

NO. 68062-5-I

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

REC'D
AUG 09 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ERIC CARMICHAEL

Appellant.

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

The Honorable Hollis R. Hill, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred by failing to reduce the term of community custody to ensure that the total sentence will not exceed the statutory maximum sentence as required by RCW 9.94A.701(9).

Issue Pertaining to Assignment of Error

RCW 9.94A.701(9) requires the court to reduce a term of community custody that, when combined with the term of confinement, may exceed the statutory maximum sentence. Here, the court merely instructed the Department of Corrections to ensure the statutory maximum was not exceeded. Did the trial court erred by failing to reduce the term of community custody to a definite term that ensures the total sentence will not exceed the statutory maximum?

B. STATEMENT OF THE CASE

On December 20, 2011, Carmichael was sentenced for one count of first-degree unlawful possession of a firearm, one count of first-degree possessing stolen property, and one count of violating the Uniform Controlled Substances Act. CP 457. The court imposed a standard range sentence of 116 months for the unlawful possession of a firearm charge as well as 12 months community custody. CP 460-61. The statutory maximum sentence for Class B felonies such as unlawful possession of a firearm is 120 months. RCW 9A.20.021; RCW 9.41.040. The judgment and sentence also

provides that “The term of community custody shall be reduced by the Department of Corrections if necessary so that the total amount of incarceration and community custody does not exceed the maximum term of sentence for any offense, as specified in this judgment.” CP 461.

C. ARGUMENT

THE TRIAL COURT ERRED BY FAILING TO REDUCE THE TERM OF COMMUNITY CUSTODY TO ENSURE THE TOTAL SENTENCE WILL NOT EXCEED THE STATUTORY MAXIMUM.

Whenever the term of confinement in combination with the term of community custody exceeds the statutory maximum, “the term of community custody shall be reduced by the court.” RCW 9.94A.701(9). In Carmichael’s case, the court imposed 116 months confinement and 12 months community custody. CP 460-61. When combined, this results in a total of 128 months, 8 months beyond the statutory maximum for Carmichael’s offense of unlawful possession of a firearm. CP 458; RCW 9A.20.021; RCW 9.41.040.

The sentencing court apparently realized the community custody could exceed the statutory maximum, and therefore noted in the judgment and sentence that: “The term of community custody shall be reduced by the Department of Corrections if necessary so that the total amount of incarceration and community custody does not exceed the maximum term of

sentence for any offense, as specified in this judgment.” CP 461. But the court did not comply with RCW 9.94A.701(9) because it failed to reduce Carmichael’s community custody sentence to ensure that the total sentence would not exceed the statutory maximum.

Before 2009, the prior community custody statute permitted a variable term of community custody. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). In that context, a sentence did not exceed the statutory maximum where the Department of Corrections was required to release the offender on or before the date the offender would have served the statutory maximum, and the sentence specifically directed the Department to ensure the offender would not serve more than the statutory maximum. Brooks, 166 Wn.2d at 672-73. But Brooks noted that the Sentencing Reform Act was about to be amended observed that its decision was intended to guide courts in the meantime.

This year in State v. Winborne, 167 Wn. App. 320, 273 P.3d 454 (2012), Division Three of this Court considered the impact of the 2009 amendment to the Sentencing Reform Act (SRA) on community custody notations such as the one imposed in this case, which it calls a “Brooks notation.” In Winborne, the court held that a Brooks notation, such as the one in this case, is not the reduction required by the SRA and does not comply with RCW 9.94A.701(9). Winborne, 167 Wn. App. at 9. “While a

Brooks notation may not be the opposite of a reduction, it is the negation of one; it is essentially a mechanism by which a court avoids making a reduction.” Winborne, 167 Wn. App. at 328.

Winborne held the 2009 amendment clearly requires the sentencing court “to impose the term of confinement, impose the term of community custody, then reduce the term of community custody if necessary.” Winborne, 167 Wn. App. at 329. “[T]o attempt to preempt it with a prophylactic Brooks notation is contrived. Id. To do so “transforms the term of community custody into a variable term, contrary to the clear intent of the 2009 changes.” Id. The plain language of the statute requires the sentencing court to reduce the term of community custody to a determinate length that does not exceed the statutory maximum. Id. The so-called Brooks notation does not alter the fact that the total sentence exceeds the statutory maximum and is therefore beyond the court’s sentencing authority. Id. at 330. The remedy is remand for resentencing. Id.

As in Winborne, the sentencing court in this case exceeded its statutory authority by imposing community custody of an indeterminate length with a Brooks notation. Under RCW 9.94A.701(9), the court was required to reduce Carmichael’s community custody sentence to four months so that it would not exceed the statutory maximum 120 months. The remedy for this error is reversal and remand for resentencing.

D. CONCLUSION

For the foregoing reasons, Carmichael requests this Court reverse his sentence and remand for a resentencing before a different judge.

DATED this 8th day of August, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

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COA NO. 68062-5-1

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 9TH DAY OF AUGUST, 2012, 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] ERIC CARMICHAEL
DOC NO. 849471
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF AUGUST, 2012.

x Patrick Mayovsky

2012 AUG -9- E11 11:36
STATE OF WASHINGTON
COURT OF APPEALS DIVISION ONE