

NO. 34111-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

DAVID D. TARABOCHIA,

Appellant.

dear
JUL 11 2011
COURT REPORTS
SUNSHINE

FIN 1-8-06

ON APPEAL FROM THE
SUPERIOR COURT OF WAHKIAKUM COUNTY

Before the Honorable Joel M. Penoyar, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE.....	2
1. <u>Procedural History</u>	2
D. ARGUMENT	5
I. <u>THE TRIAL COURT EXCEEDED THE STANDARD RANGE OF 144 MONTHS WHEN IT IMPOSED A SENTENCE OF 120 MONTHS AND AN ADDITIONAL 36 MONTHS OF COMMUNITY PLACEMENT IN COUNTS I AND II, THEREBY VIOLATING <i>BLAKELY V. WASHINGTON</i></u>	5
a. Does community placement constitute imprisonment for purposes of <i>Blakely</i> analysis?	7
i. Community placement.....	7
ii. Community Custody	8
E. CONCLUSION	10
F. APPENDIX.....	A-1 through B-1

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>In re Caudle</i> , 71 Wn. App. 679, 863 P.2d 570 (1993).....	9
<i>In re Crowder</i> , 97 Wn. App. 598, 985 P.2d 944 (1999).....	9
<i>State v. Crandall</i> , 117 Wn. App. 448, 71 P.3d 701 (2003).....	8
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	5
<i>State v. Hurt</i> , 107 Wn. App. 816, 27 P.3d 1276 (2001).....	10
<i>State v. Ross</i> , 129 Wn.2d 279, 916 P.2d 405 (1996).....	9, 10
<i>State v. Tarabochia</i> , 2002 Wn. App. LEXIS 1485	3
<i>State v. Tarabochia</i> , 150 Wn.2d 59, 74 P.3d 642 (2003)	3
<i>State v. Williams</i> , 149 Wn.2d 143, 65 P.3d 1214 (2003).....	5
<i>State v. Zavala-Reynoso</i> , 127 Wn. App. 119, 110 P.3d 827 (2005)	6
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	1, 2, 3, 6, 7
<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 9A.20.021	6
RCW 9A.44.083	6
RCW 9.94A.030(5).....	8
RCW 9.94A.030(7).....	8
RCW 9.94A.535	6
RCW 9.94A.545	9
RCW 9.94A.715(1).....	9
<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. Amend. VI.....	1, 2
Wash. Const. Art. I, § 21	1

<u>COURT RULES</u>	<u>Page</u>
CrR 7.8(b)(4).....	6
CrR 7.8(b)(5).....	6

A. ASSIGNMENTS OF ERROR

1. The lower court violated Tarabochia's right to jury trial under the Sixth Amendment of the United States Constitution, and Article I, § 21 of the Washington Constitution, when it imposed a sentence that included 36 months of community supervision, following a sentence of 126 months, exceeding the standard range sentence of 144 months, without submitting the issue to a jury.

2. The lower court erred by entering an order denying the Appellant's motion to modify his sentence.

3. The lower court judge erred by making the following finding of fact in the Memorandum opinion filed July 11, 2005:

As to the first issue, the Defendant provided no proof that he is unable to obtain treatment. In addition, the 36 months of supervision for the Defendant after he is released from prison serves a number of other purposes, including protection of the community.

Defendant argues that somehow the standard range in this case is equivalent to a maximum term and, proceeding from that false premise, jumps to a *Blakely* analysis. The logic is obviously faulty. The Defendant did not receive an exceptional sentence and he did not receive community custody exceeding the maximum term.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment guarantees a defendant the right to a jury trial on every elements of the charged crime. A sentence that exceeds the

defendant’s sentence beyond that for the crime of conviction must also be found by the jury beyond a reasonable doubt. Did the lower court violate Tarabochia’s right to jury trial when it imposed a sentence including 36 months of community supervision—in addition to 126 months of imprisonment—in Counts I and II, where the minimum standard range was 144 months, without submitting the issue to a jury? Assignments of Error No. 1, 2, and 3.

2. Does community supervision constitute “imprisonment” or “total confinement” for purposes of analysis under *Blakley v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)? Assignments of Error No. 1, 2, and 3.

C. STATEMENT OF THE CASE¹

1. Procedural History:

Appellant David Tarabochia pleaded guilty to two counts of first degree child molestation, one count of second degree child molestation, and one count of sexual exploitation of a minor. Clerk’s Papers [CP] at 136-144. Report of Proceedings [RP] (10.9.00) at 12-16. He was sentenced to 126 months for Count I, 126 months for Count II, 78 months for Count III, and 53 months for Count IV, to be served concurrently. CP at 140. Former

¹This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

Wahkiakum County Superior Court Judge Joel Penoyar sentenced Tarabochia to 36 months of community placement for Counts I, II, III. CP at 140.

Tarabochia appealed his sentence to this Court in 2001, arguing that the lower court erred by rejecting his affidavit of prejudice against Judge Penoyar and that he received ineffective assistance of counsel. This Court affirmed his convictions on June 21, 2002, finding that the lower court judge did not err when it rejected Tarabochia's affidavit of prejudice and that Tarabochia received effective representation. *State v. Tarabochia*, 2002 Wn. App. LEXIS 1485. Tarabochia's petition to the Washington State Supreme Court was accepted, and this Court's opinion was affirmed on August 21, 2003. *State v. Tarabochia*, 150 Wn.2d 59, 74 P.3d 642 (2003).

Tarabochia filed a Motion to Modify Judgment and Sentence on June 27, 2005. CP at 124-144. Tarabochia moved the lower court for resentencing, arguing that the period of community custody placed him outside the statutory maximum sentence, in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). CP at 124-24. He also argued that the 36 month period of community placement imposed by the trial court was for the purpose of completing sex offender treatment, and that the DOC determined that he was "so such a very low risk, there is no treatment available" to treat him, making the 36 month community

custody an abuse of discretion by the trial court. CP at 126-31.

Judge Penoyar denied the Motion to Modify Judgment and Sentence without hearing in an order filed July 11, 2005. CP at 147. Appendix A-1. Accompanying the Order Denying Defendant's Motion to Modify Judgment and Sentence, Judge Penoyar entered the following Memorandum Opinion
Re: Motion to Modify:

Defendant has asked the Court to modify his sentence for two reasons:

1) The Defendant argues the sentence was imposed for 36 months because "community placement or custody" was "for the Defendant to enter and successfully complete treatment as directed by the trial court and/or the Defendant's CCO." The Defendant then alleges, without proof, that there is no treatment available for him because he is at "low, low risk".

2) Defendant argues the Court exceeded jurisdiction in requiring 36 months of "community placement and/or custody" under a *Blakely* analysis.

As to the first issue, the Defendant provided no proof that he is unable to obtain treatment. In addition, the 36 months of supervision for the Defendant after he is released from prison serves a number of other purposes, including protection of the community.

Defendant argues that somehow the standard range in this case is equivalent to a maximum term and, proceeding from that false premise, jumps to a *Blakely* analysis. The logic is obviously faulty. The Defendant did not receive an exceptional sentence and he did not receive community custody exceeding the maximum term.

CP at 145-46. Appendix B-1, B-2.

Tarabochia filed a Notice of Appeal on November 10, 2005, appealing the trial court's ruling denying the motion to modify. CP at 148-54. His motion to allow late filing of appeal was granted on January 13, 2006. CP at 156.

D. ARGUMENT

I. THE TRIAL COURT EXCEEDED THE STANDARD RANGE OF 144 MONTHS WHEN IT IMPOSED A SENTENCE OF 120 MONTHS AND AN ADDITIONAL 36 MONTHS OF COMMUNITY PLACEMENT IN COUNTS I AND II, THEREBY VIOLATING *BLAKELY V. WAHSINGTON*

Appellate review is available for the correction of legal errors committed during sentencing. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). Sentences must fall within the proper presumptive sentencing ranges set by the legislature. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Any fact other than that of a prior conviction that increases the applicable punishment, must be found by a jury beyond a reasonable doubt unless it is stipulated to by the defendant or the defendant waives his right to a jury finding. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Tarabochia's change of plea resulted in an offender score of 7 for

Counts I, II, and III, and a standard range of 108 to 144 months for Counts I and II which were for first degree child molestation. CP at 137. First degree child molestation is a Class A felony with a statutory maximum of life in prison. RCW 9A.20.021, RCW 9A.44.083. The lower court imposed a midrange sentence of 126 months, followed by 36 months of community placement. RP (12.4.00) at 59.

In his motion, Tarabochia relies in part on *State v. Zavala-Reynoso*, 127 Wn. App. 119, 110 P.3d 827 (2005). In *Zavala-Reynoso*, the appellant moved for resentencing pursuant to CrR 7.8(b)(4) and (5) on the basis that community custody of 9 to 12 months exceeds the ten year statutory maximum term of 120 months that can be imposed in a Class B felony. Division 3 found that the sentence exceeded the statutory maximum, vacated the sentence and remanded to the lower court for resentencing. *Zavala-Reynoso*, 127 Wn. App. at 124.

In the case at bar, Tarabochia adopts a similar argument, but bases his challenge, *inter alia*, on *Blakely*, as well as *Zavala-Reynoso*. Tarabochia submits that community placement should be considered imprisonment, and that the lower court violated *Blakely* when it imposed a 36 month period of community supervision following the 126 month sentence because the total—162 months—exceeds the top of the standard range of 144 months, therefore

constituting an exceptional sentence in violation of RCW 9.94A.535. Tarabochia also submits in his motion that “statutory maximum” does not apply to the maximum sentence that may be imposed—i.e. life for a Class A felony—but the maximum that may be imposed without additional findings.

Tarabochia’s argument is precipitated upon the proposition that community placement constitutes imprisonment and therefore must be included in the calculation of an offender’s standard range. Tarabochia acknowledges that this appears to be a case of first impression. He argues that the 36 month period must be included in the total period of confinement and that the total period of confinement imposed is 162 months rather than 126, exceeding the top of the standard range of 144 months by 18 months.

a. Does community placement constitute imprisonment for purposes of *Blakely* analysis?

Tarabochia argues that community placement is a part of imprisonment and that any time imposed in placement must be considered as part of the period of total confinement.

i. Community placement.

The period of time in which an offender is subject to the conditions of community custody is known as "community placement." Community placement is "that period during which the offender is subject to the

conditions of community custody and/or post release supervision, which begins either upon completion of the term of confinement (post release supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely post release supervision, or a combination of the two." RCW 9.94A.030(7). Therefore, community custody is a subset of community placement. *State v. Crandall*, 117 Wn. App. 448, 71 P.3d 701 (2003).

ii. Community Custody

"Community custody" is a portion of a sentence that is served in the community subject to controls placed on the offender's movement and activities by the Department of Corrections. RCW 9.94A.030(5). RCW 9.94A.030(5) provides:

'Community custody' means that portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to RCW 9.94A.505(2)(b), 9.94A.650 through 9.94A.670, 9.94A.690, 9.94A.700 through 9.94A.715, or 9.94A.545, served in the community subject to controls placed on the offender's movement and activities by the department.

A term of community custody begins either upon completion of the term of confinement, or when an offender is transferred to community custody in lieu of earned release. RCW 9.94A.715(1). Standard ranges

exist for the length of community custody. The ranges are dependant upon the offense. The length of community custody varies by the calculation of the offense.

RCW 9.94A.545 provides:

Except as provided in RCW 9.94A.650, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

Community custody is the “intense monitoring of an offender in the community.” *In re Crowder*, 97 Wn. App. 598, 600, 985 P.2d 944 (1999). During the period of community custody the defendant remains under the supervision of the Department of Corrections.

Community placement imposes significant restrictions on a defendant’s constitutional freedoms. *State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996). “A defendant is no less restricted when he is under community placement, particularly community custody, as when incarcerated.” *Ross*, 129 Wn.2d at 287, quoting *In re Caudle*, 71 Wn. App.

679, 683, 863 P.2d 570 (1993). See also, *State v. Hurt*, 107 Wn. App. 816, 27 P.3d 1276 (2001) (“Community placement counts as punishment. It is no less restrictive of liberty than incarceration.” *Hurt*, 107 Wn.App. at 829, (citing *Ross*, 129 Wn.2d at 286.)) The Appellant contends that community placement imposes the same restrictions as that contemplated by total confinement, and the sentence—which exceeds the maximum standard range—is an exceptional sentence, meriting remand.

E. CONCLUSION

The Appellant respectfully requests that this Court vacate the sentence and remand with instructions to have the trial court note that incarceration and community supervision may not exceed the top of the standard range of 144 months.

DATED: July 7, 2006.

Respectfully submitted,

THE TILLER LAW FIRM



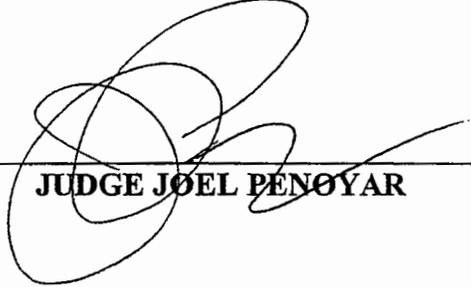
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A

B

Defendant argues that somehow the standard range in this case is equivalent to a maximum term and, proceeding from that false premise, jumps to a Blakely analysis. This logic is obviously faulty. The Defendant did not receive an exceptional sentence and he did not receive community custody exceeding the maximum term.

DATED this 11 day of July 2005.



JUDGE JOEL PENOYAR

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STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID D. TARABOCHIA,

Appellant.

COURT OF APPEALS NO.
34111-5-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to David D. Tarabochia, Appellant, and Mr. Frederick A. Johnson, Prosecuting Attorney, by first class mail, postage pre-paid on July 7, 2006, at the Centralia, Washington post office addressed as follows:

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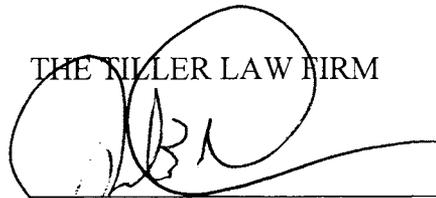
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A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over a horizontal line. The signature is stylized and includes a large loop at the end.

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