

No. 80704-3
(COA No. 60255-1-I)

**IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON**

IN RE PERSONAL RESTRAINT PETITION

STATE OF WASHINGTON, Respondent,

vs.

JEFFREY BROOKS, Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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STATE OF WASHINGTON

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A. ISSUES PRESENTED

1. Is a sentence that imposes the statutory maximum of 120 months in confinement and the statutorily required term of community custody, 18-36 months of community custody or the amount of earned early release, whichever is longer, but also requires that the total time not exceed the statutory maximum, determinate under the Sentencing Reform Act where the term of community custody is required to be a range, the period of early release cannot be determined until after the defendant has begun to serve his sentence, and the consideration of early release does not render a sentence indeterminate?
2. Does a sentence that has a statutory maximum term of confinement and a term of community custody set forth as a range or the period of early release, whichever is longer, and requires the Department of Corrections to administer the sentence so that the statutory maximum is not exceeded violate the separation of powers where the legislature delegated the authority and responsibility to the Department of Corrections to determine the defendant's earned release period and to set a discharge date?

B. ARGUMENT

Brooks asserts that his sentence as amended is unlawfully indeterminate under the Sentencing Reform Act ("SRA") and violates the separation of powers. The amendment to Brooks's judgment and sentence clarifies that the total of the confinement time and the community custody term may not exceed the statutory maximum of 120 months. As a standard range sentence in compliance with RCW 9.94A.505 Brooks's sentence is determinate under the SRA. The community custody term is necessarily inexact because under the SRA the community custody term

imposed by the sentencing court must be a range of months or the period of early release, whichever is longer. The amendment caps the specific community custody term that the DOC can set. Limiting the total custody term served to the statutory maximum does not render the imposed sentence indeterminate.

Delegating to the Department of Corrections (“DOC”) the responsibility to calculate the community custody term so as not to exceed the statutory maximum does not violate the separation of powers doctrine. The legislature specifically delegated to the DOC the responsibility and authority to determine the earned release period and to set a term of community custody within the range imposed by the court. Ensuring that the imposed sentence does not exceed the statutory maximum is within the DOC’s purview to administer the sentence and does not infringe upon the integrity of the judiciary.

- 1. Brooks’s standard range sentence is not indeterminate because under the SRA the specific term of community custody is not and cannot be determined until the defendant’s period of earned release is calculated.**

Brooks argues that his sentence as amended is unlawfully indeterminate because a sentence must be determinate at the time of imposition and his total term of confinement time and supervision still exceeds the statutory maximum. Otherwise, he argues, the court would

improperly speculate regarding a defendant's ability to earn early release. As a standard range sentence in compliance with the provisions of the SRA, however, Brooks's sentence is not indeterminate.

Sentencing under the SRA is "structured as a system of determinate sentencing." State v. Shove, 113 Wn.2d 83, 86, 776 P.2d 132 (1989). A "determinate sentence" under the SRA is defined as a sentence that "states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision¹." RCW 9.94A.030(17) (2006)². This definition of determinate sentence, however, is referenced in only two other provisions of the SRA: the court must impose a "determinate sentence" for exceptional sentences and sentences without established standard ranges. RCW 9.94.535 (2006); RCW 9.94A.505(2)(b) (2006)³. A sentence in compliance with the provisions of RCW 9.94A.505, *i.e.*, one which imposes a standard range confinement time and other mandatory sentence terms, is determinate. *See, State v. Garcia-Martinez*, 88 Wn. App. 322, 327-28, 944 P.2d 104 (1997), *rev. den.*, 136 Wn.2d 1002 (1998) (focus of determinate

¹ "Community supervision means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed by a court pursuant to this chapter" RCW 9.94A.030(9); RCW 9.94A.030(10) (2009).

² Currently RCW 9.94A.030(21).

³ The 2009 provisions are the same.

sentencing on proportionality, equality and justice is achieved through standard range sentencing scheme).

RCW 9.94A.505 requires the court impose a sentence in accord with the provisions of RCW 9.94A.710 and 715 regarding community custody⁴. RCW 9.94A.505(2)(a)(iii) (2006)⁵. Under RCW 9.94A.715 the trial court imposes a term of community custody which shall be the prescribed range or the period of earned early release, whichever is longer. RCW 9.94A.715(1). The precise term of community custody cannot be specified because the term is contingent upon the actual award of earned release. State v. Pharris, 120 Wn. App. 661, 664, 86 P.3d 815 (2004). As the term of community custody is set forth as one of two possibilities, one of which is a range, it is necessarily somewhat inexact.

The SRA specifically provides that a sentence is not rendered indeterminate by the earned release component of the sentence. “The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.” RCW 9.94A.030(18). The SRA requires that the

⁴ Community custody is defined as “that portion of an offender’s sentence of confinement in lieu of earned release or imposed pursuant to [certain specified statutes], served in the community subject to controls placed on the offender’s movement and activities by the department.” RCW 9.94A.030.

⁵ The only difference between the 2006 version and current version of RCW 9.94A.505 is that the 2009 version has an additional provision (2)(a)(xiii) regarding felony DUIs.

community custody term factor in Brooks's period of earned release. Even with the amendment, any uncertainty relates to the consideration of earned release and therefore the sentence is not indeterminate.

Brooks relies upon a couple of juvenile cases to argue that the sentence as amended requires the trial court to improperly speculate regarding his ability to earn early release. Those cases are inapposite because the courts there improperly considered the juveniles' early release in deciding to impose an exceptional sentence and in setting the length of the exceptional sentence. State v. Sledge, 133 Wn.2d 828, 845, 947 P.2d 1199 (1997); State v. S.H., 75 Wn. App. 1, 15, 877 P.2d 205 (1994). Such consideration of early release usurps the statutory authority of the corrections entity. Sledge, 133 Wn.2d at 845. State v. Bourgeois, 72 Wn. App. 650, 866 P.2d 43 (1994)), cited by Brooks, actually controverts Brooks's argument. There, the Court held that the statute prohibiting commitment of a juvenile past his 21st birthday did not prohibit the court from imposing a standard range sentence beyond the juvenile's 21st birthday because, pursuant to that statute, a juvenile offender would be released at age 21 regardless of the term of confinement imposed at disposition. *Id.* at 657-58.

The court sentenced Brooks to a standard range confinement term and to a period of community custody as required by the SRA and did not

consider Brooks's early release in setting either term. The amendment caps his total sentence at 120 months. Brooks will serve a 120-month sentence and be released from DOC custody (actual or community) at the end of the 10 year maximum term. There is nothing "speculative" about such a sentence.

Brooks has submitted State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008), as supplemental authority in support of his indeterminate argument. There the Court of Appeals held "that when a court does not make an initial determination of the sentence length, and requires the DOC to calculate an inmate's time served and ensure it does not exceed the statutory maximum, the sentence is indeterminate..." Id. at 946. The Court emphasized that the SRA does not authorize the DOC to determine how long the sentence *imposed* will be. Id. at 949. However, as acknowledged by the Court, the SRA specifically requires the DOC to calculate an offender's early release period and to determine a discharge date. Id. The DOC does not determine how long the community custody *imposed* shall be, but does determine how long the community custody *served* shall be based on the parameters imposed by the court and the offender's behavior while incarcerated.

The Court was also concerned about the "risks of requiring the DOC to ensure the inmate does not serve in excess of his or her maximum

sentence,” given legal arguments the DOC has made in the past in a couple of cases.⁶ Id. at 951. The cases referenced by the Court, however, all address the DOC’s policy regarding approval of release plans of sex offenders and not DOC’s policies with or history regarding statutory maximum sentences. The prophylactic approach set forth in Linerud and advocated by Brooks is not one dictated by the SRA, addresses perceived potential errors but not actual ones, and could result in repeat offenders, those with the highest offender scores, not serving the statutory maximum even where that is the trial court’s specific intent.⁷

2. The trial court’s amendment capping the sentence at the statutory maximum did not violate the separation of powers because the legislature delegated to the DOC the responsibility and authority to administer the sentence imposed by the court.

Brooks argues that the sentence as amended improperly delegates to the DOC the duty to ensure that the sentence does not exceed the statutory maximum. Under the SRA the DOC is responsible for

⁶ The Court was also concerned that clarifying language interlineated in the judgment and sentence could be overlooked. However, any handwritten notation by the judge, whether it be the number of months of confinement or another cause number that the sentence is to run consecutively to or concurrently with, is always subject to such concern.

⁷ If the trial court reduced the confinement time by the 36 months of community custody as originally requested by Brooks, then Brooks’s confinement time would be 84 months. If he earned release for the full period he would be eligible for (28 months), the most he could serve would be a total of 92 months (56 months confinement time and 36 months community custody).

calculating a defendant's early release and discharge date. The court's amendment requires the DOC to factor the statutory maximum limit into its calculation of Brooks's community custody term and does not infringe on the court's independence or integrity.

The separation of powers doctrine is not inflexible in application.

The validity of this [separation of powers] doctrine does not depend on the branches of government being hermetically sealed off from one another. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government. ... The doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate.

The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread. ...

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

State v. Blilie, 132 Wn.2d 484, 489-90, 939 P.2d 691 (1997) (*quoting* Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). With respect to the judicial branch, the doctrine is aimed at ensuring that: (1) the judiciary is not assigned or allowed to perform tasks that are more properly accomplished by another branch; and (2) no law is passed that threatens the integrity of the judiciary. Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994) (*citing* Mistretta v. U.S., 488 U.S. 361, 109

S.Ct. 647, 102 L.Ed.2d 714 (1989)). Even if a duty involves judicial as well as executive functions, it does not violate the separation of powers doctrine so long as it does not impermissibly interfere with the integrity of the branch of power. Carrick, 125 Wn.2d at 139.

The Legislature has the authority to determine the sentencing process and punishment. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986). “While it is the function of the judiciary to determine guilt and impose sentences, ‘the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body.’” State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937); *accord*, In re Welfare of Lowe, 89 Wn.2d 824, 826, 576 P.2d 65 (1978). Sentencing courts do have the power to delegate some limited aspects of community custody to the DOC. State v. Autrey, 136 Wn. App. 460, 468-469, 150 P.3d 580 (2006).

Under the SRA the legislature has determined that certain offenders should serve a term of community custody the length of which will either be the period of earned release or the range of community custody imposed by the court. The legislature delegated to the DOC the authority and responsibility to determine whether an offender receives earned release time, when an offender may transfer to community custody

in lieu of earned release, and the date the defendant is to be discharged from community custody. RCW 9.94A.728(1), (2); RCW 9.94A.715(4).⁸ Under the SRA the DOC administers the sentence imposed by the court in accord with its obligations regarding community custody and early release.

Nonetheless, Brooks asserts that in imposing the sentence as amended, the court delegated its power to the DOC to set his sentence.⁹ The court did not delegate its power to impose sentence: it imposed the sentence as required by the SRA, directing the DOC to cap community custody at the statutory maximum when DOC calculates the length of community custody. The sentencing court's power under RCW 9.94A.505 is limited to imposing a standard range sentence and a mandatory community custody range, which it did here.

Brooks cites State v. Davis, 146 Wn. App. 714, 192 P.3d 29 (2008), in support of his argument. Davis is inapposite as it addressed whether the fact that a sentence might exceed the statutory maximum when community custody was included was a valid basis for an

⁸ The DOC determines the discharge date except for community custody imposed for sentences under RCW 9.94A.670, Special Sex Offender Sentencing Alternatives.

⁹ Brooks also asserts that delaying appellate review of such a sentence would defeat the finality of a determinate sentence. A judgment and sentence that imposes community custody "for a specified term or for the period of earned release, whichever is longer" is sufficiently specific for the purposes of appeal. State v. Mitchell, 114 Wn. App. 713, 719, 59 P.3d 717 (2002).

exceptional sentence downward. Brooks, however, asserts that a sentence like the one imposed in Davis, in which the court imposed less than the standard range of confinement, is not exceptional because it is dictated by the terms of the SRA.

There is nothing in the SRA that states where the statutory maximum is reached the court must *not* follow the directive of RCW 9.94A.505(2)(a)(i) to impose a standard range sentence. There is nothing in the SRA that directs the trial court to reduce the confinement time of an offender who reaches the statutory maximum as opposed to reducing the community custody time. On the contrary, the community custody term is supposed to be *in addition* to the other terms of the sentence. *See, In re Caudle*, 71 Wn. App. 679, 680, 863 P.2d 570 (1993) (the “‘in addition to the other terms of sentence’ language ... does not support the inference the legislature, by adding the community placement requirement, intended to reduce ... the maximum standard range period of confinement to which persons convicted of certain particularly serious crimes could be sentenced.”); RCW 9.94A.715(1).

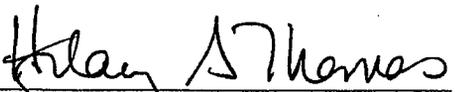
To follow the example in Davis would potentially give a benefit to offenders with more egregious criminal history: those offenders with lesser offender scores could end up serving essentially the same amount of confinement time as those facing the statutory maximum. Brooks’s

proposed remedy would require trial courts to deviate from the standard range sentences mandated by the SRA and would permit offenders hitting the statutory maximum to serve the same time in confinement as those offenders with lesser criminal histories. That is certainly not what is intended by the SRA.

C. CONCLUSION

Brooks's sentence as amended complies with all the provisions of RCW 9.94A.505 and as such is determinate under the SRA. Contrary to Brooks's assertion, the legislature did delegate to the DOC the authority to calculate the actual term of community custody, and the court's order requiring the DOC to factor in the statutory maximum limit in making its calculation regarding community custody does not impermissibly infringe upon the integrity of the judiciary. For the reasons set forth above, the State respectfully requests that this Court deny Brooks' request for relief.

Respectfully submitted this 23rd day of March, 2009.


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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to Petitioner's counsel, GREGORY LINK, addressed as follows:

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