

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

IN THE SUPREME COURT FOR THE  
STATE OF WASHINGTON

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IN RE PERSONAL RESTRAINT PETITION

STATE OF WASHINGTON, Respondent,

vs.

JEFFREY BROOKS, Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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**A. ISSUES PRESENTED**

1. Is a petitioner entitled to vacation of his sentence and resentencing where the trial court imposed 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 – in order to clarify that the total term of incarceration and community custody cannot exceed the statutory maximum?

**B. FACTS**

Petitioner Jeffrey Brooks was convicted at jury trial of three counts of Attempted Robbery in the First Degree and one count of Residential Burglary. See Judgment and Sentence at 1. He appealed his convictions, which appeal was denied. See Court of Appeals No. 59104-5-I. His petition for review is currently pending before this Court. Sup. Ct. No. 81775-8.

Subsequent to his appeal Brooks filed a CrR 7.8 motion challenging his sentence, which motion was transferred to the Court of Appeals to be treated as a personal restraint petition. When that petition was denied, he moved for reconsideration, which motion was transferred to the Supreme Court and treated as a motion for discretionary review. See Commissioner's Jan. 3, 2008 Ruling. The Commissioner concluded that the Court of Appeals Acting Judge had erred in determining that Brooks' statutory maximum was life, because

Brooks had only been convicted of Attempted Robbery in the First Degree, rather than a completed robbery. *Id.* The Commissioner then directed the State to file a response suggesting an appropriate remedy, as well as a full copy of Brooks' judgment and sentence because he could not tell from the limited portion of the judgment and sentence Brooks had filed whether there was any language clarifying that the total term could not exceed the statutory maximum.

The State responded and asserted that the sentence should not be vacated as requested by Brooks, but that the judgment and sentence should be amended to state that the total of the term of incarceration and the term of community custody for each of the class B felony counts shall not exceed the statutory maximum of 120 months. See State's Response to Motion for Discretionary Review. Brooks filed a reply in which he requested that his sentence be reduced by 36 months. See Brooks' Reply. The Commissioner then entered a ruling denying review conditioned upon the State obtaining and filing an amended judgment and sentence reflecting that the total term could not exceed the statutory maximum. See Commissioner's May 20, 2008 Ruling.

The State obtained an order amending the judgment and sentence stating in relevant part: "The total of the term of incarceration and the term of community custody for each counts I, II, and III shall

not exceed the statutory maximum of 120 months. The State filed the order with the Supreme Court. Brooks thereafter moved to modify the Commissioner's ruling.

**C. ARGUMENT**

Brooks asserts that his sentence including the term of community custody exceeds the statutory maximum and that he is entitled to vacation of the sentence and resentencing in the form of a reduction of 36 months off his confinement time. Brooks was sentenced to the statutory maximum confinement time of 120 months. Brooks' sentence including the term of community custody does not exceed the statutory maximum because the specific term of the community custody, the community custody range or the community custody in lieu of earned release period, remains to be set by the Department of Corrections. To the extent that Brooks desires to ensure that the Department of Corrections does not impose a term of community custody that would exceed the statutory maximum, the remedy is limited to remand for clarification of the judgment and sentence, which has already been done in this case. Brooks' sentence is not unlawful and he is not entitled to any further relief.

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing

of constitutional error from which he has suffered actual prejudice or nonconstitutional error that is a fundamental defect resulting in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petition must set forth the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations. In re Personal Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). The petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), *rev. den.*, 110 Wn.2d 1002 (1988).

**1. The court did not impose an unlawful sentence.**

Brooks alleges that his sentence is unlawful because when the term of community custody is added to the confinement time, his sentence exceeds the statutory maximum. A trial court may not exceed its statutory authority in imposing a sentence under the Sentencing Reform Act ("SRA"). In re Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002). Except as relates to collection of restitution, a sentence may not exceed the statutory maximum term set by the legislature. RCW 9.94A.505(5); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004). RCW 9.94A.505 provides: "... a court may not impose a sentence providing for a term of confinement or community

supervision, community placement, or community custody which exceeds the statutory maximum....” RCW 9.94A.505(5). The statutory maximum for Attempted Robbery in the First Degree is 10 years. RCW 9A.20.021; RCW 9A.28.020(3); RCW 9A.56.200.

With the 2003 amendments to the SRA, the legislature limited community custody to specified serious offenders. In re Jones, 129 Wn. App. 626, 630-31, 120 P.3d 84 (2005). Under RCW 9.94A.715 the trial court is required to impose a term of community custody<sup>1</sup> when the defendant is being sentenced for a violent offense,<sup>2</sup> among other defined offenses. RCW 9.94A.715(1). The term of community custody shall be the community custody range established under RCW 9.94A.850<sup>3</sup> or the period of earned early release, whichever is longer. *Id.* The term of community custody begins upon completion of the term of confinement or when the person is transferred to community custody in lieu of earned release. *Id.* The Department of Corrections (“DOC”) determines the date the defendant is to be discharged from

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<sup>1</sup> 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).

<sup>2</sup> Attempted Robbery in the First Degree is a violent offense. RCW 9.94A.030(50)(a)(i).

<sup>3</sup> RCW 9.94A.850 required the Sentencing Guidelines initially to establish the community custody ranges, subject to approval of the legislature. RCW 9.94A.850(5).

community custody. RCW 9.94A.715(4);<sup>4</sup> State v. Pharris, 120 Wn. App. 661, 665, 86 P.3d 815 (2004) (DOC decides at what point within the community custody range the defendant is released from community custody).

Under RCW 9.94A.728, a person convicted of a violent offense, and other certain specified offenses, committed after July 1, 2000 can become eligible for transfer to community custody status in lieu of earned release time. RCW 9.94A.728(2)(b). Under the statute an offender convicted of a violent offense is eligible for up to one third of his sentence in earned release time. RCW 9.94A.728(1). A defendant subject to community custody who earns early release is placed on community custody for any time remaining between the date of his release and the maximum sentence. RCW 9.94A.728(2); State v. Sloan, 121 Wn. App. 220, 223, 87 P.3d 1214 (2004); State v. Vanoli, 86 Wn. App. 643, 937 P.2d 1166, *rev. den.*, 133 Wn.2d 1022 (1997). An offender under the jurisdiction of the DOC earns early release in accord with the procedures set forth by DOC. RCW 9.94A.728(1). Under the current statutory scheme, an offender who has committed a violent offense is eligible to accrue earned release time for up to one

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<sup>4</sup> The DOC determines the discharge date except for community custody imposed for sentences under RCW 9.94A.670, Special Sex Offender Sentencing Alternatives.

third of the sentence and will be placed on community custody in lieu of early release for that period of time.

Under the scheme set forth by the legislature, the precise term of community custody cannot be determined until the defendant has begun serving his sentence. *See, State v. Pharris*, 120 Wn. App. 661, 664, 86 P.3d 815 (2004) (precise term of community placement cannot be determined until early release time actually awarded). The court determines the applicable community custody range, but the community custody *term* is either that range or the defendant's period of earned release, whichever is longer. Although a sentence that imposes the statutory maximum as incarceration and a term of community custody may *appear* to exceed the statutory maximum, in actuality it may not "because prisoners who earn early release credits, and transfer to community custody status in lieu of earned early release, have not yet served the maximum." *Sloan*, 121 Wn. App. at 222-23 (emphasis added).

Brooks is mistaken in asserting that the trial court imposed a community custody term of 18 to 36 months, it imposed a community custody term of 18-36 months *or the period of earned release, whichever is longer*. The trial court sentenced Brooks to "Community PLACEMENT/Community CUSTODY/ Community SUPERVISION,

as determined by DOC, for 18 to 36 months for Count I, 18 to 36 months for Count II, 18-36 months for Count III, ...; or the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer....” See Judgment and Sentence at 6. If Brooks earns the full amount of time he would be eligible for under the current statute, one third of his sentence, his earned early release period would be 40 months. His community custody term then would be the 40 months as that period is longer than the community custody range. If he does not earn the full release time period, then DOC determines his community custody discharge date in accord with the provisions of the Sentencing Reform Act, including RCW 9.94A.505 requiring that community custody not exceed the statutory maximum. Because Brooks’ community custody term is inextricably linked to his earned release period, the sentence as imposed does not exceed the statutory maximum.

The only scenario in which there is a theoretical possibility that Brooks’ sentence as imposed would exceed the statutory maximum is where Brooks would earn some early release time but less than 18 months. In that case, the community custody range imposed by the court would be longer than the early release period and the Department would be faced with not being able to comply with the court directive

of 18 months of community custody. However, the DOC is still faced with the SRA mandate that the community custody term not exceed the statutory maximum and would have to set a discharge date in accord with that mandate.<sup>5</sup>

At most, and dependent upon the actions of Brooks while in confinement, the sentence as imposed could only potentially result in a situation where the defendant has served confinement time which when combined with the community custody range might appear to exceed the statutory maximum. If Brooks' community custody term is determined to be the period of his earned release, his sentence will not exceed the statutory maximum. The theoretical possibility for a sentence to exceed the statutory maximum based on the defendant's subsequent behavior in prison does not render the sentence as imposed unlawful on its face.

Brooks implies that in order for the sentence as imposed not to exceed the statutory maximum, the court would have to improperly speculate regarding his early release time. A judgment and sentence must be specific about the term of community custody imposed. State

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<sup>5</sup> Cf., State v. Bourgeois, 72 Wn.App. 650, 658, 866 P.2d 43 (1994) (statute that precluded commitment of a juvenile beyond his/her 21<sup>st</sup> birthday was a limit on the authority to confine a juvenile rather than a limit on the juvenile court's authority to enter disposition beyond 21<sup>st</sup> birthday).

v. Pharris, 120 Wn. App. 661, 663, 86 P.3d 815 (2004). The imposition of community custody “for a specified term or for the period of earned release, whichever is longer” is sufficiently specific to meet this requirement. *Id.* at 664. All that is required is that the judgment and sentence make clear, to the extent possible, what community custody obligation has been imposed. *Id.* at 665. 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.<sup>6</sup> The sentence as imposed does not speculate as to, or improperly consider, Brooks’ earned early release time; the statute requires that the community custody term factor in his earned early release, if any.

To the contrary, it is Brooks that requests this Court to speculate as to whether he will actually earn the one-third early release time for which he would be eligible. Brooks asks this Court to consider that he will *not* earn that time, and therefore the community custody term will become the 18-36 months community custody range, which would then make the sentence appear to exceed the statutory maximum. In imposing the statutorily required community custody term, the trial

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<sup>6</sup> The fact that an offender can reduce the actual period of confinement through earned early release does not affect the determinate nature of the sentence. RCW 9.94A.030(18).

court did not consider at all Brooks' early release when it imposed the statutory maximum sentence. The trial court imposed the statutory maximum sentence because Brooks' standard range without the statutory limit was 96.75 – 128.25 months. (See Judgment and Sentence §2.3, 4.5.) It is by operation of law that Brooks' early release time will be considered *by the Department of Corrections* when it determines what specific term of community custody Brooks will serve, the earned release period or the community custody range of 18-36 months.

To the extent that Brooks' argument can be interpreted as asserting a claim that he may be forced to comply with community custody conditions beyond the statutory maximum, such an argument is not ripe for review. See, In re Reifschneider, 130 Wn. App. 498, 123 P.3d 496 (2005) (under RAP 16.4(a) offender must be under current unlawful restraint in order to obtain relief); State v. Motter, 139 Wn. App. 797, 804, 162 P.3d 1190 (2007), *rev. den.*, 163 Wn.2d 1025 (2008) (where defendant has not been harmed by the potential for error, the issue is not ripe for review).<sup>7</sup> Brooks is not currently under unlawful restraint – he is serving the confinement portion of his

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<sup>7</sup> *But see*, State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005), *infra*, at 15-16.

sentence. His concern that he may end up serving a term of community custody exceeding the statutory maximum would only arise, if at all, once he has served his confinement time. Should Brooks' unlikely scenario occur, his avenue of redress would be a personal restraint petition at that time.

The only issue appropriately before this Court is whether his sentence as imposed exceeds the statutory maximum and therefore the judgment and sentence is unlawful on its face. The fact that there is a theoretical possibility that Brooks will not earn sufficient early release time *and* that the DOC will fail to follow the law in setting the applicable community custody term does not render the sentence as imposed unlawful. Brooks has failed to show that this theoretical possibility the sentence might, dependent on subsequent circumstances, exceed the statutory maximum constitutes a fundamental defect resulting in a complete miscarriage of justice.

**2. Clarification that the total term of incarceration and community custody cannot exceed the statutory maximum is the appropriate remedy to resolve any ambiguity in the community custody term.**

Brooks asserts that the appropriate remedy is vacation of his sentence and resentencing with a reduction to his confinement time of

36 months.<sup>8</sup> Vacation is not the proper remedy where the sentence imposed is not unlawful. In order to ensure that DOC does not set a community custody discharge date beyond the statutory maximum time, amendment of the judgment and sentence to clarify that the total term cannot exceed the statutory maximum is sufficient to address the specific alleged ambiguity. Such language is currently part of Brooks' judgment and sentence.

Generally, "the imposition of an unauthorized sentence does not require vacation of the entire judgment .... The error is grounds for reversing only the erroneous portion of the sentence imposed." In re West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005). "Where a judgment and sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for the correct period of community placement is the proper course." State v. Broadaway, 133 Wn.2d 118, 135, 942 P.2d 363 (1997); *accord*, Sloan, 121 Wn. App. at 224. It is only where the trial court is mistaken regarding the correct term of

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<sup>8</sup> This would require imposition of an exceptional sentence downward, as the low end of the standard range for Brooks is 96.75 months. See Judgment and Sentence at 2. The issue of whether the need to limit a sentence to the maximum statutory term is grounds for imposition of an exceptional sentence downward is pending on petition for review in State v. Davis, Sup. Ct. No. 82379-1.

community placement that remand for resentencing is appropriate. *Id.* at 136; *accord*, State v. Hibdon, 140 Wn. App. 534, 538-39, 166 P.3d 826 (2007). Resentencing in that circumstance is appropriate so the trial court can reconsider the length of incarceration in light of the correct community placement term. *Id.*

All three divisions of the Court of Appeals have acknowledged that language in some manner clarifying that the total term of incarceration and community custody or placement cannot exceed the statutory maximum is appropriate and sufficient to address any ambiguity about a term of confinement and community placement exceeding the statutory maximum. State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004); State v. Vant, 145 Wn. App. 592, 606-07, 186 P.3d 1149 (2008) (remand to trial court to clarify that the term of confinement and community custody cannot exceed the statutory maximum proper remedy where sentence imposing 18 months of confinement and 36-48 months of community custody exceeded the statutory maximum); State v. Hibdon, 140 Wn. App. 534, 539, 166 P.3d 826 (2007) (language imposing community placement term consisting entirely of such community custody to which the offender may become eligible sufficient to address situation where term of community placement and confinement exceeded the statutory

maximum). Although the court in Sloan found that a sentence imposing a statutory maximum sentence of 60 months of confinement and 36-48 months of community custody would not result in the offender actually serving more than the statutory maximum, it recommended that the judgment and sentence make it clear that the term of incarceration and the term of community custody cannot exceed the statutory maximum:

To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.

State v. Sloan, 121 Wn. App. at 223-24.

The only case not to follow this prescribed course was State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005). In that case, the offender was sentenced to 114 months plus community custody of 9-12 months or the period of earned release whichever is longer, where the statutory maximum was ten years. The State argued that the issue was not ripe for review. The court, however, remanded for resentencing. *Id.* at 124. The court found that the issue was ripe for review in part because it was concerned that waiting would severely diminish the defendant's opportunity for meaningful relief. *Id.* The

court failed to analyze the community custody term in the context in which it was imposed, for the community custody range or the period of earned release, whichever is longer. Instead, the court held that the community custody *range* imposed exceeded the statutory maximum and rendered the judgment and sentence invalid on its face. *Id.* (emphasis added). Division III has since acknowledged that the remedy in Zavala-Reynoso is but one means of addressing such circumstances. Hibdon, 140 Wn. App. at 538-39 (trial court was not required at resentencing to impose a lesser term of confinement; it could impose a term of community placement consisting of such community custody to which the defendant might become eligible).<sup>9</sup>

Moreover, reduction of the confinement time, as requested by Brooks, would not be appropriate because the community custody term imposed under RCW 9.94A.715(1) is *in addition* to the other terms of the sentence. *See, In re Caudle*, 71 Wn. App. 679, 680, 863 P.2d 570 (1993) (the language “in addition to other terms of sentence” indicates that the legislature did not intend to reduce a standard range term of confinement in order to add a term of community placement) (emphasis

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<sup>9</sup> Should DOC unlawfully impose community custody beyond the statutory maximum, Brooks would be able to assert in a personal restraint petition at that time that he was being unlawfully restrained.

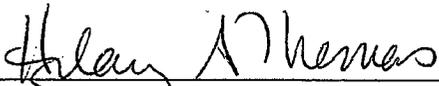
added). The legislature has specifically provided for offenders subject to community placement: "When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible." RCW 9.94A.700(3); RCW 9.94A.705. The legislature's clear preference would be for reduction of the community custody term and not reduction of the confinement time.

Even if a judgment and sentence without the recommended clarifying language is impermissibly vague, vacation is not the proper remedy. As long as a court is not mistaken regarding the statutory term of community custody, only that portion of the "erroneous sentence" should be revisited. The only alleged error here regards the imposition of the term of community custody. The term of confinement clearly does not exceed the statutory maximum as it is set at 120 months. The trial court did not err in the community custody term it imposed, it imposed the statutorily required community custody range of 18-36 months or the period of earned release, whichever is longer. As the trial court did not err in imposing that term, remand for amendment of the judgment and sentence to clarify that the total term of confinement and community custody cannot exceed the statutory maximum is the appropriate remedy. That has been already been done in Brooks' case.

**D. CONCLUSION**

It is Brooks' obligation to demonstrate constitutional error resulting in actual prejudice or nonconstitutional error resulting in complete miscarriage of justice in order to grant him any relief. His petition doesn't demonstrate either. To the extent that there was any impermissible ambiguity in the sentence imposed, the language stating that total term of incarceration and community custody cannot exceed the statutory maximum, set forth in the order amending the judgment and sentence, has resolved it. For the reasons set forth above, the State respectfully requests that this Court deny Brooks' request for relief.

Respectfully submitted this 12<sup>th</sup> day of November, 2008.

  
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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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 11/12/2008  
Legal Assistant Date