

Original

NO. 36455-7-II

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL TORRES, APPELLANT

FILED  
COURT OF APPEALS  
DIVISION II  
08 APR -1 PM 2:03  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

Appeal from the Superior Court of Pierce County  
The Honorable Vicki L. Hogan

No. 04-1-01976-3

**BRIEF OF RESPONDENT**

GERALD A. HORNE  
Prosecuting Attorney

By  
JAMES S. SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

- A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR ..... 1
  - 1. Should this court remand this case for entry of an amended judgment and sentence that sentences the appellant to community custody for three years or up to the period of earned early release, whichever is longer for all four counts?..... 1
- B. STATEMENT OF THE CASE. .... 1
- C. ARGUMENT.....2
  - 1. THIS COURT SHOULD REMAND THIS CASE FOR ENTRY OF AN AMENDED JUDGMENT AND SENTENCE CONCERNING COMMUNITY CUSTODY. ....2
- D. CONCLUSION. ....3

## Table of Authorities

### State Cases

<i>State v. Michael Torres</i> , 33141-1-II .....	1, 2
---	------

### Statutes

Former RCW 9.94A.120(10).....	2, 3
RCW 9.94A.120(1).....	3
RCW 9.94A.150(1).....	2
RCW 9.94A.150(2).....	2
RCW 9.94A.712 .....	1

### Rules and Regulations

RAP 12.2 .....	2
----------------	---

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court remand this case for entry of an amended judgment and sentence that sentences the appellant to community custody for three years or up to the period of earned early release, whichever is longer for all four counts?

(Appellant's Assignment of Error No. 1)

B. STATEMENT OF THE CASE.

The appellant was convicted of two counts of rape of a child in the first degree and two counts of child molestation in the first degree on January 21, 2005. CP50-64. He was originally sentenced to an indeterminate term of incarceration under RCW 9.94A.712 on March 18, 2005. CP 8-20. He successfully appealed that sentence under *State v. Michael Torres, 33141-1-II*. This court reversed the indeterminate term of incarceration and remanded for re-sentencing.

A re-sentencing hearing was held by the court on June 1, 2007. RP 3. At the re-sentencing hearing the court sentenced the defendant to a concurrent determinate term of incarceration of 160 months on counts one and four and 89 months on counts two and three. CP 50-64. The court also sentenced the defendant to a term of community custody for the

remainder of the defendant's life for all four counts. CP 50-64. The defendant timely filed this appeal.

C. ARGUMENT.

1. THIS COURT SHOULD REMAND THIS CASE FOR ENTRY OF AN AMENDED JUDGMENT AND SENTENCE CONCERNING COMMUNITY CUSTODY.

In light of this court's holding in *State v. Michael Torres*, 33141-1-II, the sentencing authority of the trial court concerning community custody was provided by the sentencing statute in effect at the beginning of the charging period. RAP 12.2. That statute was former RCW 9.94A.120(10) which provided as follows:

When a court sentences a person to the custody of the department of corrections for an offense categorized as a sex offense committed on or after June 6, 1996, but before July 1, 2000, the court shall, in addition to other terms of the sentence, sentence the offender to community custody for three years or up to the period of earned release awarded pursuant to *RCW 9.94A.150(1)* and *(2)*, whichever is longer. The community custody shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release in accordance with *RCW 9.94A.150 (1)* and *(2)*.

The jury convicted the defendant of four crimes. The charging period as well as the period included in the jury instructions for all four counts was the same, November 1, 1999 to June 30, 2002. This period fell in part within the community custody period from former RCW

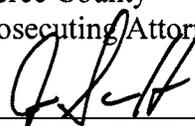
9.94A.120(10) quoted above. Since the jury could have found that the defendant committed all four crimes before July 1, 2000, rather than after the proper term of community custody was the term specified by this statute. This court should reverse the defendant's community custody sentence from section 4.13 of the judgment and sentence insofar as it sentences the defendant to community custody for the remainder of the defendant's life. This court should also direct that an amended judgment and sentence be entered with the proper term of community custody.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this case be remanded for entry of an amended judgment and sentence in accordance with former RCW 9.94A.120(1).

DATED: MARCH 31, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
JAMES S. SCHACHT  
Deputy Prosecuting Attorney  
WSB # 17298

Certificate of Service:

The undersigned certifies that on this day she delivered by (U.S. mail) or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/1/08 Johnson  
Date Signature

FILED  
COURT OF APPEALS  
DIVISION II  
08 APR -1 PM 2:03  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY