

67007-7

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NO. 67007-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK OLSEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

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

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STATE OF WASHINGTON
DIVISION ONE
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MARLA L. ZINK

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENT OF ERROR 1

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

D. STATEMENT OF THE CASE2

E. ARGUMENT3

THE COURT EXCEEDED ITS AUTHORITY IN
IMPOSING A TERM OF COMMUNITY CUSTODY THAT,
TOGETHER WITH THE STANDARD RANGE
SENTENCE IMPOSED, EXCEEDED THE STATUTORY
MAXIMUM SENTENCE.....3

a. The SRA requires a sentencing court impose a
determinate sentence in which the combined terms of
confinement and supervision do not exceed the
statutory maximum3

b. This Court must correct Mr. Olsen’s sentence6

F. CONCLUSION7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Brooks, 166 Wn.2d 664,
211 P.3d 1023 (2009)..... 3, 4, 5, 6

In re Pers. Restraint of Call, 144 Wn.2d 315,
28 P.3d 709 (2001)..... 6

In re Pers. Restraint of Carle, 93 Wn.2d 31,
604 P.2d 1293 (1980)..... 3

Statutes and Other Authorities

Laws of 2009, ch. 375 5

RCW 9.94A.030 2, 4

RCW 9.94A.701 1, 3, 4, 5

RCW 9.94A.715 5

RCW 9.94A.728 2

RCW 9A.20.021 2, 3, 4

RCW 9A.44.079 2, 4

A. SUMMARY OF ARGUMENT

The Sentencing Reform Act requires that a sentencing court reduce the term of community custody whenever a standard range sentence combined with a term of community custody exceeds the statutory maximum for the crime. Here, Frank Olsen pled guilty to third-degree rape of a child, which contains a five-year statutory maximum. Mr. Olsen was sentenced to a standard-range term of confinement of 34 months. The trial court thus exceeded the statutory maximum of five years when it also sentenced Mr. Olsen to at least 36 months of community custody. The court exceeded its statutory authority and this case must be remanded for resentencing.

B. ASSIGNMENT OF ERROR

The trial court exceeded its statutory authority in imposing its sentence for Mr. Olsen's guilty plea.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority. RCW 9.94A.701(9) requires that, where the combined term of community custody and confinement exceeds the statutory maximum for an offense, the court must reduce the term of community custody. Where the trial court

imposed a 34-month sentence for a Class C felony and imposed a term of community custody of at least 36 months, must this Court correct the erroneous sentence?

D. STATEMENT OF THE CASE

Mr. Olsen pled guilty to a single count of rape of a child in the third degree under RCW 9A.44.079. CP 33. The statutory maximum for this crime is 60 months. CP 34; RCW 9A.20.021(1)(c); RCW 9A.44.079; RCW 9.94A.030(48). The court sentenced Mr. Olsen to 34 months confinement. CP 35. In addition, the court imposed a 36-month term of community custody. CP 35. Specifically, the judgment and sentence provides that Mr. Olsen “shall be on community custody for the longer of: 1. The period of early release. RCW 9.94A.728(1)(2); or 2. The period imposed by the court as follows: 36 months for Count IV.” CP 35.

Mr. Olsen had already served his term of 34 months confinement at the time of sentencing. The court provided no direction to the Department of Corrections (DOC) or otherwise that the total terms of confinement and community custody must not exceed the statutory maximum sentence of 60 months. See generally CP 33-48.

E. ARGUMENT

THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING A TERM OF COMMUNITY CUSTODY THAT, TOGETHER WITH THE STANDARD RANGE SENTENCE IMPOSED, EXCEEDED THE STATUTORY MAXIMUM SENTENCE.

- a. The SRA requires a sentencing court impose a determinate sentence in which the combined terms of confinement and supervision do not exceed the statutory maximum.

“A trial court only possesses the power to impose sentences provided by law.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The statutory maximum for an offense sets the ceiling of punishment that may be imposed. RCW 9A.20.021; In re Pers. Restraint of Brooks, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). A term of community custody must be authorized by the legislature. RCW 9A.20.021. The controlling statutes instruct the trial court that a term of community custody may not exceed the statutory maximum when combined with the prison term imposed. Id.; RCW 9.94A.701(9). RCW 9.94A.701(9) 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.

This Court reviews de novo whether a sentence is legally

erroneous. Brooks, 166 Wn.2d at 667.

Mr. Olsen pled guilty to a single count of rape of a child in the third degree under RCW 9A.44.079. CP 33. That crime is a Class C felony with a 60-month statutory maximum. RCW 9A.20.021(1)(c); RCW 9A.44.079; RCW 9.94A.030(48). The trial court imposed a term of 34 months confinement. CP 35. The court also imposed a term of community custody for the the longer of the period of early release or 36 months. CP 35. The least amount of community custody Mr. Olsen could serve under the sentence, therefore, would be 36 months. CP 35. This sentence exceeds the 60-month statutory maximum sentence.

The statute requires the court to itself reduce the term of community custody to comply with the statutory maximum. RCW 9.94A.701(9). There is no statutory authority to leave this determination to others. Moreover, there is no provision that subsequently and automatically reduces a total punishment erroneously imposed. Instead, RCW 9.94A.701(9) specifically requires a reduction of the term of community custody, *by the court at the time the sentence is imposed*, to ensure the total does not exceed the maximum. Thus, the sentence imposed here is erroneous.

Because Mr. Olsen's sentence does not contain any language limiting the total sentence to the statutory maximum, this case is unlike Brooks. Brooks was decided prior to enactment of the current RCW 9.94A.701(9).¹ In that case, the Supreme Court concluded language that instructed DOC to impose community custody conditions only up until the statutory maximum is reached complied with then-existing statutes, primarily former RCW 9.94A.715. Brooks, 166 Wn.2d at 672. As Brooks itself recognized, that statute was repealed even while Brooks was pending. Id. at 672 n.4. With the repeal of RCW 9.94A.715, Brooks recognized that newly-enacted RCW 9.94A.701(9) would control the issue going forward. 166 Wn.2d at 672 n. 4. The issue of the effect of RCW 9.94A.701(9) where the trial court imposes the statutory maximum term of confinement for a crime is pending before the Washington Supreme Court in State v. Franklin, No. 84545-0 (oral argument held June 14, 2011). In that case the trial court directed that the total amount of incarceration and community

¹ Engrossed Substitute Senate Bill 5288 amended RCW 9.94A.701 in 2009 to add the provision currently codified at subsection nine. Laws of 2009, ch. 375, § 5; RCW 9.94A.701(9). 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.

custody not exceed the statutory maximum. Supp. Br. of Petiti. at 2, State v. Franklin, No. 84545-0.

However, neither Brooks nor Franklin controls here because the court did not provide any instruction that the total sentence not exceed the statutory maximum. Here, the court imposed a determinate term of confinement—34 months—and a term of community custody for the longer of the period of early release or 36 months. Because the total of these terms exceeds the statutory maximum, the sentence is erroneous.

b. This Court must correct Mr. Olsen's sentence.

“Courts have the duty and power to correct an erroneous sentence upon its discovery.” In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). The SRA limits the sentencing court's authority in this case to a total sentence of 60 months. Mr. Olsen respectfully asks this Court to remand for imposition of a proper sentence.

F. CONCLUSION

Because the court imposed a sentence in excess of its statutory authority, the sentence must be vacated and remanded.

DATED this 3rd day of October, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. L. Zirk', is written over a horizontal line.

Marla L. Zirk – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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DIVISION ONE**

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)	
RESPONDENT,)	
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v.)	NO. 67007-7-I
)	
FRANK OLSEN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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BELLINGHAM, WA 98225 | <input checked="" type="checkbox"/> | U.S. MAIL |
| | | <input type="checkbox"/> | HAND DELIVERY |
| | | <input type="checkbox"/> | _____ |
|
 | | | |
| <input checked="" type="checkbox"/> | FRANK OLSEN
2618 LUMMI ISLAND RD
BELLINGHAM, WA 98226 | <input checked="" type="checkbox"/> | U.S. MAIL |
| | | <input type="checkbox"/> | HAND DELIVERY |
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