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NO. 61481-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN FRANKLIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

SUPPLEMENTAL BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUL 13 PM 4:47

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DANIEL KALISH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES

Where a term of community custody is imposed, the sentencing court must explicitly limit the total sentence (confinement plus community custody) to the statutory maximum. In this case, the court imposed a total sentence on counts 1 and 3 that exceeded the statutory maximum. Should this Court remand this case to the trial court so that it can correct its sentence on counts 1 and 3?

B. STATEMENT OF THE CASE

The State incorporates the Statement of the Case presented in its initial Brief of Respondent. For this supplemental brief, the State adds the following facts:

A jury convicted Franklin of eight felonies, including one count of Assault in the Third Degree (count 1) and one count of Possession of Cocaine with Intent to Deliver ("PWI - Cocaine") (count 3). CP 106-07. At sentencing on February 22, 2008, the court sentenced Franklin to 68 months on count 1 and 120 months on count 3. CP 217. The court failed to impose any community custody on counts 1 or 3. CP 218.

On June 11, 2008, the court entered an Order Modifying Judgment and Sentence. CP 274-75. The court modified the sentence by, among other things, resentencing Franklin to 60 months on count 1 with 9 to 18

months community custody and by resentencing him to 120 months on count 3 with 9 to 12 months of community custody. CP 274-75. The statutory maximum is 60 months on count 1 and 120 months on count 3. CP 215.

On September 5, 2008, the court then entered a Second Order Modifying Judgment and Sentence. CP 276-77. The court then resentenced Franklin on counts 1 and 3 to state that the total amount of incarceration and community custody on count 1 shall not exceed 60 months, and that the total amount of incarceration and community custody on count 3 shall not exceed 120 months. CP 276-77.

C. ARGUMENT

The State asks this Court to accept its concession of error and remand this case for resentencing on counts 1 and 3. For the reasons stated in the State's previous brief, the State asks this Court to affirm the convictions for all counts.

Franklin points out that the addition of 9-18 months of community custody to his sentence of 60 months of confinement for Assault in the Third Degree - Domestic Violence results in a total sentence that exceeds the statutory maximum of 5 years for this crime. Franklin also points out that the addition of 9 to 12 months of community custody to his sentence

of 120 months of confinement for PWI - Cocaine results in a total sentence that exceeds the statutory maximum of 10 years for this crime. On both points, Franklin is correct.

In State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008), as amended on denial of reconsideration (March 23, 2009), this Court rejected the approach it had previously approved in State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004), under which the trial court could impose a total sentence that exceeded the statutory maximum so long as the court included a note clarifying that the *actual* time served in confinement plus community custody could not exceed the statutory maximum. Linerud, 147 Wn. App. at 948. This Court held instead that, where a term of community custody is imposed, the sentencing court must explicitly limit the total sentence to the statutory maximum. Linerud, at 950-51.

Because Franklin's sentence for Assault in the Third Degree - Domestic Violence and PWI - Cocaine exceed the statutory maximum for those crimes, this case must be remanded for resentencing on counts 1 and 3.

D. CONCLUSION

Because the sentence imposed on counts 1 and 3 exceed the statutory maximum for those crimes, this case must be remanded for resentencing on counts 1 and 3. For the reasons stated in the State's initial Response brief, the State requests that this Court reject all of Franklin's other arguments and affirm all his convictions.

DATED this 13th day of July, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DANIEL KALISH, WSBA #35815
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elizabeth Albertson, the attorney for the appellant, at Washington Appellate Project, 1511 Third Ave., Suite 701, Seattle, WA 98101, containing a copy of the **SUPPLEMENTAL BRIEF OF RESPONDENT**, in State v. John Franklin, Cause No. 61481-9-I, in the Court of Appeals, Division I. of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name

7/13/09
Date

Done in Seattle, Washington

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