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NO. 64374-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANDRE KARLOW,

Appellant.

REC'D  
AUG 25 2010  
King County Prosecutor  
Appellate Unit

2010 AUG 25 PM 3:53  


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

The Honorable Jim Rogers, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT

1. KARLOW'S SENTENCE FOR THIRD DEGREE ASSAULT EXCEEDS THE STATUTORY MAXIMUM AND MUST BE REDUCED.

As argued in the opening brief, the combined term of confinement (five years) and community custody (9 - 12 months) for the third degree assault count exceeds the five year statutory maximum. Brief of Appellant at 28-30; State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004); State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005).

The opening brief, however, did not take into account the appropriate remedy for this error. Under RCW 9.94A.701(9), the proper remedy is reduction of the community custody term to zero months rather than clarification of the sentence.

RCW 9.94A.701(9), originally effective August 1, 2009,<sup>1</sup> provides "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."<sup>2</sup>

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<sup>1</sup> Laws of 2008 ch. 231 § 61.

<sup>2</sup> RCW 9A.20.021(1)(c) provides the statutory maximum for a class C felony is "by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine."

Questions of statutory interpretation are reviewed de novo. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

The plain language of RCW 9.94A.701(9) requires the court to reduce the term of community custody when the term of confinement in combination with the term of community custody exceeds the statutory maximum. The court here imposed five years of confinement plus 9 to 12 months of community custody for an offense with a five year statutory maximum. CP 117, 120, 121.<sup>3</sup> The community custody term must be reduced to zero months to comply with RCW 9.94A.701(9).

The trial court here imposed sentence on October 26, 2009. CP 117-25. RCW 9.94A.701(9) applies to Karlow, even though his offense occurred before the effective date of August 1, 2009.

Laws of 2008 ch. 231 § 55(2) provides: "Sections 6 through 58 of this act also apply to all sentences imposed or reimposed on or after August 1, 2009, for crimes committed prior to the effective date of this section, to the extent that such application is constitutionally

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<sup>3</sup> RCW 9.94A.701(3)(a) provides for 12 months of community custody for crimes against persons, which include third degree assault.

permissible."<sup>4</sup> The statement of legislative intent affirms retroactive application.<sup>5</sup>

In Brooks, the Supreme Court held the appropriate remedy for a combined term of confinement that exceeds the statutory maximum is amendment of the sentence to explicitly state the combination of confinement and community custody shall not exceed the statutory maximum. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). Brooks, however, was issued before the statutory change applicable to Karlow became effective. Brooks, 166 Wn.2d at 672 n.4. The Brooks remedy was only meant to "to give guidance to trial courts as they await the amendment to take effect." Id.

The amendment has since taken effect and applies to Karlow. RCW 9.94A.701(9), not Brooks, provides the proper remedy. Mere

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<sup>4</sup> Laws of 2009 ch. 375, which amended the new community custody changes in certain respects, retained the same retroactivity requirement. Laws of 2009 ch. 375, § 20.

<sup>5</sup> Laws of 2008 ch. 231 § 6 provides "Sections 7 through 58 of this act are intended to simplify the supervision provisions of the sentencing reform act and increase the uniformity of its application. These sections are not intended to either increase or decrease the authority of sentencing courts or the department relating to supervision, except for those provisions instructing the court to apply the provisions of the current community custody law to offenders sentenced after July 1, 2009, but who committed their crime prior to August 1, 2009, to the extent that such application is constitutionally permissible."

clarification is not enough under RCW 9.94A.701(9). The court must reduce the term of community custody.

Even if RCW 9.94A.701(9) is in some sense ambiguous, the rule of lenity requires this Court to construe the statute in Karlow's favor. In a criminal case, the rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). "The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991).

This Court should order correction of the judgment and sentence to reflect zero months of community custody.

B. CONCLUSION

For the reasons stated, this Court should remand to correct the sentencing error in the event it declines to reverse the convictions.

DATED this 25<sup>th</sup> day of August 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
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ANDRE KARLOW,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     ANDRE KARLOW  
          DOC NO. 890141  
          WASHINGTON STATE PENITENTIARY  
          1313 N. 13<sup>TH</sup> AVENUE  
          WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF AUGUST, 2010.

x *Patrick Mayovsky*