

64367-3

643673

NO. 64367-3-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

ROY WINKLE,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

---

LILA J. SILVERSTEIN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

2010 JUL 22 PM 4:51  
FILED  
DIVISION ONE  
COURT OF APPEALS  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

A. ARGUMENT ..... 1

    THE SENTENCING COURT ERRED IN IMPOSING  
    COMMUNITY CUSTODY ON TOP OF THE 60-MONTH  
    TERM OF CONFINEMENT..... 1

B. CONCLUSION..... 4

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

In re the Personal Restraint Petition of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009)..... 2

**Washington Court of Appeals Decisions**

State v. Stratton, 130 Wn. App. 760, 124 P.3d 660 (2005) ..... 3

**Statutes**

Laws of 2009 ch. 375, § 20 ..... 2

Laws of 2009, ch. 375, § 5 ..... 1

Laws of 2009, ch. 375, § 7 ..... 1

RCW 9.94A.505 ..... 2

RCW 9.94A.701 ..... 1, 2

RCW 9.94A.715(1) (2008)..... 3

RCW 9.94A.729 ..... 3

A. ARGUMENT

THE SENTENCING COURT ERRED IN IMPOSING  
COMMUNITY CUSTODY ON TOP OF THE 60-MONTH  
TERM OF CONFINEMENT.

The sentencing court in this case imposed a 60-month sentence (equal to the maximum and to the standard range), and also imposed a term of community custody equal to Mr. Winkle's earned early release time. But as pointed out in Mr. Winkle's opening brief, the statutory authority for such a sentence has been repealed, and the amendment is retroactive.

Engrossed Substitute Senate Bill 5288 amended RCW

9.94A.701 to add:

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 provide in RCW 9A.20.021.

Laws of 2009, ch. 375, § 5; RCW 9.94A.701 (8). Section 7 of the same bill deleted the portion of RCW 9.94A.707 that had stated community custody could begin "at such time as the offender is transferred to community custody in lieu of earned release." Laws of 2009, ch. 375, § 7. These amendments took effect August 1, 2009, and are retroactive to all cases in which a community custody

term was imposed and has not yet been completed. Laws of 2009 ch. 375, § 20. Furthermore, RCW 9.94A.715, which provided for the imposition of a term of community custody for “the period of earned early release,” has been repealed. See In re the Personal Restraint Petition of Brooks, 166 Wn.2d 664, 672 n.4, 211 P.3d 1023 (2009).

The State acknowledges that RCW 9.94A.715 has been repealed and that RCW 9.94A.701(8) applies to Mr. Winkle. It argues that the sentencing court complied with RCW 9.94A.701(8) when it imposed a term of community custody equal to the period of earned early release. The State is wrong. The Sentencing Reform Act does not allow the term of confinement plus the term of community custody to exceed the statutory maximum. RCW 9.94A.505(5) (“a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime”). It mandates a reduction in community custody to avoid exceeding the maximum. RCW 9.94A.701(8).

Mr. Winkle’s term of confinement is 60 months. That is the term of confinement imposed irrespective of any future earned early release. See RCW 9.94A.505. To impose a term of community

custody on top of a term of confinement that already equals the maximum violates the SRA. RCW 9.94A.505(5); RCW 9.94A.701(8). And to the extent the statute is ambiguous, the rule of lenity demands it be construed in favor of Mr. Winkle. State v. Stratton, 130 Wn. App. 760, 764-65, 124 P.3d 660 (2005).

The State's reliance on RCW 9.94A.729(5)(a) is unavailing. That statute dictates the action the Department of Corrections is to take when community custody has been imposed at sentencing. It says nothing about what is to occur at sentencing itself. RCW 9.94A.505 and 9.94A.701(8) apply at sentencing, and mandate that community custody be reduced to ensure that the sentence imposed does not exceed the statutory maximum.

An analysis of former RCW 9.94A.715 makes clear that the phrase "term of confinement" in RCW 9.94A.701(8) means the term imposed, not the term actually served prior to earned early release. The former statute provided, in relevant part: "The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release ..." RCW 9.94A.715(1) (2008). Subsection (b) would be redundant if "term of confinement" meant the term actually served as opposed to the

term imposed. The SRA requires a sentencing court to impose a sentence that does not exceed the statutory maximum. Thus, if the “term of confinement” imposed equals the statutory maximum, no community custody may be imposed.

In sum, the current statutory scheme limits the sentencing court’s authority in this case to a single sentence: 60 months of confinement with no community custody. Mr. Winkle respectfully asks this Court to remand for imposition of this sentence.

B. CONCLUSION

For the reasons set forth above and in the opening brief, this Court should vacate Mr. Winkle’s sentence and remand for imposition of a 60-month term of confinement with no community custody.

DATED this 21<sup>st</sup> day of July, 2010.

Respectfully submitted,

  
Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64367-3-I
v.	)	
	)	
ROY WINKLE,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY 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:

<input checked="" type="checkbox"/> DEBORAH DWYER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
---	-------------------	-------------------------------------

<input checked="" type="checkbox"/> ROY WINKLE 278784 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
--	-------------------	-------------------------------------

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF JULY, 2010.

X \_\_\_\_\_ *Good*

2010 JUL 22 PM 4:51  
COURT OF APPEALS  
STATE OF WASHINGTON  
FILED - DIV #1

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710