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Division II
State of Washington
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No. 51650-1-II

IN THE COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

GREGORY CHAPMAN, Appellant

APPEAL FROM THE SUPERIOR COURT

OF THURSTON COUNTY

THE HONORABLE JUDGE ERIK D. PRICE

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The Trial Court Erred When It Denied Mr. Chapman's Motion to Vacate And Resentence When It Did Not Believe It Had Discretion To Impose A Sentence With A Fixed Term Of Community Custody.

Issue Related To Assignment of Error

In 2001 the Washington Administrative Code allowed a sentencing court to impose a range for the community custody portion of a sentence. With the 2009 change in sentencing laws trial courts faced previously sentenced defendants seeking a determined community custody time rather than a range. Is it within the trial court's discretion to resentence with a fixed term of community custody?

II. STATEMENT OF FACTS

In 2001 Gregory Chapman was charged and convicted of crimes in Thurston County. The judgment and sentence listed the standard ranges and enhancements. CP 42.

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUS -NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	11	IV	63-84 months	12 months D	75-96 months	10 Years
II	11	IV	63-84 months	36 months F	99-120 months	10 Years
III	11	X	149-198 months	60 months F	209-258 months	Life
IV	11	V	72-96 months		72-96 months	10 Years
V	9	III	51-60 months		51-60 months	5 Years

The court imposed a 306-month term of incarceration, which included 108 months of time for weapon enhancements. CP 45.

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT**. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

(84+12) 96 months on Count I — 96 months on Count IV

(84)+36) 120 months on Count II — 60 months on Count V

(198+60) 258 months on Count III — ____ months on Count ____

Actual number of months of total confinement ordered is: 306 MONTHS

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The court also imposed community custody within a range of months, or for the period of earned released awarded, whichever was longer. CP 45.

4.6 [ ] **COMMUNITY PLACEMENT** is ordered as follows: Count ____ for ____ months; Count ____ for ____ months; Count ____ for ____ months;

[X] **COMMUNITY CUSTODY** is ordered as follows:

Count I for a range from 18 to 36 months;

Count II for a range from 18 to 36 months;

Count III for a range from 24 to 48 months; Ct IV 18-36 months

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

In July 2008, the trial court amended the judgment to delete the conviction for Count IV, extortion in the first degree. CP 1. The total sentence of 306 months with the variable community custody remained as in the original. CP 1.

In 2016, Mr. Chapman filed a CrR 7.8 motion to vacate his sentence and a memorandum in support. CP 4-6, 50-60. The argument presented pointed out to the court that the community custody imposed by the court coupled with the term of incarceration exceeded the statutory maximums for the crimes. CP 5, 50-60.

Both Mr. Chapman and the State agreed the judgment must be amended to contain language that prohibited the sentence from exceeding the statutory maximum. CP 5, 7-8. The State's position was that the court could only amend the judgment and sentence with a *Brooks* notation: the trial court had no discretion to vacate the judgment and sentence and impose a fixed term of community custody to comply with the limitation against exceeding the statutory maximum. CP 8-9.

Mr. Chapman's position was that the trial court had the authority to amend the judgment and sentence with a *Brooks* notation <u>and</u> had discretion to vacate the judgment and sentence and impose a fixed term for community custody. CP 5.

The court concluded the appropriate remedy for the errors should be determined under LAWS of 2009, ch. 375. CP 37. The trial court denied Mr. Chapman's motion to vacate the sentence and instead, amended the judgment and sentence with a *Brooks* notation. Specifically, for Count 1, assault in the second degree while armed with a deadly weapon and Count 2, assault in the second degree while armed with a firearm, the trial court noted the DOC "shall adjust the end date for the periods of community custody to be served by the defendant for each of those counts to conform with the statutory maximum punishment of 120 months (ten years), depending on the amount of confinement defendant has actually served at the point he is released from confinement." CP 36. Mr. Chapman filed a timely notice of appeal. CP 35-38.

III. ARGUMENT

A. The Trial Court May Exercise Its Discretion, Vacate Chapman's Sentence, And Impose A Fixed Term Of Community Custody.

The appellate Court reviews a trial court's ruling on a motion to vacate a sentence for an abuse of discretion. *State v. Zavala-Reynoso,* 127 Wn. App. 119, 122, 110 P.3d 827 (2005). A trial court's decision will be reversed if it was manifestly unreasonable or based on untenable grounds or reasons. *State v. Powell,* 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court's decision "is based on untenable reasons if it is based on an

incorrect standard of the facts do not meet the requirements of the correct standard. A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *In re Marriage of Littlefield,* 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Failure to exercise discretion is itself an abuse of discretion. *State v. Pettitt,* 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).

In general, a sentence imposed under the Sentencing Reform Act (SRA) is "determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. In 2001, when Mr. Chapman was originally sentenced, WAC 437-20-010 provided community custody to be imposed within a range of 18 to 36 months for a violent offense. When the court imposed the period of incarceration for counts 1 and 2, 96 months and 120 months respectively, the additional time (18-36 months) for community custody exceeded the statutory maximum for the Class B offenses.

"A court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." Former RCW 9.94A.120(13) (1998). In response to the problem of sentencing that imposed a term of confinement and a variable

community custody that potentially exceeded the statutory maximum the Courts devised different remedies.

The remedy applied by Division 3 vacated the sentence and remanded for resentencing. *See Zavala-Reynoso,* 127 Wn.App.at 124. In *Zavala-Reynoso* the court added together the term of confinement (114 months) and the term of community custody (9-12 months) and concluded the variable term of community custody or for the period of earned early release, whichever was longer. *Id.* at 122. The sentence, on its face, exceeded the statutory maximum. The Court remanded for resentencing. *Id.*

The remedy applied by Division One in *State v. Sloan,* 121 Wn. App. 220, 87 P.3d 1214 (2004) directed the trial court to clarify the sentence on remand and set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum. *Id.* at 223-224.

In *State v. Hibdon,* 140 Wn. App. 534, 166 P.3d 826 (2007), the Court echoed the remedies in *Sloan* and *Zavala-Reynoso*, holding a remand for resentencing was as much of an option as remand for a clarification. *Id.* at 538.

In 2009, the Court developed the *Brooks* notation to deal with the problem of the combined term of incarceration and community potentially

exceeding the statutory maximum for a crime. *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 675, 668, 211 P.3d 1023 (2009). The *Brooks* Court found that former RCW 9.94A.715(1) required the sentencing court to impose a determinate sentence that did not exceed the statutory maximum, but the variable of community custody, which included the period of earned early release, (whichever was longer) made it impossible to determine at the time of sentencing, with any certainty, how much community custody the defendant would have to serve,. *Id.* at 671-72. It found former RCW 9.94A.715(4) gave the DOC the discretion to later specify the end date of that term. *Id.* at 671-72.

The Court reasoned that a sentence which could exceed the statutory maximum was acceptable because DOC "is required by the SRA to release the offender on or before the date the offender will have served the statutory maximum" and the sentence "specifically directs the DOC to ensure that whatever release date it sets, under no circumstances may the offender serve more than the statutory maximum." *Id.* at 672-73.

That same year, the State legislature repealed the statute which provided for the variable term of community custody. RCW 9.94A.715. LAWS of 2009, ch. 375 § 5 (Engrossed Substitute S.B. 5288). The new law, RCW 9.94A.701(1)-(3) required sentencing courts to impose fixed terms of community custody, depending on the type of offense. It

required the sentencing court to determine the precise length at the time of sentencing. The legislature also added a new provision requiring the trial court to reduce the term of community custody whenever the offender's standard range of confinement, combined with the term of community custody exceeded the statutory maximum for the crime. RCW 9.94A.701(8)[1].

In 2011, the Supreme Court of Washington considered whether the new law applied retroactively to individuals like Mr. Chapman. *State v. Franklin,* 172 Wn.2d 831, 263 P.3d 585 (2011).

The statute itself provides:

> This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

RCW 9.94A.701(9).

The Court concluded the 2009 amendments applied retroactively. *Franklin,* 172 Wn.2d at 839. But the Court found that the trial court did not have to set a fixed term of community custody or to bring the previously imposed sentence into alignment with the new law that by its terms was retroactive. *Id.* at 840. Rather, the Court held the retroactivity

[1] The subsection was later renumbered as (9) by LAWS of 2010, ch. 224, § 5.

portion of the statute simply required DOC to bring pre-amendment sentences into compliance with the amendments. *Id.* at 840-41.

The Court held RCW 9.94A.701(9) authorized DOC to recalculate the terms of community custody under the fixed terms established in RCW 9.94A.701(1)-(3) for those who were sentenced before the 2009 statutory changes. *Id.* at 841. Under *Franklin,* Mr. Chapman is not *entitled* to a resentencing to bring his sentence into conformity with the statutory maximum. The opinion does not address discretion to resentence.

The term of community custody imposed by the court here was 18-36 months. The court made no reduction in the term and the *Brooks* notation added to his sentence does not operate as a reduction. In *State v. Winborne,* 167 Wn.2d 320, 273 P.3d 454 (2012), the Court noted "The legislative mandates that a *Brooks* notation was found to satisfy in *Brooks* dealt with the ultimate sentence; they were not explicit as to its confinement and community custody components." *Id.* at 329.

Winborne reasoned that after the 2009 amendments an attempt to use a prophylactic *Brooks* notation "had no other objective but to prevent the reduction of community custody called for by the statute and preserve a substitution of community custody for earned release time that was eliminated by the 2009 repeal of former RCW 9.94A.715 and amendment of RCW 9.94A.701(1)-(3). It transforms the term of community custody

into a variable term, contrary to the clear intent of the 2009 changes." *Winborne,* 167 Wn.2d at 329.

Under *Zavala-Reynoso* and *Hibdon* the trial court has the discretion to vacate and resentence Mr. Chapman. Exercising its discretion allows the court to avoid the trap of the *Brooks* notation changed in 2009. Mr. Chapman respectfully asks this Court to remand with instructions to the trial court to exercise its discretion and impose a fixed term of community custody.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Chapman respectfully asks this Court to remand with instructions for the trial court to exercise its discretion to impose a fixed term of community custody.

Respectfully submitted this 13th day of November 2018.

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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 November 13, 2018, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Thurston County Prosecuting Attorney at paoappeals@co.thurston.wa.us and to Gregory Chapman/DOC#929253, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

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