather,
Petitioner

13 OCT -4 AM 8:16
BY RONALD R. CARPENTER
CLERK

MOTION FOR DISCRETIONARY REVIEW

Clinton Allen Prather
DOC #714185
H-5 B-64
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA. 98520

1. IDENTITY OF MOVING PARTY

Petitioner pro-se Clinton Allen Prather respectfully asks the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

A.) Petitioner's current sentence on Count One is illegal on its face as its base sentence, Firearm Enhancements and Community Custody take it 18-36 months above the Statutory Maximum for a class B Felony. Division II's position is that this is a matter for DOC to calculate, but DOC will not act without a direct order from the courts. In the meantime the sentence remains illegal. Petitioner asks this Court to give that order.

B.) Once and for all, clear up the issue of operability of a "Firearm" as defined in WPIC 2.101 RCW 9.41.010(7) and how this pertains to sentencing in regard to Firearm Enhancements. This current appeal stemmed from the Personal Restraint Petition C.O.A. 41475-9-II in which this Court remanded back to trial court for clarification of another issue, but failed to address Firearm Enhancement. Petitioner asks this Court to address this issue now.

3. ARGUMENT

Petitioner was sentenced on Count One to top of the range, 84 months for Assault Second Degree, plus 36 months Firearm Enhancement taking the sentence to 120 months which is the Statutory Maximum for that crime. The imposition of 18-36 months mandatory Community Custody takes the sentence well above Statutory Maximum and is therefore illegal.

Division II seems to agree but in accordance with RCW 9.94A 701(9), and because I was sentenced before July 26, 2009, leaves it to DOC to calculate and set new release date citing **State vs. Franklin**, 172 Wn.2d 831, 840, 263 P.3d 585 (2011). RCW 9.94A 701(9) is on point and is retroactive to my case, however in accordance with this Court's **Franklin** decision No. 84545-0 (2011) DOC, not the trial court must make changes, however the problem is that the records department will not act without a direct order on exactly what to do. They have stated they will not decipher Division II's opinion, they want to be told exactly what to do. Petitioner has tried to get relief through Division II to no avail. Stafford Creek Corrections Center Records Department needs to be directly told with a court order how they need to adjust this sentence to make base sentence, plus Firearm Enhancements, plus Community Custody fit within the 120 months Statutory Maximum for a Class B Felony. Base sentence needs to be reduced by 18-36 months to make sentence legal.

Pertaining to the Firearm Enhancements in this case, Petitioner asks this Court to review this appeal C.O.A. No. 43437-7-II and hold Division II to its decision in **State vs. Pierce** 155 Wn. App. 701 at 714 (2010) in which they state, Quote: "To uphold a Firearm Enhancement, the State must present the jury with sufficient evidence to find a firearm operable under this definition."

The shotgun in this case was never tested, nor proven in any way whatsoever to be an operable firearm. Division II erred in not removing Firearm Enhancements as in **Pierce** regardless of whether the State alleged Firearm or Deadly Weapon Enhancement.

Closer inspection of **Pierce** will show his Firearm Enhancements were removed for two reasons, one being failure to prove an operable firearm. Division II also states that an officer testifying that firearm in this case is sufficient as it was in **State vs. Raleigh** 157 Wn. App. 728 (2010), but the officer never tested this firearm in any way whatsoever. In **Raleigh**, a demonstration was given to prove firing pin was in working order, therefore proving an operable firearm.

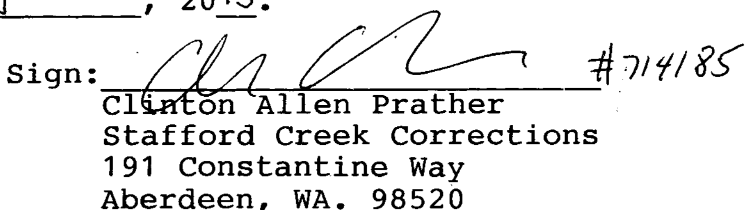
All three Divisions in our State seem divided on this issue and interpret our Laws in different ways it seems. As Firearm Enhancements account for a significant amount of time given out, this is not an issue that can remain ambiguous. Therefore Petitioner asks this Court to make a ruling on this matter once and for all. Can a firearm that is not operable or not proven operable qualify for a Firearm Enhancement?

Conclusion

Petitioner's sentence on its face is 18-36 months over the Statutory Maximum on Count One and DOC will not adjust sentence without a direct court order. The only fix is to lower base sentence by 18-36 months or remove Community Custody. Correspondence between Petitioner and DOC has been exhausted on this issue (correspondence attached). Please intervene.

also, Petitioner's Firearm Enhancements should be removed as in **State vs. Pierce** as the firearm in this case was not operable and never proven so, therefore not qualifying for Firearm Enhancements.

Done this 30th day of September, 2013.



Sign: #714185

Clinton Allen Prather
Stafford Creek Corrections
191 Constantine Way
Aberdeen, WA. 98520

KITE #1 OF 2

RECEIVED
SEP 3 - 2013
SCCC Records

OFFENDER'S KITE
PAPELETA DE PETICIÓN DEL INTERNO

OFFENDER NAME (PRINT) ***NOMBRE DEL INTERNO (LETRA DE MOLDE)***		
PRATHER, CLINT		
DOC NUMBER/*NÚMERO DOC*	**FACILITY, UNIT, CELL/FACILITY IS INSTALACIÓN*UNIDAD, CELDA***	**DATE/*FECHA***
714185	H-5 B-64	8/19/13
DESIRE INTERVIEW WITH OR ANSWER FROM/*DESEA ENTREVISTA CON O RESPUESTA DE*		
RECORDS – P. IVERSON		

☐ **Interpreter needed for________________ (language).**
☐ ***Necesito intérprete para________________ (idioma).***

REASON/QUESTION
RAZÓN/PREGUNTA

I AM AWARE THAT YOU ARE TIRED OF ME FIGHTING THIS ISSUE WITH YOU BUT HOPEFULLY YOU GOT THE DECISION IN THE MAIL FROM DIVISION II AND CAN SEE WHAT NEEDS TO BE DONE. BASE SENTENCE MUST BE REDUCED 18-36 MONTHS TO MAKE ROOM FOR COMM CUSTODY WHICH IS MANDATORY. YOU CITED STATE VS. THOMAS ~~[illegible]~~ I AGREE THAT MY TOTAL SENTENCE CAN GO ABOVE 120 MONTHS AS IN THOMAS. BUT COUNT ONE ON ITS FACE CANNOT. THE COURTS DID THEIR PART IN THE ORDER. D.O.C. MUST FIX..

SIGNATURE/*FIRMA*	**DAYS OFF/*DÍAS LIBRES***
[signature]	—

RESPONSE
RESPUESTA

Seek legal advice as, DOC will not revise your J&S without an amended order from the court. Not a Decision: not a mandate: Not any document ~~at~~ except, a order amending your J&S. Period.

RESPONDER/*PERSONA QUE RESPONDE*	**DATE/*FECHA***
P. Iverson	9/4/13

Distribution: **WHITE/YELLOW**-Responder, **YELLOW**-Return to Offender with Response, **PINK**-Offender keeps
*Distribución: **BLANCA/AMARILLA**-Persona que responde, **AMARILLA**-Devuelva al interno con respuesta, **ROSA**-Interno*

DOC 21-473 E/S (Rev. 05/23/13) DOC 390.585, DOC 450.500

KITE # 2 of 2

Department of Corrections
WASHINGTON STATE

RECEIVED
SEP 3 - 2013
SCCC Records

OFFENDER'S KITE
PAPEL DE PETICIÓN DEL INTERNO

OFFENDER NAME (PRINT) *NOMBRE DEL INTERNO (LETRA DE MOLDE)*		
PRATHER, CLINT		
DOC NUMBER/*NÚMERO DOC*	FACILITY, UNIT, CELL/FACILITY IS INSTALACIÓN*UNIDAD, CELDA*	DATE/*FECHA*
714185	H-5 B-64	8/19/13
DESIRE INTERVIEW WITH OR ANSWER FROM/*DESEA ENTREVISTA CON O RESPUESTA DE*		
RECORDS - P. IVERSON		

☐ Interpreter needed for________________ (language).
☐ *Necesito intérprete para________________ (idioma).*

REASON/QUESTION
RAZÓN/PREGUNTA

PLEASE SEE SUPREME COURT CASE NO. 86709-7 - JOSHUA ELIAS BOYD - RCW 9.94A 701(9) IS RETROACTIVE BUT THE COURT RULED THOSE CASES SENTENCED BEFORE 7/26/09 MUST BE FIXED BY D.O.C., THOSE AFTER BY THE TRIAL COURTS. THIS WAS CLEARLY TO LIGHTEN THE BURDEN ON COURTS, BUT CREATED CONFUSION AMONG FACILITIES. PLEASE GIVE SAME RELIEF AS BOYD. THANK YOU

SIGNATURE/*FIRMA*	DAYS OFF/*DÍAS LIBRES*
[signature]	

RESPONSE
RESPUESTA * PLEASE RETURN BOYD CASE *

this will not be continually addressed. Seek legal advice.

RESPONDER/*PERSONA QUE RESPONDE*	DATE/*FECHA*
P. Iverson	9/4/13

Distribution: **WHITE/YELLOW**-Responder, **YELLOW**-Return to Offender with Response, **PINK**-Offender keeps
*Distribución: **BLANCA/AMARILLA**-Persona que responde, **AMARILLA**-Devuelva al interno con respuesta, **ROSA**-Interno*

DOC 21-473 E/S (Rev. 05/23/13) DOC 390.585, DOC 450.500

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA ELIAS BOYD,

Petitioner.

NO. 8 6 7 0 9 - 7

EN BANC

Filed May 3, 2012

PER CURIAM -- Joshua Boyd was convicted of violating a protection order and was sentenced to terms of confinement and community custody that together exceeded the 60-month statutory maximum for the offense. The court included a notation on the judgment and sentence stating that the total term of confinement and community custody could not exceed the statutory maximum. The Court of Appeals affirmed, holding that the notation was sufficient under In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). Boyd filed a petition for review. We grant review in part and remand for resentencing or amendment of the community custody term.1

1 Boyd also sought review of whether there was sufficient evidence of premeditation to support his first degree attempted murder conviction. We deny review of that issue.

Boyd was charged with various crimes including first degree attempted murder and violation of a protection order after he attacked and stabbed Tasha Mitchell, the subject of the protection order and the mother of Boyd's children. A jury convicted Boyd as charged, and the court sentenced him on November 6, 2009. For the protection order violation, the court sentenced Boyd to 54 months of confinement and 12 months of community custody, but it noted on the judgment and sentence that the total term of confinement and community custody actually served could not exceed the 60-month statutory maximum.

The Court of Appeals affirmed in an unpublished opinion, holding in part that the trial court's note on the total term of confinement and community custody was sufficient under Brooks. State v. Boyd, noted at 164 Wn. App. 1014 (2011). In Brooks, this court held that when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term of confinement and community custody actually served may not exceed the statutory maximum. Brooks, 166 Wn.2d at 674. But in Brooks we also noted the then-recent passage of RCW 9.94A.701(9) and indicated that once the statute became effective it would likely supersede our decision in that case. Id. at 672 n.4.

Under RCW 9.94A.701(9),2 first enacted in 2009, the community custody term specified by RCW 9.94A.701 "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 this court explained in State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011), following the

2 This subsection was originally codified as RCW 9.94A.701(8). It was renumbered to subsection (9) in 2010. Laws of 2010, ch. 224, § 5.

enactment of this statute, the "Brooks notation" procedure no longer complies with statutory requirements. We held there that RCW 9.94A.701(9) applies retroactively, but for those sentenced before the enactment of the statute (as was the case in Franklin), it is the responsibility of the Department of Corrections to reduce the term of community custody to bring the total term within the statutory maximum. Franklin, 172 Wn.2d at 839-41. Thus, we held that remand for resentencing was not necessary in that case. See id. at 840 (directive that court reduce term of community custody to avoid sentence in excess of statutory maximum only applies when court first imposes sentence).

Unlike the defendant in Franklin, Boyd was sentenced after RCW 9.94A.701(9) became effective on July 26, 2009. See Laws of 2009, ch. 375, § 5. Thus, the trial court, not the Department of Corrections, was required to reduce

CORRESPONDENCE SENT BACK & FORTH TO RECORDS DEPT.

EXHIBIT #1

Boyd's term of community custody to avoid a sentence in excess of the statutory maximum. The trial court here erred in imposing a total term of confinement and community custody in excess of the statutory maximum, notwithstanding the Brooks notation.

We reverse the Court of Appeals and remand to the trial court to either amend the community custody term or resentence Boyd on the protection order violation conviction consistent with RCW 9.94A.701(9).

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COMMUNITY CUSTODY IS MANDATORY IN MY CASE, SO 18-36 MONTH REDUCTION IN BASE SENTENCE IS ONLY SOLUTION TO SATISFY ALL POINTS. FOR COUNT ONE, BASE SENTENCE + FIREARM ENHANCEMENT + COMMUNITY CUSTODY MUST ALL FIT WITHIN 120 MONTHS ON ITS FACE

TOTAL SENTENCE YES, CAN GO ABOVE 120 AS IN THOMAS.

RECENT OPINION IN MY CASE NO. 43437-7-II DIRECTS D.O.C. TO FIX SENTENCE

QUOTE:

"BECAUSE PRATHER WAS FIRST SENTENCED BEFORE JULY 26, 2009, IT IS UP TO THE DEPARTMENT OF CORRECTIONS TO ASSURE THAT PRATHERS TERM OF COMM CUST ENDS WHEN HIS COMBINED TERMS OF CONFINEMENT AND COMMUNITY CUSTODY REACH HIS STAT MAX OF 120 MONTHS."

* SAYING "IF I MAX OUT I WONT HAVE COMM CUST" IS NO FIX EITHER.

FILED
COURT OF APPEALS
DIVISION II

2013 JUN 11 AM 10: 40

STATE OF WASHINGTON

BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CLINTON ALLEN PRATHER, Appellant.	No. 43437-7-II UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Clinton Prather appeals from the order clarifying his sentence for his convictions for second degree assault, two counts of felony harassment, and second degree malicious mischief. He argues that the trial court erred in (1) not reducing his term of confinement to allow for his term of community custody and (2) not striking his firearm sentencing enhancements because the State did not prove that the firearm was operational. We affirm.[1]

On December 18, 2007, the trial court sentenced Prather for the convictions noted above. On the second degree assault conviction, the court imposed 120 months of confinement, which included a 36-month firearm sentencing enhancement, to be followed by a term of community custody of 18 to 36 months. On the two convictions for felony harassment, the court imposed 60

[1] A commissioner of this court initially considered Prather's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

months of confinement, which included a 60-month firearm sentencing enhancement. On the second degree malicious mischief conviction, the court imposed 29 months of confinement. All four sentences were ordered to run concurrently.

Prather filed a personal restraint petition in 2010, challenging his sentence. Cause No. 41475-9-II. We dismissed his petition. On discretionary review, our supreme court remanded Prather's sentence to the trial court to clarify it in light of *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 671-73, 211 P.3d 1023 (2009). Cause No. 86316-4.

At resentencing, Prather moved for relief from judgment under CrR 7.8(b)(5), arguing that the firearm enhancements should be stricken because the State did not prove that the firearm was operational. He also argued that his term of confinement on the second degree assault should be reduced to 84 months, so that his 18 to 36 months of community custody could fall within his 120-month statutory maximum sentence. On May 30, 2012, the trial court entered the following order clarifying judgment and sentence:

> The judgment and sentence entered in court on DECEMBER 18, 2007 for Count I, Assault in the Second Degree with a Firearm Enhancement, the combination of time spent in actual incarceration and time spent on community custody shall not exceed 120 months, the rest of the Judgment and Sentence shall remain in full force and effect.
>
> The Court denies the defendant's CrR 7.8 motion, effective May 9, 2012 nunc pro tunc.

Clerk's Papers at 91.

First, Prather argues that the trial court erred in not reducing his term of confinement to 84 months, such that the combination of that term and his 18 to 36 months of community custody would not exceed his 120-month statutory maximum sentence. He contends that under RCW 9.94A.701(9) and *Dress v. Department of Corrections*, 168 Wn. App. 319, 325, 279 P.3d 875

(2012), the trial court cannot leave the determination of the duration of his term of community custody to the Department of Corrections.

RCW 9.94A.701(9) provides that "[t]he term of community custody . . . 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." However, it does not apply to sentences first imposed before July 26, 2009, when the statute was amended to add this language. *State v. Franklin*, 172 Wn.2d 831, 840, 263 P.3d 585 (2011). For those sentences

> [t]he department of corrections shall recalculate the term of community custody and reset the date that community custody will end for each offender currently in confinement or serving a term of community custody for a crime specified in RCW 9.94A.701. That recalculation shall not extend a term of community custody beyond that to which an offender is currently subject.

Franklin, 172 Wn.2d at 841 (quoting LAWS OF 2009, ch. 375, § 9).

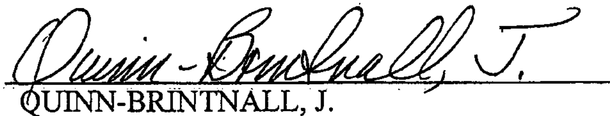
Because Prather was first sentenced before July 26, 2009, it is up to the Department of Corrections to assure that Prather's term of community custody ends when his combined terms of confinement and community custody reach his statutory maximum sentence of 120 months. *Dress* is inapplicable: it rejected the Department of Correction's contention that it could treat Dress's sentences as consecutive even though the judgment and sentence provided, erroneously, that the sentences were to be served concurrently. The trial court did not err in not reducing Prather's term of confinement or in not reducing his term of community custody.

Second, Prather argues that the trial court erred in not striking his firearm sentencing enhancements because the State did not prove beyond a reasonable doubt that the firearm was

operational.[2] *State v. Pierce*, 155 Wn. App. 701, 714 n.11, 230 P.3d 237 (2010). But in *Pierce*, the State had alleged a deadly weapon enhancement, not a firearm enhancement, and the trial court had not instructed the jury on the definition of firearm. In Prather's case, the State alleged firearm enhancements and the trial court properly instructed the jury on the definition of firearm. In such a case, physical evidence of operability is not required. *State v. Raleigh*, 157 Wn. App. 728, 735-36, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011). The investigating officer's testimony that the shotgun was operable was sufficient evidence for the jury to find that Prather was armed with a firearm when he committed his crimes. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

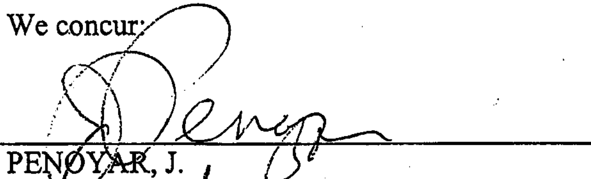
We affirm the trial court's order clarifying Prather's judgment and sentence.

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.

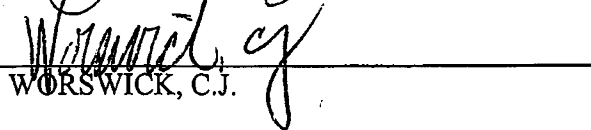


QUINN-BRINTNALL, J.

We concur:



PENOYAR, J.



WORSWICK, C.J.

[2] Prather also raises this argument in his statement of additional grounds.