

**FILED**

JAN 02, 2014

Court of Appeals  
Division III  
State of Washington

No. 31705-6-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

EDUARDO FELIX,

Defendant/Appellant.

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Appellant's Brief

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A. ASSIGNMENT OF ERROR

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

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the sentencing court not have the statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701?

C. STATEMENT OF THE CASE

Mr. Felix was charged and convicted by a jury of first degree attempted robbery and unlawful possession of a firearm. CP 17-19.

The 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: . . .18 months . . .

CP 10, ¶4.6.

This appeal followed. CP 2.

D. ARGUMENT

The sentencing court did not have the statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293

(1980). The statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

(2) 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.

RCW 9.94A.701(2).

“Under [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing.” *State v. Franklin*, 172 Wn.2d 831, 836, 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: . . .

18 months . . .

CP 10, ¶4.6.

The trial court did not have the statutory authority to sentence Mr. Felix to a variable term of community custody contingent on the amount

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of earned release. Under RCW 9.94A.701 it could only sentence him to a finite term of 18 months. Therefore, the variable term of community custody imposed by the trial court was improper.

E. CONCLUSION

For the reasons stated the matter should be remanded to impose a finite term of community custody.

Respectfully submitted January 2, 2014,

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on January 2, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

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