

33209-8-III

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Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LONNIE DEAN GLEIM, JR.

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent does not object to remand to clarify the community custody term consistent with *State v. Bruch*. The Respondent asserts no error occurred in the conviction of the Appellant and in imposition of legal financial obligations.

III. ISSUES

1. Should the sentence be remanded for correction consistent with *State v. Bruch*?
2. Will this Court accept review where the Defendant failed to preserve error in the record? Does the record of Defendant's long term employment support the court's finding that the Defendant has the ability to his legal financial obligations?

IV. STATEMENT OF THE CASE

The Defendant Lonnie Dean Gleim was charged with ten counts of possession of child pornography in the first degree and two counts of

dealing in child pornography in the first degree. CP 5-9. This was not his first prosecution of this type; in 2001, he had been charged in Nevada with four counts of child pornography. CP 31-32, 34.

He pleaded guilty to four counts of possession of child pornography in the first degree. CP 10-23. The crimes are class B felonies with maximum terms of ten years. CP 11; RCW 9.68A.070(1)(b); RCW 9A.20.021(1)(b). The standard range for his offenses was 77-102 months and 36 months of community custody. CP 11.

The court sentenced the Defendant to 102 months confinement. CP 46. The court imposed community custody for 36 months “or the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer.” CP 46. The court found he had the ability to pay his legal financial obligations (LFO’s) and ordered him to pay \$1639.10 at a rate of \$50/mo to begin 90 days after his release. CP 43-44.

The record before the court includes the Affidavit of Probable Cause and the Presentence Investigation Report. CP 1-4, 27-39.

In the investigation of the offense, police discovered that Mr. Gleim had active internet and cell phone accounts with Charter Communications and Verizon; he was working as the apartment manager of the Birchway Apartments; he possessed nine hard drives, a tower

computer, a laptop computer, seven flash memory cards, and five cell phones. CP 2-3. On the day the search warrant was executed, he had just purchased a new cell phone to which he had added additional memory. CP 27. He also possessed “a suitcase of pornography,” a “red notebook of porn,” a rifle, and ammunition. CP 27. The laptop hard drive contained 100+ images of minors engaged in sexually explicit conduct. CP 4. The tower computer contained ten digital images of child pornography. CP 4. He had uploaded two of these digital images to a photo-sharing website. CP 2, 4.

The Defendant is a high school graduate with no learning disabilities and no current substance abuse issues. CP 32, 35. He has the support of his mother and sisters. CP 33. He was honorably discharged after serving in the army. CP 32. He is computer savvy, engaging in social media and internet role playing games. CP 35.

He worked for Sykes customer call center and then for approximately eleven years as an apartment manager for the Birchway Apartments. CP 32. He was “making adequate wages.” CP 32.

In speaking with his community corrections officer (CCO), the Defendant claimed that after his arrest, he quit his job “in anger,” and went on public assistance. CP 32. He claimed he had considered filing

for bankruptcy related to his medical bills. CP 32-33. However the CCO caught the Defendant in multiple large lies which “makes me wonder if anything Mr. Gleim reported is credible.” CP 34, 36.

The Defendant challenges his community custody term and court’s finding that he has the ability to pay his LFO’s.

V. ARGUMENT

A. THE STATE DOES NOT OBJECT TO CORRECTION OF THE COMMUNITY CUSTODY TERM LANGUAGE CONSISTENT WITH *STATE V. BRUCH*.

The Defendant challenges the term of his community custody, arguing that the term (102 months confinement + 36 months community custody) exceeds the 120 month (ten year) maximum for a class B felony under RCW 9A.20.021(1)(b). Brief of Appellant (BOA) at 3-5.

The Washington courts’ interpretation on this matter has evolved in recent years. In the case of *In re Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009), the defendant Brooks was sentenced to 120 months confinement and 18-36 months community custody. He sought review, arguing the combined punishment of confinement and supervision exceeded the ten-year statutory maximum. *Id.* The Washington Supreme Court held that the sentence was lawful, but should be amended to clarify

that the combined term of confinement plus supervision should not exceed the maximum term. *In re Brooks*, 166 Wn.2d at 673, 675.

In *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011), the court decided that for defendants sentenced before certain statutory amendments took effect, the Department of Corrections shall recalculate the term of community custody and set a specific length for the term of community custody. *State v. Franklin*, 172 Wn.2d at 840-41. However, for defendants sentenced after July 26, 2009, it will be the trial court which shall reduce the term of community custody to avoid a sentence in excess of the statutory maximum. *State v. Boyd*, 172 Wn.2d 470, 473, 275 P.3d 321 (2012).

In *State v. Winborne*, 167 Wn. App. 320, 323-26, 273 P.3d 454 (2012), this Court held that the term of community custody should be determinative, and not flexible or dependent upon the defendant's earned early release or good time. *State v. Winborne*, 167 Wn. App. at 329-30, citing *State v. Hale*, 94 Wn. App. 53, 971 P.2d 88 (1999); *In re Sentencing of Jones*, 129 Wn. App. 626, 627-28, 120 P.3d 84 (2005).

Earlier this year, the Washington Supreme Court held differently. There the court found that the defendant Bruch's sentence of 116 months confinement and community custody for a period of "at least 4 months,

plus all accrued earned release time at the time of release” was sufficiently fixed to comply with statutory requirements. *State v. Bruch*, 182 Wn.2d 854, 857, 346 P.3d 724 (2015). “The statutes must be read together to assure that the trial court’s intended sentence – a total term of 120 months – is not undermined by giving effect to the DOC’s authority to transfer earned early release into community custody.” *State v. Bruch*, 182 Wn.2d at 857.

This holding corrects a statutory reading in *Winborne* which would have reduced supervision for those offenders most in need of it. Those offenders whose standard ranges approach the statutory maximum should not be released into society with little to no supervision for the reason that they served long sentences. Both goals of appropriate supervision and statutorily limited sentences are met by converting earned early release time into community custody.

In our case, the superior court’s sentence of 36 months community custody “or the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer” does not accurately reflect the *Bruch* intent. *Bruch* issued 6 days after the Defendant was sentenced. The State does not object to remand to correct this language under *Bruch* to read: community custody for a period of at least 18 months, plus all accrued

earned release time at the time of release.

B. THE UNPRESERVED CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS FAILS ON THE MERITS.

The Defendant challenges for the first time on appeal the sentencing court's imposition of \$1639.10 in legal obligations. BOA at 5-8. He acknowledges that this matter was not preserved below as required by RAP 2.5(a). BOA at 6.

This Court has held that it will not review unpreserved challenges to the imposition of LFO's. *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014). That case is good law.¹ In the more recent *State v. Blazina*, which the Defendant cites in support of his challenge, the Washington Supreme Court held that a court of appeals "properly decline[s] discretionary review" of the challenge. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). "[I]t is well settled" that a defendant who fails to object at the time of sentencing, "is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d at 832. None of the exceptions in RAP 2.5(a) apply to such a challenge. *State v. Blazina*, 182 Wn.2d at 833.

This Court should continue to reject these challenges automatically, especially where the challenges fail to acknowledge the actual record before the sentencing court and the low burden needed to

¹The Petition for Review in *Duncan* was accepted only as to a different issue.

satisfy the finding. A single reference in a presentence report to the defendant describing himself as “employable” will satisfy. *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

The record in this case is that the actual fines imposed were very small: \$1639.10. CP 44. The payment schedule was very reasonable: \$50/mo to begin 90 days after his release. CP 44. The Defendant Gleim had a long history of employment. Police verified that he was employed at the time of his arrest at an apartment management job. He had held this job for approximately 11 years. He had accumulated a significant amount of expensive luxury goods – computers, multiple cell phones, and a gun.

The Defendant hangs his hat on his claim that he was earning only \$200/month at the time of his sentence. BOA at 7. There are multiple problems with this claim. First, the source of this factual claim is unreliable. It comes from the Defendant himself in an interview with his CCO during which he was caught in many significant lies.

Second, even if we take the Defendant at his word, this is his story: The Defendant had maintained employment at an adequate wage for over a decade. He voluntarily left his job in anger after he was arrested. He became angry and depressed for being held accountable for his offenses. This does not demonstrate inability to work, but lack of desire.

Third, the Defendant's argument that temporary, voluntary indigency equates to inability to work (BOA at 7) is illogical. Indigency alone is not a prohibition against the imposition of legal financial obligations. *State v. Lundy*, 176 Wn. App. at 99. There is a significant difference between one's ability to pay \$50/mo (which can be earned in a few hours a month at the call center) and being immediately able to come up with the thousands of dollars necessary to retain an attorney and transcribe a record. In any case, indigency is a condition, not an ability. And it is not a static condition. In the Defendant's case, it is a temporary, voluntary condition.

Even if the Defendant were uneducated and without any job history, he would be able to make an extra \$50 a month in unskilled labor. However, the Defendant has every ability to work and earn an income when he is released – more than sufficient to make payments at a rate of \$50/mo. He has his family's support. He is educated. He has skills. He has military experience and an honorable discharge. He has consistent work experience. And he is not disabled.

The challenge is without basis in law or fact and must be summarily denied.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: September 24, 2015.

Respectfully submitted:



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<p>Andrea Burkhart <Andrea@BurkhartandBurkhart.com></p> <p>Lonnie D. Gleim, Jr. DOC # 934937 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 9850</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 24, 2015, Pasco, WA</p>  <p>Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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