

No. 32806-6-III  
*Consolidated with No. 32903-8-III*

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

**FILED**  
**Jan 21, 2015**  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DUKE COOMBES,

Appellant.

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

The Honorable Judge Annette S. Plese

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

Michael Duke Coombes was found guilty by a jury of one count of first degree murder and one count of tampering with a witness, alleged to have occurred in 2007. On appeal, this Court reversed Mr. Coombes' tampering with a witness conviction based upon an erroneous jury instruction. On remand to the trial court, Mr. Coombes was resentenced on the first degree murder count only. Mr. Coombes now appeals from this resentencing. He challenges his community custody term, a community custody condition prohibiting contact with gang members or their associates, and an error in his judgment and sentence.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred in imposing a 36 month term of community custody.
2. The trial court erred by imposing a community custody condition prohibiting Mr. Coombes from having any association or contact with gang members or their associates.
3. The judgment and sentence contains an omission that should be corrected: it does not indicate that Mr. Coombes used a firearm in the commission of the offense, as found by the jury.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: The trial court violated the constitutional prohibition against ex post facto laws by imposing a 36 month term of community custody.

Issue 2: The trial court erred by imposing a community custody condition prohibiting Mr. Coombes from having any association or contact with gang members or their associates.

Issue 3: The judgment and sentence contains an omission that should be corrected: it does not indicate that Mr. Coombes used a firearm in the commission of the offense, as found by the jury.

### **D. STATEMENT OF THE CASE**

The State charged Michael Duke Coombes with one count of first degree murder, alleged to have occurred “on or about between [sic] August 30, 2007, and September 02, 2007,” and one count of first degree unlawful possession of a firearm, alleged to have occurred “on or about September 04, 2007[.]” (CP 1-2). In June 2008, Mr. Coombes pleaded guilty to both charges. (CP 11-56).

In 2011, this Court granted Mr. Coombes’ personal restraint petition and remanded the case to the trial court to allow him to withdraw his guilty plea to the first degree murder charge, because Mr. Coombes was not informed of a direct consequence of his guilty plea. (CP 57-64). Mr. Coombes then withdrew his guilty plea to the first degree murder charge and the case was set for a jury trial. (CP 65-66).

The State sought to admit some gang evidence at trial for purposes of an additional charge of intimidating a witness. (RP<sup>1</sup> (Dec. 12, 2011) 69-74). Some gang evidence came in during trial. (RP (Dec. 14, 2011) 420; RP (Dec. 15, 2011) 586, 604).

Following a jury trial, Mr. Coombes was convicted of first degree murder and an additional charge of tampering with a witness, and he was acquitted of the intimidating a witness charge. (CP 68-80; RP (Dec. 16, 2011) 757). The jury also found Mr. Coombes used a firearm in the commission of the first degree murder. (CP 69, 72; RP (Dec. 16, 2011) 758). On appeal, this Court affirmed the first degree murder conviction, and reversed and remanded the tampering with a witness conviction based upon an erroneous jury instruction. (CP 81-98).

On remand to the trial court, Mr. Coombes was resentenced on the first degree murder charge, using an offender score of one less point than the previous sentence. (CP 68-80, 104-116; RP 4-10).

The trial court imposed a 36 month term of community custody. (CP 109; RP 9). The trial court also imposed the following community custody condition, among others: “[t]hat the defendant not be allowed to

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<sup>1</sup> The Report of Proceedings in this appeal consists of a single 12-page volume dated August 21, 2014. References to “RP” herein refer to this volume. References to “RP” including the date refer to the trial transcripts from Mr. Coombes jury trial, transcribed for his direct appeal (COA No. 30550-3-III) following trial. On November 25, 2014, this Court granted Mr. Coombes’ motion to transfer these transcripts to this appeal.

have any association or contact with . . . gang members or their associates.” (CP 110; RP 9-10). The judgment and sentence does not indicate that Mr. Coombes used a firearm in the commission of the offense. (CP 105).

Mr. Coombes timely appealed from his resentencing. (CP 117-131).

### **E. ARGUMENT**

#### **Issue 1: The trial court violated the constitutional prohibition against ex post facto laws by imposing a 36 month term of community custody.**

Mr. Coombes was sentenced to a 36 month term of community custody. (CP 109; RP 9). He challenges this term of community custody for the first time on appeal. (CP 109; RP 9). “[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citations omitted). An alleged violation of the prohibitions on ex post facto laws is a question of law, reviewed de novo. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). Mr. Coombes bears the burden of proving that the applying the statutory provision imposing a 36 month term of community custody on him is unconstitutional beyond a reasonable doubt. *See State v. Enquist*, 163 Wn. App. 41, 45, 256 P.3d 1277 (2011), *review denied*, 173 Wn.3d 1008 (2012).

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. Mr. Coombes offense was committed between August 30, 2007 and September 2, 2007. (CP 1-2, 104, 108). At that time, the SRA imposed a discretionary range of community custody of 24 to 48 months for his offense. *See* former RCW 9.94A.505(2)(a)(iii) (2007); former RCW 9.94A.715(1) (2007); former RCW 9.94A.850(5) (2007); former WAC 437-20-010 (2007); RCW 9.94A.030(41)(a)(i) (2007).

In 2009, the legislature amended the applicable community custody provision of the SRA. Laws of 2009, ch. 375, § 5. The amended statute imposed a mandatory 36 month term of community custody for Mr. Coombes’ offense. *See* RCW 9.94A.701(1)(b). The legislature expressly stated that this statute applies retroactively:

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

Laws of 2009, ch. 375, § 20.

The legislature may explicitly provide for retroactive application of a statute. *In re Pers. Restraint of Flint*, 174 Wn.2d 539, 546, 277 P.3d 657 (2012). However, the United States and Washington Constitutions both

prohibit ex post facto laws. U.S. Const. art. I, § 10; Wash. Const. art. I, § 23. ““A law that imposes punishment for an act that was not punishable when committed or increases the quantum of punishment violates the ex post facto prohibition.”” *Flint*, 174 Wn.2d at 545 (quoting *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004)).

Accordingly, a defendant is properly subject to the punishment in effect at the time he committed the crime and the State cannot increase the amount of punishment thereafter. *Pillatos*, 159 Wn.2d at 475.

In order to bring a successful ex post facto claim, Mr. Coombes must show that the law (1) is operating retroactively and (2) increases the level of punishment from the level he was subject to on the date of the crime. *See Flint*, 174 Wn.2d at 545.

Both prongs of this test are met here. First, the statute expressly states that it applies retroactively. *See* Laws of 2009, ch. 375, § 20. Also, because the legislature amended the statute after Mr. Coombes committed the offense, the statute applied retroactively to him.

Second, the SRA increased the level of punishment applicable to Mr. Coombes, from a discretionary range of 24 to 48 months of community custody, to a mandatory term of 36 months of community custody. *See* former RCW 9.94A.505(2)(a)(iii) (2007); former RCW 9.94A.715(1) (2007); former RCW 9.94A.850(5) (2007); former WAC

437-20-010 (2007); RCW 9.94A.030(41)(a)(i) (2007); RCW 9.94A.701(1)(b). The applicable level of punishment increases when a statute makes a formerly discretionary punishment mandatory. *Lindsey v. Washington*, 301 U.S. 397, 401-02, 57 S. Ct. 797, 81 L. Ed. 2d 1182 (1937); *see also Flint*, 174 Wn.2d at 550-51.

The 36 month term of community custody imposed on Mr. Coombes is barred by the constitutional prohibitions against ex post facto laws. *See Lindsey*, 301 U.S. at 401-02; *Flint*, 174 Wn.2d at 545, 550-52. The 36 month term of community custody should be stricken, and the case remanded for imposition of a 24 to 48 month community custody term.

**Issue 2: The trial court erred by imposing a community custody condition prohibiting Mr. Coombes from having any association or contact with gang members or their associates.**

The trial court imposed the following community custody condition, among others: “[t]hat the defendant not be allowed to have any association or contact with . . . gang members or their associates.” (CP 110; RP 9-10). Although Mr. Coombes did not object to the imposition of this condition, a defendant may object to community custody conditions for the first time on appeal. *See State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*,

160 Wn.2d 106, 110, 156 P.3d 201 (2007). A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). As recognized above, a sentence imposed under SRA “shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345.

Under former RCW 9.94A.700(5), a permissible community custody condition is “[t]he offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals.” Former RCW 9.94A.700(5)(b) (2007); *see also* former RCW 9.94A.715(2)(a) (2007) (stating that community custody conditions may include those listed in RCW 9.94A.700(5)).

In *State v. Riles*, the defendant, convicted of first degree rape of a 19-year-old woman, challenged a sentencing condition prohibiting him from having contact with minor children. *State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). The court struck the sentencing condition, reasoning that the condition was not related to his crime. *Id.* at 350. The court stated that while the applicable statutory provision, former RCW 9.94A.120(9)(c)(ii), “gives courts authority to order offenders to have no contact with victims or a ‘specified class of individuals[,]’” the term “ ‘specified class of individuals’ seems in context

to require some relationship to the crime.” *Id.* The court further reasoned “the defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order[,]” and here, “there has been no showing that children are at risk and thus require special protection from him.” *Id.*; *see also State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (stating that “[c]onditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order.”); *State v. Bobenhouse*, 143 Wn. App. 315, 332, 177 P.3d 209 (2008) (stating that “[a]n offender's usual freedom of association may be restricted if the restriction is reasonably necessary to accomplish the needs of the State and public order.”).

The applicable statute in *Riles*, former RCW 9.94A.120(9)(c)(ii), mirrors the applicable statute here, former RCW 9.94A.700(5)(b), “[t]he offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals.” Former RCW 9.94A.700(5)(b) (2007); *Riles*, 135 Wn.2d at 350. Thus, the term “specified class of individuals” at issue here requires some relationship to the crime itself. *See* former RCW 9.94A.700(5)(b) (2007); *Riles*, 135 Wn.2d at 350.

The trial court lacked statutory authority to prohibit Mr. Coombes from having any association or contact with gang members or their

associates, because the condition has no relationship to the crime of first degree murder. (CP 110; RP 9-10); former RCW 9.94A.700(5)(b) (2007); *Riles*, 135 Wn.2d at 349-50. There is no showing that Mr. Coombes' first degree murder offense involved gang activity. *Cf. Warren*, 165 Wn.2d at 31-35 (upholding a sentencing condition prohibiting the defendant from having contact with his wife, who was not a direct victim of the crime, because protecting his wife was reasonably related to the crime).

Although the State admitted some gang evidence during trial for purposes of the intimidating a witness charge, Mr. Coombes was acquitted of this charge. (RP (Dec. 12, 2011) 69-74; RP (Dec. 14, 2011) 420; RP (Dec. 15, 2011) 586, 604; RP (Dec. 16, 2011) 757).

In addition, because the first degree murder was not gang-related, there is no showing that restricting Mr. Coombes' freedom of association in this manner "is reasonably necessary to accomplish the essential needs of the state and the public order." *Riles*, 135 Wn.2d at 350; *see also Warren*, 165 Wn.2d at 32; *Bobenhouse*, 143 Wn. App. at 332.

The trial court lacked statutory authority to impose a community custody condition prohibiting Mr. Coombes from having any association or contact with gang members or their associates, and this condition interferes with Mr. Coombes' fundamental right of association. Former RCW 9.94A.700(5)(b) (2007); *Riles*, 135 Wn.2d at 350; *Warren*, 165

Wn.2d at 32; *Bobenhouse*, 143 Wn. App. at 332. Accordingly, this court should remand this case with an order that the trial court strike the community custody condition “[t]hat the defendant not be allowed to have any association or contact with . . . gang members or their associates.” (CP 110); see *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition).

**Issue 3: The judgment and sentence contains an omission that should be corrected: it does not indicate that Mr. Coombes used a firearm in the commission of the offense, as found by the jury.**

The jury found Mr. Coombes used a firearm in the commission of the first degree murder. (CP 69, 72; RP (Dec. 16, 2011) 758). However, the judgment and sentence entered after his resentencing does not indicate that he used a firearm in the commission of the offense. (CP 105). Therefore, this court should remand this case for correction of the judgment and sentence to indicate that Mr. Coombes used a firearm in the commission of the offense. See, e.g., *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener’s error

in judgment and sentence, incorrectly stating the terms of confinement imposed).

**F. CONCLUSION**

This court should strike the 36 month term of community custody and remand the case for imposition of a 24 to 48 month community custody term. This court should also remand the case with an order that the trial court strike the community custody condition prohibiting Mr. Coombes from having any association or contact with gang members or their associates. In addition, the case should be remanded for correction of the judgment and sentence to indicate that Mr. Coombes used a firearm in the commission of the offense.

Respectfully submitted this 21st day of January, 2015.

  
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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 32806-6-III  
vs. ) *Consolidated with No. 32903-8-III*  
)  
MICHAEL DUKE COOMBES )  
) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on January 21, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Michael Duke Coombes  
DOC #841276  
Clallam Bay Corrections Center  
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Having obtained prior permission from the Spokane County Prosecutor's Office, I also served Mark Erik Lindsey at SCPAAppeals@spokanecounty.org using Division III's e-service feature.

Dated this 21st day of January, 2015.

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