

NO. 84545-0

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHARLES FRANKLIN,

Appellant.

**SECOND SUPPLEMENTAL BRIEF OF RESPONDENT
ANSWER TO THE COURT'S QUESTION**

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A. ISSUE PRESENTED

This Court has asked the parties to address how section 9 of SB 5288 (Laws of 2009 c 375 § 9) (hereinafter section 9) relates to Franklin's claim that his term of community custody on counts I and III must be vacated.

B. ANSWER

The State believes that, pursuant to section 9, the Department of Corrections must modify Franklin's terms of community custody on all counts on which community custody was imposed (counts I, III, V and VI) by setting fixed terms of community custody, as now required by RCW 9.94A.701, in place of the ranges of community custody the sentencing court imposed.¹ Franklin will still have a fixed term of community custody on count I and on count III.²

¹ It should be noted that the Attorney General, who represents the Department of Corrections (hereinafter the Department or DOC), is not a party to this appeal, and the prosecutor's interpretation of the relevant statutes does not necessarily reflect the views of the Department.

² To the extent that this Court's inquiry is intended to question the relevance or mootness of the issue raised by Franklin in light of section 9, this Court already cannot provide Franklin with any meaningful relief. Franklin is serving 120 months confinement on count III, with lesser concurrent terms of confinement on all other counts. This Court's decision will not affect Franklin's term of confinement. Similarly, a term of community custody of 18 to 36 months was imposed on counts V and VI. Even with a modification to those terms under RCW 9.94A.701, Franklin's term of community custody would be 18 months, a

C. ARGUMENT: THE PRACTICAL AFFECT OF SECTION 9

Franklin was convicted for crimes committed in the first five months of 2007. He was sentenced on January 22, 2008, with modifications to his sentence in June of 2008 and September of 2008.³ As pertinent here, at the time of Franklin's criminal acts and sentencing, the following statutes applied:

RCW 9.94A.505(2)(a) required the sentencing court to impose community custody pursuant to RCW 9.94A.715.

RCW 9.94A.715(1) required the court to impose "community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer."

RCW 9.94A.850 directed the sentencing guidelines commission to establish specific ranges of community custody for specific offenses. The ranges are codified at WAC 437-20-010.

term greater than his term of community custody on counts I and III. Thus, the actual amount of time Franklin will serve in confinement and on community custody will be unaffected by this Court's decision.

³ See State's Supplemental Brief of Respondent for greater details regarding Franklin's sentencing.

Accordingly, Franklin was subject to the following terms of community custody:

On Count I, Third-Degree Assault, as a "crime against a person," Franklin was subject to a range of 9 to 18 months of community custody.

On Count III, VUCSA, possession with intent to deliver cocaine, as a violation of RCW 69.50, Franklin was subject to a range of 9 to 12 months of community custody.

On Counts V and VI, both Second-Degree Assault convictions, as "violent crimes," Franklin was subject to a range of 18 to 36 months of community custody.

The parties do not dispute that these were the laws in effect at the time of the defendant's conviction and sentence, and that these were the applicable community custody ranges.

Next, the sentencing court, being aware that on counts I and III, if the court imposed a standard range sentence and a term of community custody, the total would exceed the statutory maximum penalty for each offense, included the following language:

On Count I, the defendant is sentenced to 9 to 18 months community custody or for the entire period of earned early release awarded under RCW 9.94A.728,

whichever is longer. ***On Count I, the total amount of incarceration and community custody shall not exceed 60 months.***

On Count III, the defendant is sentenced to 9 to 12 months community custody or for the entire period of earned release awarded under RCW 9.94A.728, whichever is longer. ***On Count III, the total amount of incarceration and community custody shall not exceed 120 months.***

CP 276-77 (emphasis added). This language was subsequently approved of by this Court in In re Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009) as a proper and lawful way for sentencing courts to address situations wherein the total amount of confinement and community custody may exceed the statutory maximum for the offense. The parties here appear to agree that the sentence imposed is lawful under Brooks.

Subsequent to Franklin's conviction and sentence, and while this Court was addressing the situation in Brooks, the legislature came up with a different way for sentencing courts to handle situations where the amount of confinement and community custody may exceed the statutory maximum for the offense. The legislature's solution was codified at RCW 9.94A.701(8), recodified at RCW 9.94A.701(9) (Laws of 2010 c 224 § 5). The law went into effect on July 26, 2009. The law provides as follows:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(8).

If a court were sentencing Franklin under this law, the court could impose no term of community custody on counts I and III because on both counts Franklin was sentenced to the statutory maximum for each offense. Both the State and Franklin agree that the legislature intended RCW 9.94A.701(8) to apply retroactively. However, this is also where the parties' disagreement arises.

Laws of 2009 c 375 § 20 provides as follows:

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

Franklin argues that the retroactivity of RCW 9.94A.701(8) requires *that sentencing courts* throughout the state must return every single defendant currently incarcerated with a term of community custody or currently on community custody and resentence them in accordance with the dictates of RCW

9.94A.701(8)--even though these sentences are lawful.⁴

What seems to best effectuate the legislative intent, and is consistent with retroactivity jurisprudence, is that sentencing courts must sentence defendants according to the dictates of RCW 9.94A.701(8), regardless of when the defendant's crime occurred if the trial court sentences the defendant after the effective date of RCW 9.94A.701(8). This would include defendants being resentenced when their sentence has been overturned on appeal. But this is not the case here.

The legislature also gave the Department of Corrections a role under the new statutory provision. Specifically, as section 9 provides:

The department of corrections shall recalculate the term of community custody and reset the date that community custody will end for each offender currently in confinement or serving a term of community custody for a crime specified in RCW 9.94A.701. The recalculation shall not extend a term of community custody beyond that to which an offender is currently subject.

Laws of 2009 c 375 § 9.

⁴ Franklin's argument would not be limited to situations like here, where the sentencing court included language in compliance with In re Brooks. Rather, under the defendant's argument, *the sentencing court* would be required to resentence *every* defendant who was sentenced to a *range* of community custody, and impose a *fixed term* of community custody. This cannot be what the legislature intended.

For Franklin, section 9 dictates that the department must modify his terms of community custody, changing them from ranges to the fixed terms listed in RCW 9.94A.701. This would affect Franklin's sentence in the following ways:

Franklin's 9 to 18 month term of court ordered community custody on count I would be changed by the department to a fixed term of 12 months. See RCW 9.94A.701(3)(a).

Franklin's 9 to 12 month term of court ordered community custody on count III would be changed by the department to a fixed term of 12 months. See RCW 9.94A.701(3)(c).

Franklin's 18 to 36 month terms of court ordered community custody on counts V and VI would be changed by the department to a fixed term of 18 months. See RCW 9.94A.701(2).

At the same time, the amount of time Franklin would be on community custody for counts I and III would still be subject to the lawful provision of the sentencing court--that the total amount of incarceration and community custody on each count cannot exceed the statutory maximum penalty for that count.

Thus, on counts I and III, Franklin would serve a maximum term of 12 months of court ordered community custody--assuming that he earns at least 12 months of early release--and a minimum

of no community custody if he serves the maximum sentence in confinement.

In sum, the sentencing court here no longer has a role in modifying Franklin's terms of community custody. His current sentence is lawful, and this Court should affirm. The Department of Corrections may have certain obligations in regards to Franklin's terms of community custody, and if the Department does not act as Franklin believes lawfully required, the Department's actions would be subject to challenge.

D. CONCLUSION

For the reasons cited above and in the Supplemental Brief of Respondent, this Court should affirm the defendant's sentence.

DATED this _____ day of June, 2011.

Respectfully submitted,

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State v. John Franklin 84545-0

As requested by the Court, please accept the attached document for filing in the above-subject case:

Second Supplemental Brief of Respondent: Answer To The Court's Question

Sincerely

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