FILED
Court of Appeals
Division II
State of Washington
1/8/2019 2:33 PM

No. 51650-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GREGORY CHAPMAN
Appellant.

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

The Honorable Erik Price, Judge
Cause No. 01-1-01443-2

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

1. The trial court did not abuse its discretion when it appropriately added a *Brooks* notation to Mr. Chapman's Judgment and Sentence 1

D. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Brooks,
166 Wn.2d 664, 211 P.3d 1023 (2009) 2, 3, 4, 6, 7

State v. Franklin,
172 Wn.2d 831, 839, 263 P.3d 585 (2011) 3, 4, 5, 7

In re Pers. Restraint of McWilliams,
182 Wn.2d 213, 340 P.3d 223 (2014) 5, 6

Decisions Of The Court Of Appeals

State v. Hibdon,
140 Wn.App. 534, 538, 166 P.3d 826 (2007) 3, 7

State v. Torngren,
147 Wn.App. 556, 196 P.3d 742 (2008) 3

State v. Winborne,
167 Wn.App. 320, 273 P.3d 454 (2012) 6

State v. Zavala-Reynoso,
127 Wn.App. 119, 121, 110 P.3d 827 (2005) 3, 7

Statutes and Rules

RCW 9.94A.701(9) 4, 6

RCW 9.94A.715(1) 1, 2

RCW 9.94A.715(1)(2001) 2

RCW 9.94A.728(1) 1

RCW 9.94A.728 (2) 1

Constitutional Authorities

Laws of 2009, ch. 375, § 5 4

Laws of 2009, ch. 375, § 9 ..... 4, 7

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly amended Chapman's judgment and sentence adding a notation that the combined period of incarceration and community custody shall not exceed the statutory maximum where case law and legislative action indicate that it is the responsibility of the Department of Corrections, not the trial court to reset the end date of community custody.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of facts with additional facts as included in the argument below.

C. ARGUMENT.

1. The trial court did not abuse its discretion when it appropriately added a *Brooks* notation to Mr. Chapman's Judgment and Sentence.

As of September 6, 2001, when Mr. Chapman's crimes were committed, former RCW 9.94A.715(1) provided for the imposition of community custody for a violent offense such as assault in the second degree. Community custody was to be ordered for the particular community custody range authorized by the Sentencing Guidelines Commission for that type of crime, and the actual period of community custody served would be for whatever time period within that range chosen by the Washington State Department of Corrections (DOC) or for whatever period of earned release ultimately awarded by DOC pursuant to RCW 9.94A.728(1) and (2),

depending on which time period turned out to be longer. Former RCW 9.94A.715(1)(2001).

Under former RCW 9.94A.715(1), such community custody was to begin upon completion of the term of confinement ordered by the court, or at such time as the defendant was transferred to community custody in lieu of earned early release. The sentencing scheme that applied to Chapman's sentence was discussed in In re Pers. Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009).

Similar to Chapman, Brooks had been sentenced to 120 months in prison for the violent offense of attempted robbery in the first degree, to be followed by a community custody range of 18 to 36 months or the period of earned early release, whichever was longer. Brooks, 166 Wn.2d at 666. Brooks filed a motion for collateral relief arguing and the trial court amended his judgment and sentence clarifying that the period of confinement and community custody together could not exceed the statutory maximum sentence. Brooks then sought review with essentially the same argument that Chapman now makes, asking for a resentencing instead of an amendment to the judgment and sentence with what is now commonly referred to as a *Brooks*

notation. Brooks, 166 Wn.2d at 667-668; State v. Franklin, 172 Wn.2d 831, 839, 263 P.3d 585 (2011).

In reviewing the issue, the State Supreme Court noted that the Court of Appeals had adopted conflicting positions as to whether a resentencing hearing or an amendment to the existing judgment and sentence was the appropriate remedy to the problem. Brooks, 166 Wn.2d at 669-671. The Supreme Court specifically addressed the Division III decisions of State v. Zavala-Reynoso, 127 Wn.App. 119, 121, 110 P.3d 827 (2005)(remanded the matter for resentencing); State v. Torngren, 147 Wn.App. 556, 196 P.3d 742 (2008)(an amended sentence is an appropriate remedy for this issue); and State v. Hibdon, 140 Wn.App. 534, 538, 166 P.3d 826 (2007)(holding that in addition to remand for clarification another option in these circumstances is to remand for resentencing). Brooks, 166 Wn.2d at 671.

In resolving the conflict, the Supreme Court found that "It is the SRA itself that gave courts the power to impose sentences and the DOC the responsibility to set the amount of community custody to be served within that sentence." Id. at 674. The Supreme Court then concluded "the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the

combination of confinement and community custody shall not exceed the statutory maximum." Id. at 675.

In State v. Franklin, the Supreme Court considered whether amendments to the Sentencing Reform Act (SRA) pursuant to Laws of 2009, ch. 375, § 5, codified as RCW 9.94A.701(9), changed the analysis in Brooks. Franklin, 172 Wn.2d at 836-838. Franklin argued that the language added to RCW 9.94A.701(9) "must be read as requiring a trial court to reopen sentencing proceedings and retroactively reduce a previously imposed term of community custody." Id. at 840. The Supreme Court rejected that approach finding that the amendments address the manner in which retroactivity operates for defendants who were sentenced before the amendments took effect, noting, "the legislature charged DOC- not the sentencing court- with bringing preamendment sentences into compliance with the amendments." Id. at 840-841, *citing*, Laws of 2009, ch. 375, § 9.

The Supreme Court noted that "Franklin's total sentence is still subject to the *Brooks* notation in his original sentence," before summarizing,

> "for individuals sentenced before the effective date of ESSB 5288, the responsibility lies with DOC—not the sentencing court—to bring preamendment terms of

> community custody into compliance with the new sentencing requirements by adjusting the end date for community custody. Consequently, Franklin is not entitled to resentencing."

Franklin, 172 Wn.2d at 842. Therefore, even following the 2009 legislative amendments to the SRA, the appropriate remedy for insuring that the combined term of community custody and incarceration do not exceed the maximum sentence for an offender in Chapman's situation is to amend the original judgment and sentence with a *Brooks* notation.

The trial court specifically referred to the Franklin decision when it decided that it did not have discretion to grant a resentence under the circumstances. 3 RP 41-42.[1] The trial court stated "I can't read *Franklin* to give me authority to resentence, not under these circumstances." 3 RP 42. The notion that a *Brooks* notation is the sole appropriate remedy when a sentence falls outside of RCW 9.94A.701(9) was reiterated in In re Pers. Restraint of McWilliams, 182 Wn.2d 213, 340 P.3d 223 (2014).

In that case, the Supreme Court considered whether a *Brooks* notation was the appropriate remedy when the combined

---

1 The Verbatim Report of Proceedings for this appeal appears in three volumes. Though not cited to in this brief, the State has assigned 1 RP to the report of proceedings from 07/18/2005 and 2 RP to the report of proceedings from 11/29/17. The portion relevant, and cited in this brief, from the hearing January 10, 2018, will be referenced herein as 3 RP.

periods of community custody and incarceration exceeded the statutory maximum sentence with an exceptional sentence imposed. Id. at 215. Finding that RCW 9.94A.701(9) applies only to a sentence within the standard range, the Supreme Court held that a *Brooks* notation was the appropriate remedy stating,

> "We hold that an explicit notation in the judgment and sentence is still the appropriate remedy in the case of an exceptional sentence, and we remand to the trial court to amend the sentence to include this notation."

McWilliams, 182 Wn.2d at 218. The rational is equally applicable to preamendment sentences such as Chapman's. The dissenting opinion in McWilliams highlighted the majority approach that the sole remedy was a *Brooks* notation, stating, "I disagree that this relief is limited to remand for the addition of a *Brooks* notation." Id. at 219. *Gordon McCloud (dissenting).*

Chapman cites to State v. Winborne, 167 Wn.App. 320, 273 P.3d 454 (2012) as support for his contention that the trial court erred in finding that it did not have discretion to resentence him. In Winborne, Division III of this Court discussed the Brooks decision and the 2009 legislative amendments and specifically noted that "Mr. Winborne was sentenced for his crimes a year and a half after *Brooks* and the effective date of the 2009 amendments." Id. at 326.

Further, Chapman's request that this Court rely on State v. Zavala-Reynoso and State v. Hibdon is misplaced. The Supreme Court specifically considered those approaches in Brooks and concluded that the notation was the appropriate remedy.

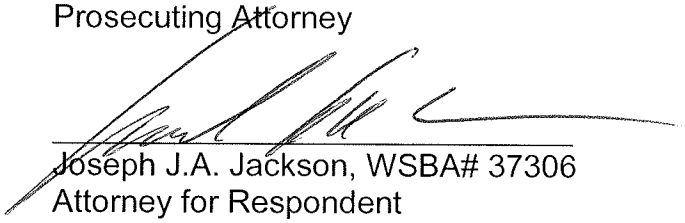
The trial court correctly concluded that the only appropriate remedy available to Chapman's pre-amendment sentence was the addition of a *Brooks* notation. There was no error in that decision. Pursuant to Brooks, Franklin and Laws of 2009, ch. 375 § 9, the *Brooks* notation adopted by the trial court was the only appropriate remedy and DOC has the responsibility of recalculating the term of community custody.

D. CONCLUSION.

The trial court correctly concluded that an amendment to the original judgment and sentence with a *Brooks* notation was the appropriate remedy to ensure that the combined period of incarceration and community custody in Chapman's sentence does not exceed the statutory maximum sentence. There was no abuse of discretion in the trial court. Chapman is simply not entitled to a resentencing.

Respectfully submitted this 8 day of January, 2019.

JON TUNHEIM
Prosecuting Attorney



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

ELECTRONICALLY FILED AT DIVISION II

TO: DEREK M. BYRNE, CLERK
COURT OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA WA 98402-6045

VIA E- MAIL

TO: MARIE JEAN TROMBLEY
ATTORNEY AT LAW
P O BOX 829
GRAHAM WA 98338-0829

marietrombley@comcast.net

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of January, 2019, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

January 08, 2019 - 2:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51650-1
Appellate Court Case Title:	State of Washington, Respondent v. Gregory W. Chapman, Appellant
Superior Court Case Number:	01-1-01443-2

The following documents have been uploaded:

- 516501_Briefs_20190108143232D2774823_4436.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was CHAPMAN BRIEF OF RESPONDENT.pdf

A copy of the uploaded files will be sent to:

- jacksoj@co.thurston.wa.us
- marietrombley@comcast.net
- powersj@co.thurston.wa.us
- valerie.marietrombley@gmail.com

Comments:

Sender Name: Cynthia Wright - Email: wrightc@co.thurston.wa.us
Filing on Behalf of: Joseph James Anthony Jackson - Email: jacksoj@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:
2000 Lakedrige Dr SW
Olympia, WA, 98502
Phone: (360) 786-5540

Note: The Filing Id is 20190108143232D2774823