

NO. 46159-5-II

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

STATE OF WASHINGTON, Respondent

v.

CHARLES TEWEE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01517-5

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

A. ANSWERS TO ASSIGNMENTS OF ERROR..... 1

 I. THE SENTENCING COURT DID NOT ERR IN FINDING THAT THE DEFENDANT WAS UNDER COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE. 1

 II. THE SENTENCING COURT DID NOT ERR IN ADDING A POINT TO DEFENDANT’S OFFENDER SCORE UNDER RCW 9.94A.525(19). 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT 1

 I. THE COURT PROPERLY ADDED A POINT TO DEFENDANT’S OFFENDER SCORE BECAUSE HE WAS UNDER COMMUNITY CUSTODY WHEN HIS CURRENT OFFENSE WAS COMMITTED..... 1

D. CONCLUSION..... 4

TABLE OF AUTHORITIES

Cases

<i>Chapin v. Rhay</i> , 59 Wn.2d 459, 367 P.2d 832 (1962)	4
<i>State v. Jones</i> , 172 Wn.2d 236, 257 P.3d 616 (2011)	1
<i>State v. Malone</i> , 9 Wn.App 122, 511 P.2d 67 (1973)	4
<i>State v. Parmelee</i> , 172 Wn.App. 899, 292 P.3d 799 (2013)	1
<i>State v. Watkins</i> , 86 Wn.App 852, 939 P.2d 1243 (1997)	4

Statutes

RCW 10.01.040	2
RCW 9.92.060	2
RCW 9.94A.030.....	2, 3
RCW 9.94A.345.....	1
RCW 9.94A.501.....	2
RCW 9.94A.5011.....	2
RCW 9.94A.525(19).....	2, 3
RCW 9.95.204	2
RCW 9.95.210	2

Other Authorities

LAWS 2009, ch 375 § 4	2
-----------------------------	---

A. **ANSWERS TO ASSIGNMENTS OF ERROR**

I. **THE SENTENCING COURT DID NOT ERR IN FINDING THAT THE DEFENDANT WAS UNDER COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE.**

II. **THE SENTENCING COURT DID NOT ERR IN ADDING A POINT TO DEFENDANT’S OFFENDER SCORE UNDER RCW 9.94A.525(19).**

B. **STATEMENT OF THE CASE**

The State adopts Appellant’s Statement of the Case. Br. of App. at 1-4.

C. **ARGUMENT**

I. **THE COURT PROPERLY ADDED A POINT TO DEFENDANT’S OFFENDER SCORE BECAUSE HE WAS UNDER COMMUNITY CUSTODY WHEN HIS CURRENT OFFENSE WAS COMMITTED.**

A sentencing court’s interpretation of the Sentencing Reform Act (SRA) is reviewed de novo. *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). Sentences under the SRA “are determined in accordance with the law in effect when” the current offense “was committed, absent clear legislative intent to the contrary.” *State v. Parmelee*, 172 Wn.App. 899, 909, 292 P.3d 799 (2013); RCW 9.94A.345 (“Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the *current* offense was committed.”) (emphasis added); RCW

10.01.040. At sentencing, “[i]f the present conviction is for an offense committed while the offender was under community custody” then the court shall add one point to the defendant’s offender score. RCW 9.94A.525(19).

Community custody is defined as “that portion of an *offender's* sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.” RCW 9.94A.030(5) (emphasis added). Since July 26, 2009, the term “offender,” for the purpose of determining whether a person is under “community custody,” includes “a misdemeanor or gross misdemeanor probationer ordered by a superior court to probation pursuant to RCW 9.92.060, 9.95.204, or 9.95.210 and supervised by the department pursuant to RCW 9.94A.501 and 9.94A.5011.” RCW 9.94A.030(34); LAWS 2009, ch 375 § 4. Accordingly, a misdemeanor or gross misdemeanor ordered by a superior court to probation and who is being supervised is considered to be under “community custody.” Moreover, if that person remains on probation at the time of committing a new offense, he or she is under “community custody” and, pursuant to RCW 9.94A.525(19), a point shall be added to his or her offender score at the time of sentencing.

Here, Charles Tewee was convicted in superior court on December 24, 2008, of two gross misdemeanor offenses of Assault in the Fourth Degree. CP 91; Supp. CP 88, 148-155, 168. Pursuant to those convictions, Mr. Tewee was placed on probation for 48 months and supervised by the Department of Corrections. *Id.* Mr. Tewee committed his current offense of Child Molestation in the First Degree between January 1, 2010, and February 28, 2010, while he was still on probation for the Assault in the Fourth Degree convictions. CP 3-4, 75-86.

The law in effect when Mr. Tewee committed his current offense dictates that he was under “community custody” at that time based on his status as a gross misdemeanant ordered to probation by a superior court and supervised by the Department of Corrections and results in an extra point added to his offender score. RCW 9.94A.030(34); RCW 9.94A.525(19). Consequently, the trial court correctly added a point to Mr. Tewee’s offender score and properly calculated Mr. Tewee’s offender score at ten.

That the definition of “offender” changed from the time Mr. Tewee was originally sentenced on his Assault in the Fourth Degree convictions to the time he was sentenced for his current offense of Child Molestation in the First Degree is of no matter under Washington’s well-settled ex post facto law. *See State v. Watkins*, 86 Wn.App 852, 855-56, 939 P.2d 1243

(1997); *State v. Malone*, 9 Wn.App 122, 131-32, 511 P.2d 67 (1973);
Chapin v. Rhay, 59 Wn.2d 459, 463, 367 P.2d 832 (1962) (“A law which
fixes the punishment for a second offense is not ex post facto; therefore, it
is not violative of Art. 1, § 23.”). Notably, and appropriately, Mr. Tewee
does not advance an ex post facto clause argument on appeal and all but
conceded the issue at the last sentencing hearing in front of the trial court.¹

D. **CONCLUSION**

For the reasons argued above, Mr. Tewee’s sentence should be
affirmed.

DATED this 12th day of February, 2015.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

¹ “Mr. Sowder: In my memo, I really didn’t say much about ex post facto. I sort of threw
it in at the end. . . . It’s probably – I won’t concede the point, but it’s probably a stretch to
call this ex post facto because . . . it’s – it doesn’t quite – it doesn’t quite apply to [sic]
sentencing enhancement . . .”. 2RP 12-13.

CLARK COUNTY PROSECUTOR

February 12, 2015 - 4:06 PM

Transmittal Letter

Document Uploaded: 5-461595-Respondent's Brief.pdf

Case Name: State v. Charles Tewee

Court of Appeals Case Number: 46159-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: abby.rowland@clark.wa.gov

A copy of this document has been emailed to the following addresses:

cathyglinski@wavecable.com