

No. 47394-1

(consolidated with 45654-1)

COURT OF APPEALS DIVISION II
IN THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

TIMOTHY J. ROHN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE JUDGE JERRY COSTELLO

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The trial court erred by imposing a variable term of community custody.

II. ISSUE RELATING TO ASSIGNMENT OF ERROR

Did the sentencing court exceed its statutory authority under RCW 9.94A.701 by imposing a variable term of community custody contingent on the amount of earned early release time?

III. STATEMENT OF FACTS

Mr. Rohn was charged and convicted of arson in the first degree, two counts of first-degree malicious mischief, one count of felony harassment, and one count of intimidating a public servant. (CP 197-210). The court imposed the following sentence of community custody:

The defendant shall be on community custody for the longer of:

- (1) The period of early release RCW 9.94A.728(1)92) or
- (2) the period imposed by the court, as follows:
Count I – 12 months for violent offenses.
(CP 204-205).

On August 1, 2014, the court filed an order correcting the judgment and sentence, substituting 18 months for the 12-month

custody term. (CP 259-260). All other terms remained the same.

This appeal followed. (CP 261).

IV. ARGUMENT

The Resentencing Court Exceeded Its Statutory Authority When It Imposed A Variable Term Of Community Custody Contingent On The Amount Of Early Release.

Without conceding any legal arguments presented in the appellant's consolidated case, (Court of Appeals No. 45654-1) Mr. Rohn raises the following argument regarding the corrected sentence.

Whether a sentence is legally erroneous is reviewed *de novo*. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

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 statute, which authorizes the superior court to impose community custody terms, is RCW 9.94A.701(1)

(2). It provides in part:

A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

Under the SRA, a court may not sentence an offender to a variable term of community custody contingent on the amount of earned release. Rather, it must determine the precise length of community custody at the time of sentencing. *State v. Winborne*, 167 Wn.App. 320, 329-30, 273 P.3d 454 (2012); *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011).

Here, the trial court imposed the following sentence of community custody:

- (A) The defendant 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:
Count 1 – 18 months for violent offenses. (CP 259-60).

The trial did not have the statutory authority to sentence Mr. Rohn to a variable term of community custody contingent on the amount of early release time. It could only sentence him to a finite period of 18 months. RCW 9.94A.701. Thus, the variable term of community custody imposed by the trial court was improper. The remedy is remand for imposition of a finite term of community custody.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Rohn respectfully asks this Court to remand for a corrected sentence.

Respectfully submitted December 29, 2014.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on DECEMBER 29, 2014, I served by USPS, first class, postage prepaid a true and correct copy of the Brief of Appellant to:

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