

04367-3

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NO. 64367-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROY WINKLE, SR.,

Appellant.

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COURT OF APPEALS
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY D. PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUE

1. When the standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime, the term of community custody must be reduced by the sentencing court. Winkle was sentenced to the statutory maximum of 60 months of confinement for Rape of a Child in the Third Degree; in addition, he was sentenced to a term of community custody of 36-48 months. Upon remand, the trial court reduced the term of community custody, imposing it only for the period of any earned early release. Did the trial court properly reduce the term of community custody so that the combination of confinement and community custody cannot exceed the statutory maximum for Winkle's crime?

B. STATEMENT OF THE CASE

Defendant Roy Winkle, Sr. was charged by Information and Amended Information with Rape of a Child in the Third Degree against 15-year-old S.N. (Count I), Rape of a Child in the Third Degree against 14-year-old A.F. (Count II), and Supplying Liquor to a Minor (Count III). CP 1-7. After a jury found him guilty as charged, Winkle was sentenced on July 27, 2007. CP 8-20. The

court imposed the statutory maximum of 60 months of confinement for each of the two felonies, to be served concurrently, plus 36-48 months of community custody. CP 8-13.

Winkle appealed his sentence, contending that the term of confinement in combination with the term of community custody exceeded the statutory maximum for his crimes. The State conceded the error, and the case was remanded for further proceedings. CP 22-24. Upon remand, the trial court, on September 18, 2008, entered an order clarifying that the "[t]otal amount of jail time and community custody supervision time combined and imposed shall not exceed statutory maximum of 60 months on cts 1 and 2."¹ CP 25-26.

Winkle again appealed. The State again conceded, based on State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008). The case was remanded for resentencing. CP 27-29.

On September 25, 2009, the trial court again sentenced Winkle to 60 months of confinement on counts 1 and 2. CP 31.

¹ As this Court noted, this was consistent with the approach endorsed in State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004). CP 28.

The court also imposed community custody "for the entire period of earned early release awarded under RCW 9.94A.728." CP 34.

Winkle has again appealed his sentence. CP 42-52.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REDUCED THE TERM OF COMMUNITY CUSTODY SO THAT IT WILL NOT EXCEED THE STATUTORY MAXIMUM FOR THE CRIME.

Winkle contends that the sentencing court erred in sentencing him to a 60-month term of confinement for Rape of a Child in the Third Degree, and imposing a term of community custody for any period of earned early release. To the contrary, and pursuant to statute, the trial court properly reduced Winkle's term of community custody so that the combination of confinement time and community custody cannot exceed the statutory maximum for Winkle's crimes.

Under former RCW 9.94A.715(1), the trial court was directed to sentence a defendant convicted of a felony sex offense, "in addition to the other terms of the sentence," to the statutorily-mandated community custody range *or* up to the period of earned

early release, "whichever is longer." Because Winkle was convicted of Rape of a Child in the Third Degree, which is a felony sex offense, he was originally subject to that statute. RCW 9.94A.030(42)(a)(i).

As Winkle correctly points out, RCW 9.94A.715 has been repealed. RCW 9.94A.701(8) now provides that "[t]he 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." This statute took effect on August 1, 2009, and thus applies to Winkle's most recent resentencing.

What Winkle fails to recognize is that the trial court *did* reduce his term of community custody in accordance with RCW 9.94A.701(8). He is no longer sentenced to 36-48 months of community custody. Nor is he sentenced to 36-48 months of community custody *or* the period of earned early release, "whichever is longer," as former RCW 9.94A.715(1) required. He is now sentenced to community custody "for the entire period of

earned early release awarded [pursuant to statute]."² CP 34.

Thus, consistent with legislative intent, his total sentence (confinement time combined with community custody) *cannot* exceed the statutory maximum of five years for Rape of a Child in the Third Degree, a class C felony. RCW 9A.44.079(2); RCW 9A.20.021(1)(c).

The legislature's intent is further clarified by an additional relevant statute. Under RCW 9.94A.729(5)(a), the statute governing earned release time, a defendant convicted of a sex offense "shall be transferred to community custody in lieu of earned release time." Because Rape of a Child in the Third Degree is a sex offense, this statute applies to Winkle. RCW 9.94A.030(42)(a)(i).

Thus, under the relevant statutes, Winkle will properly be required to serve any earned release time on community custody. His sentence will not, and cannot, exceed the statutory maximum for his crimes.

² Notably, the sentencing court crossed out "whichever is longer." CP 34.

D. CONCLUSION

Winkle has not been sentenced in excess of the 60-month statutory maximum for his crimes of Rape of a Child in the Third Degree. For all of the foregoing reasons, the State respectfully asks this Court to affirm Winkle's sentence.

DATED this 21st day of June, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Lila J. Silverstein**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. ROY WINKLE, SR.**, Cause No. **64367-3-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

06/22/10

Date