

COURT OF APPEALS
DIVISION II

NO. 37621-1-II

09 APR -9 AM 11:47

STATE OF WASHINGTON
BY SW DEPUTY

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

PM 4-8-09

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SAUNDERS,

Appellant.

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

The Honorable Rosanne Buckner

APPELLANT'S REPLY BRIEF

VANESSA M. LEE
Attorney for Appellant

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

TABLE OF CONTENTS

A. ARGUMENT 1

 1. THE TESTIMONY OF EITHER MARY ROBNETT OR
 DETECTIVE DUMAIS WAS NECESSARY TO SHOW THE
 JURY THE DISCREPANCY IN DATES 1

 2. THE SENTENCING REFORM ACT AUTHORIZES THE
 SENTENCING COURT – NOT THE DEPARTMENT OF
 CORRECTIONS – TO IMPOSE A SENTENCE, AND
 REQUIRES THAT SENTENCE NOT EXCEED THE
 STATUTORY MAXIMUM. 3

 3. THE HYBRID SENTENCE IN THIS CASE REQUIRES
 THE EXECUTIVE BRANCH TO INVADE THE
 PREROGATIVE OF THE LEGISLATIVE AND JUDICIARY
 BRANCHES 11

B. CONCLUSION 13

TABLE OF AUTHORITIES

Washington Court of Appeals

In re Personal Restraint of Dutcher, 114 Wn. App. 755, 60 P.3d 635 (2002) 12

State v. Berg, 147 Wn. App 923, 198 P.3d 529 (2008).....4

State v. Davis, 146 Wn. App. 714, 192 P.3d 29 (2008) 12

State v. Linerud, 147 Wn.App. 944, 197 P.3d 1224 (2008)3, 4, 5, 6, 8, 11, 12

Revised Code of Washington

RCW 9.94A.0305, 6

RCW 9.94A.5018

RCW 9.94A.5054, 5, 7, 10

RCW 9.94A.6608

RCW 9.94A.7157, 8, 9, 10

RCW 9.94A.7288

RCW 9.94A.7504

RCW 9.94A.7534

RCW 9.94A.8508

A. ARGUMENT

1. THE TESTIMONY OF EITHER MARY ROBNETT OR
DETECTIVE DUMAIS WAS NECESSARY TO SHOW
THE JURY THE DISCREPANCY IN DATES.

Mr. Saunders argues his attorney was ineffective for failing to call two critical witnesses due to her misinterpretations of the law, and for failing to propose a missing witness instruction when the court denied defense counsel's inadequate and ineffectual attempt to call them. Incorrectly arguing that these witnesses' testimony would have been inadmissible anyway, Respondent misses the point of the anticipated testimony.

Mary Robnett prepared a Declaration for Determination of Probable Cause stating that Mr. Saunders registered as a transient sex offender on April 13. This is consistent with Mr. Saunders's testimony that he registered on that date, but inconsistent with the testimony of Gay Lynn Wilke and Andrea Shaw, and the prosecution theory that he last registered on April 6. Ms. Robnett's Declaration was based entirely on the report prepared by Detective Dumais. Respondent is correct that "neither Dumais nor Robnett had any personal knowledge regarding whether the defendant had reported as required by statute." SRB 4. That is not the point. The point is why the record presents this discrepancy in dates. Neither

witness would have been called to testify for the matter asserted (whether or not Mr. Saunders actually registered on April 13); rather, they would testify to the fact that there was a discrepancy in dates and the source of their information.

This case, therefore, is unlike the cases cited by Respondent. SRB at 4-6. In each of those cases, the witness testimony was classic hearsay – a statement of another offered to prove the truth of the matter asserted. Here, Detective Dumais and Ms. Robnett would have authenticated the documents they prepared, so that the jury could learn of the discrepancy in dates, and asked where they obtained the information. Contrary to Respondent's assertion, their testimony would *not* have been hearsay, but admissible first-hand knowledge of the contents of the documents they themselves prepared.

The fact of the discrepancy in dates was critical to the defense theory. If presented to the jury, it could have supported Mr. Saunders's testimony that he registered on April 13, while calling into question the reliability of the records relied upon by witnesses Wilke and Shaw. Without Ms. Robnett's Declaration, the jury had no idea that there was a discrepancy in dates or that anyone besides Mr. Saunders ever stated he registered on April

13. The only way to introduce that evidence was through the testimony of Detective Dumais and Ms. Robnett.

The record does not tell us exactly what these witnesses would have said. Respondent asserts that “Dumais and Robnett reported in their respective documents what ... Wilke and Shaw [] eventually testified to.” SRB at 4. This is pure speculation. Neither Wilke or Shaw testified to giving Dumais any information or telling him that Mr. Saunders last registered on April 6.

Similarly, the court’s conclusion that the discrepancy in dates was simply a scrivener’s error, was pure speculation, which invaded the province of the jury. Counsel was ineffective in her failure to bring the evidence before the jury.

**2. THE SENTENCING REFORM ACT AUTHORIZES
THE SENTENCING COURT – NOT THE
DEPARTMENT OF CORRECTIONS – TO
IMPOSE A SENTENCE, AND REQUIRES THAT
SENTENCE NOT EXCEED THE STATUTORY
MAXIMUM**

After Appellant’s Opening Brief was filed, the Court of Appeals, Division One, decided *State v. Linerud*, 147 Wn. App. 944, 197 P.3d 1224 (2008). *Linerud* is almost identical to the instant case. As here, the defendant was convicted of failure to register as a sex offender. *Id.* at 946. As here, the court imposed

a standard-range sentence which exceeded the statutory maximum, but included a notation instructing the Department of Corrections (DOC) that he was not to serve time beyond the statutory maximum. *Id.* The Court held, unequivocally, that “a sentence is indeterminate when it puts the burden on the DOC rather than the sentencing court to ensure that the inmate does not serve more than the statutory maximum.” *Id.* at 948. Because an indeterminate sentence is invalid on its face, the sentence must be reversed. *Id.* at 950-51. The Court followed *Linerud* with *State v. Berg*, 147 Wn. App 923, 198 P.3d 529 (2008), affirming that the courts, not DOC, bear the responsibility of ensuring that the sentence does not exceed the statutory maximum.

Respondent, although discussing several pre-*Linerud* cases, fails to distinguish *Linerud* or explain why this Court should not rule in accordance with it. Although the requirements of RCW 9.94A.505(5) are at the core of the *Linerud* Court’s decision, the State argues *Linerud* reaches the wrong result without once addressing RCW 9.94.505(5). The statute plainly provides:

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4) a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community

custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

Thus, the SRA requires the imposition of determinate sentences so that there is certainty at the outset. See *Linerud*, 147 Wn. App. at 949, fn13. That is what RCW 9.94A.505(5) requires, and that is what the State's argument has failed to address.

Throughout its brief, the State conflates the sentence *imposed* with the sentence *served*. This is a crucial distinction. The sentence imposed is prospective, is determinate as defined by RCW 9.94A.030(18), and under the plain language of the SRA, may only be imposed by the sentencing court. The sentence served is known only after the fact, is effected by the inmate's behavior and eligibility for earned early release, is variable *within the confines of the determinate sentence*, and, under the plain language of the SRA, is administered by DOC. As the *Linerud* Court observed,

Whatever authority the DOC may have to grant or deny good time credits or release an inmate from community custody, the courts have a duty under RCW 9.94A.505(5) and RCW 9.94A.030(18) to *impose* a determinate sentence within the standard range.

147 Wn. App. at 950 (emphasis in the original).

Respondent misconstrues *Linerud* when it claims, “[u]nder *Linerud*, and the defendant’s reasoning, any sentence where a defendant is eligible for earned early release is ‘indeterminate’ because DOC decides how long the sentence actually is.” SRB at 11. But Mr. Saunders has never argued with the inclusion of earned early release in determinate sentences. The SRA, and the *Linerud* opinion, specifically include earned early release within the definition of “determinate sentence.”

“Determinate sentence” means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. *The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.*

RCW 9.94A.030(18) (emphasis added), quoted in *Linerud*, 147 Wn. App. at 950, fn14. Respondent acknowledges this. SRB at 11. Therefore it is not clear how Respondent arrives at such an absurd result.

The logical result is the one already found in *Linerud*. Where the total term of confinement and community custody imposed exceeds the statutory maximum, the trial court has three

options: decrease the term of confinement, decrease the community custody range, or some combination of the two. Thus, a person sentenced on a Class C felony whose standard range sentence is 43 to 57 months with a community custody range of 36 to 48 months could be sentenced to 43 months confinement with a community custody range of 12 to 17 months. The same person could receive a sentence of 30 months confinement with a community custody range of 12 to 30 months. Each of those sentences is determinate because both the term of confinement and the applicable range of community custody are stated with exactitude. Either sentence complies with RCW 9.94A.505(5).

But that is not what the trial court did here, nor is it what the State is asking. Again ignoring the distinction between imposing and administering a sentence, the State contends RCW 9.94A.715 not just permits, but actually requires a court to impose the full term of confinement, as well as the full range of community custody, in the hope DOC will not administer the sentence beyond the

statutory maximum.¹ That is not what the statute says. Instead, RCW 9.94.715(1) requires

the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. *The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program.* Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(Emphasis added); see also *Linerud*, 147 Wn.App. at 950

n17(explaining “*when [the] court sentences*” the defendant, it must choose between imposing the community custody range set forth in RCW 9.94A.850 or the period of earned early release). The statute requires the sentencing court, not DOC, to make this election at the time of sentencing. It refers to DOC only in terms of supervising the sentence, not imposing it. RCW 9.94A.715 does not permit the

¹ Without citing to any authority, the State asserts, “the Legislature does not grant the courts the authority to choose or limit the period of community custody.” SRB at 12. Presumably this assertion comes from a misreading of RCW 9.94A.715.

court to choose both options so as to impose the sort of hybrid term urged by the State.

The Legislature meant what it said when it authorized the court and not DOC to impose the sentence, required the sentencing court to impose a determinate sentence, and required the court to choose between two options for settling the term of community custody.

If the trial court wishes to maximize both the term of confinement as well as the term of community custody in a case where the defendant's standard range of confinement is approaching the statutory maximum, the court can simply choose the second option in RCW 9.94A.715(1); a term of community custody equal to the earned early release. If the court selects that option it could properly impose a term of confinement on a Class B felony of 120 months (assuming that is the top of the standard range), and any period of earned early release will be served as community custody. Assuming the person is eligible for up to 1/3 earned early release² that sentence would be determinate as the community custody could still be expressed, at the time the

² The same is true of person eligible for 1/2 or 1/6 good time, the top of the resulting community custody range is simply the term of confinement multiplied by the applicable rate of accrual for earned early release.

sentence is imposed, as a range of 0 to 40 months (1/3 the term of confinement). The sentence would comply with RCW 9.94A.505 because the combined term of the sentence imposed would not exceed the statutory maximum. Moreover, that sentence would be determinate pursuant to definition of "determinate sentence" in RCW 9.94A.030(21), as the sentencing court could state with exactitude the term of confinement and range of community custody.

Despite the State's attempts to read more into the legislative intent, SRB at 10, the Legislature's intent is in fact quite clear from the plain language of RCW 9.94A.505, either standing alone or read together with RCW 9.94A.715. The Legislature intended that the courts impose sentences which are determinate at the outset and within the statutory maximum.

Mr. Saunders does not urge the creation of a new role, but simply a literal following of the rule already proscribed by the Legislature in the form of RCW 9.94 A.505.

3. THE HYBRID SENTENCE IN THIS CASE
REQUIRES THE EXECUTIVE BRANCH TO
INVADE THE PREROGATIVE OF THE
LEGISLATIVE AND JUDICIARY BRANCHES.

As discussed in appellant's Opening Brief, sentencing is essentially a legislative function. Through the SRA, the Legislature empowers the judiciary branch to impose sentences, as set by the Legislature. Nothing in the SRA permits the executive branch, through the DOC, to impose sentences. DOC's function is to administer and enforce the sentence. The sentence imposed in this case requires DOC to step beyond its function and invade the province of the legislative branch by actually setting the sentence.

The State asserts that "determinations by DOC" do not violate the separation of powers doctrine because the court actually imposes the sentence, SRB at 13, but does not explain why the DOC's determination that a sentence has or has not exceeded the statutory maximum would not amount to imposition of a sentence, or why entrusting DOC with that power without explicit statutory authorization would not invade the prerogative of the legislative branch.

Tellingly, the State does not address the practical problems discussed in *Linerud*.

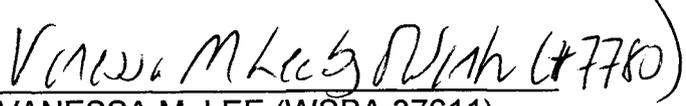
A notation written between the lines or in the margins is likely to be overlooked or get lost through repeated photocopying. There is also the danger that the DOC may ignore an offender's rights. In *In re Personal Restraint of Dutcher*, the DOC was statutorily required to evaluate the inmate's plan for community custody but ignored this obligation and instead referred the offender for a civil commitment hearing. Since *Dutcher*, we have seen several situations in which the DOC has ignored a mandate. In response to this history, "[w]e believe it is better for both the offender and the Department [of Corrections] to have the trial court impose a sentence that is clear to all from the outset."

Linerud, 147 Wn. App. at 950-51, citing *In re Personal Restraint of Dutcher*, 114 Wn. App. 755, 60 P.3d 635 (2002) and quoting *State v. Davis*, 146 Wn. App. 714, 724, 192 P.3d 29 (2008). Given the occurrence of communication problems between the courts and DOC and the DOC's failure to follow court mandates in some cases, as exemplified by the cases cited in *Linerud*, it is inevitable that some defendants will end up serving time beyond the statutory maximum. Such confinement is unacceptable, but also easily preventable, as long as the sentence is simply set within the statutory maximum at the outset..

B. CONCLUSION.

For the reasons presented above and in his Opening Brief, Mr. Saunders respectfully requests this Court reverse his conviction and sentence.

Respectfully submitted this 8th day of April 8, 2009.


VANESSA M. LEE (WSBA 37611)
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 37621-1-II
v.)	
)	
CHRISTOPHER SAUNDERS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] THOMAS ROBERTS	(X)	U.S. MAIL
PIERCE COUNTY PROSECUTING ATTORNEY	()	HAND DELIVERY
930 TACOMA AVENUE S, ROOM 946	()	_____
TACOMA, WA 98402-2171		

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF APRIL, 2009.

X _____ 

09 APR 9 11:17
STATE OF WASHINGTON
BY _____
DEPUTY
COURT OF APPEALS
DIVISION II

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711