

NO. 84545-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHARLES FRANKLIN,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

In accord with this Court's dictates articulated in In re Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), the trial court here imposed a perfectly lawful sentence that specifically provided that the terms of Franklin's confinement and community custody combined could not exceed the statutory maximum for each offense. A year after Franklin's conviction and lawful sentence, the legislature enacted RCW 9.94A.701 and provided a different way for trial courts to deal with the issue identified in Brooks. Should this Court find that this new statutory provision does not apply to Franklin's case?

B. STATEMENT OF THE CASE

1. TRIAL COURT PROCEDURAL FACTS

The following list includes (1) the charges for which the jury found Franklin guilty, (2) the statutory maximum punishment for each offense, and (3) Franklin's standard range for each offense:¹

Count I: Third-Degree Assault
Statutory Maximum: 60 months
Standard Range: 51 - 68 months

¹ This background is provided for clarity's sake. This appeal pertains only to counts I and III.

- Count II: First-Degree Unlawful Possession of a Firearm
Statutory Maximum: 120 months
Standard Range: 87 - 116 months
- Count III: Possession with Intent to Deliver Cocaine**
Statutory Maximum: 120 months
Standard Range: 60 - 120 months
- Count IV: Felony Harassment
Statutory Maximum: 60 months
Standard Range: 51 - 68 months
- Count V: Second-Degree Assault
Statutory Maximum: 120 months
Standard Range: 63 - 84 months
- Count VI: Second-Degree Assault
Statutory Maximum: 120 months
Standard Range: 63 - 84 months
- Count VII: Tampering with a Witness
Statutory Maximum: 60 months
Standard Range: 51 - 68 months
- Count VIII: Tampering with a Witness
Statutory Maximum: 60 months
Standard Range: 51 - 68 months

CP 215, 222.

Franklin committed all of the above-listed crimes between January 30, 2007 and May 30, 2007. CP 48-51. He was found guilty on October 24, 2007, and sentenced on February 22, 2008. CP 106-07, 214-24. The court imposed the following terms of confinement on each count:

Count I: 68 months
Count II: 116 months
Count III: 120 months
Count IV: 68 months
Count V: 84 months
Count VI: 84 months
Count VII: 68 months
Count VIII: 68 months

CP 217. Each term of confinement was within the standard range for the offense. See CP 215, 217, and 222. All terms were to run concurrently with each other. Id.

In imposing the above sentences, the trial court erred. Unnoticed by the parties and the court at the time, the 68-month terms imposed on counts I, IV, VII and VIII exceeded the 60-month statutory maximum for each offense.² When the trial court became aware of its error, the court corrected the error. Specifically, on June 11, 2008, the trial court entered an order modifying the judgment and sentence, reducing the term of confinement on counts I, IV, VII and VIII to the statutory maximum of 60 months. CP 274-75.

² This error likely went unnoticed because, with concurrent sentences, Franklin's overall term of confinement was not affected by the error.

At the same time that the court corrected the sentences on counts I, IV, VII and VIII, the court imposed a term of 9 to 18 months of community custody on count I, and a term of 9 to 12 months of community custody on count III--the two counts at issue in this appeal. CP 274. This too was in error, again unnoticed by the parties or the court.³ It was error because the total amount of confinement and community custody cannot exceed the statutory maximum for the offense.⁴ See Brooks, 116 Wn.2d at 671-72. However, once again, the trial court subsequently identified the error and corrected it.

Specifically, on September 5, 2008, the trial court entered an order that reads as follows:

IT IS HEREBY ORDERED, ADJUDGED and DECREED that . . . 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.***

³ This error likely went unnoticed because Franklin was already ordered to served 18 to 36 month terms of community custody on counts V and VII. CP 218; former RCW 9.94A.715.

⁴ For count I, with a statutory maximum of 60 months, the combined term of confinement and community custody imposed was 69 to 78 months. For count III, with a statutory maximum of 120 months, the combined term of confinement and community custody imposed was 129 to 132 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 in bold added, underlined language in original). The court's directive followed precisely this Court's dictates from Brooks, supra.

2. APPELLATE FACTS

In the court of appeals, Franklin argued that his sentence on counts I and III--even with the limiting language restricting the total amount of incarceration and community custody to the statutory maximum--violated RCW 9.94A.505(5)'s provision that confinement and community custody combined cannot exceed the statutory maximum for a crime. Franklin's argument was based on State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (Dec. 29, 2008).

In Linerud, the court held that limiting language, such as used here, created an impermissible indeterminate sentence and was insufficient to avoid violating RCW 9.94A.505(5). See Linerud, 147 Wn. App. at 949-50. However, just a month later, this Court in

Brooks rejected the same arguments made by the defendant in Linerud, effectively overruling Linerud.⁵

In Brooks, this Court held that a judgment and sentence with limiting language, such as used here, does not create an impermissible indeterminate sentence and does not violate the provisions of the SRA. Brooks, at 672-74.

In light of Brooks, on January 11, 2010, the Court of Appeals rejected Franklin's claim. State v. Franklin, 2010 WL 60175 (2010). On February 9, 2010, Franklin filed a motion to reconsider. In his motion, Franklin did not argue that Brooks was wrongly decided or that the holding did not apply to his case. Rather, in his motion to reconsider, Franklin argued for the first time that a new statute, RCW 9.94A.701, required that he be resentenced. On March 31, 2010, the Court of Appeals denied Franklin's motion for reconsideration. Franklin then filed a petition with this Court.

On September 9, 2010, this Court accepted review of a single limited issue, stating:

That the Petition for Review is granted only on the issue of whether the Petitioner's terms of community custody for third degree assault and possession of cocaine with intent to deliver [count I and III] must be

⁵ This Court subsequently accepted review of the Linerud case and remanded in light of Brooks. See 166 Wn.2d 1019 (Sept. 8, 2009).

reduced to bring his total terms of confinement and community custody within the statutory maximums.

C. ARGUMENT

Franklin contends that pursuant to RCW 9.94A.701(9) his terms of community custody on counts I and III must be reduced. Franklin is mistaken for three reasons. First, RCW 9.94A.701(9) applies only to terms of community custody imposed pursuant to the other statutory provisions of RCW 9.94A.701. Franklin's community custody terms were imposed pursuant to RCW 9.94A.715. Second, Franklin's sentence does not meet subsection (9)'s criteria for application, i.e., his terms of confinement and community custody combined do not exceed the statutory maximum for the crimes committed. Third, while RCW 9.94A.701(9) would apply to a defendant who committed a crime before the effective date of the statute, if sentenced (or resentenced) after that date, there is no legal authority allowing for a defendant's lawful sentence to be overturned so that he can be sentenced under a statute that did not exist at the time of the commission of his offense, conviction or sentence.

1. RCW 9.94A.701(9) DOES NOT APPLY TO FRANKLIN'S CASE.

For defendants convicted after 2003 and prior to August 1, 2009, a sentencing court was required to impose a term of 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." Former RCW 9.94A.715(1). RCW 9.94A.850 directed the sentencing guidelines commission to establish specific ranges of community custody to be applied to defendants convicted of specific offenses. The community custody ranges were codified at WAC 437-20-010. Pursuant to these statutory provisions, Franklin received a term of community custody on count I of 9 to 18 months,⁶ and on count III of 9 to 12 months.⁷

RCW 9.94A.715 has since been repealed. See RCW 9.94A.715, repealed by Laws 2008, ch. 231, § 57; Laws

⁶ This range must be imposed for all "crimes against persons," a definition that includes third-degree assault. See RCW 9.94A.411(2); WAC 437-20-010.

⁷ This range must be imposed for all offenses charged under chapter 69.50 or 69.52 RCW. WAC 437-20-010. Franklin's conviction on count III was charged under RCW 69.50.401. CP 49.

2009, ch. 28, § 42. Sentencing courts no longer impose community custody ranges. Instead, the legislature enacted RCW 9.94A.701, a statute that now requires sentencing courts to impose a fixed term of community custody.⁸ See RCW 9.94A.701, 2008 c 231 § 7, eff. Aug. 1, 2009. As part of this new statute, the legislature included the following provision:

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) (recodified at RCW 9.94A.701(9)) (emphasis added).

By its very language, RCW 9.94A.701(9) applies only to the fixed community custody terms imposed under RCW 9.94A.701. Because Franklin's community custody terms were imposed under a different statute, RCW 9.94A.701(9) is not applicable to his case.

⁸ For example, if Franklin had been sentenced under the provisions of RCW 9.94A.701 his fixed term of community custody on count I and count III would be 12 months. See RCW 9.94A.701(3)(a) and (c).

2. FRANKLIN'S SENTENCE DOES NOT MEET THE CRITERIA FOR RCW 9.94A.701(9) TO APPLY.

RCW 9.94A.701(9) was enacted to address the then-existing issue caused by the Court of Appeals decision in Linerud, supra.⁹ However, by its very terms, RCW 9.94A.701(9) applies only where "an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." Franklin's sentence does not meet this criterion. The trial court here specifically ordered that for the counts in question, Franklin's term of confinement and term of community custody combined "shall not exceed" the statutory maximum for each offense. CP 276-77. Because the combination of Franklin's term of confinement and term of community custody on each count does not exceed the statutory maximum for each offense, RCW 9.94A.701(9) does not apply.

⁹ In Brooks, this Court noted that the legislature was in the process of amending RCW 9.94A.701 to address the issue raised in Linerud. Brooks, at 672 n.4.

3. THERE IS NO AUTHORITY REQUIRING THAT A PERFECTLY LAWFUL SENTENCE BE OVERTURNED AND A DEFENDANT RESENTENCED UNDER A STATUTORY PROVISION THAT DID NOT EXIST AT THE TIME OF THE COMMISSION OF THE OFFENSE, CONVICTION OR SENTENCE.

In Linerud, supra, the Court of Appeals ruled that the limiting language, like that used here, was not sufficient; that the sentencing court was required to impose a fixed term of confinement and a fixed term of community custody that combined did not exceed the statutory maximum. However, in Brooks, this Court overruled the holding of Linerud. In short, this Court held that if the sentencing court limits the total combined term of confinement and community custody to the statutory maximum, using limiting language like that used here, the sentence is lawful.

Generally, a sentence imposed must be in accord with the law in effect at the time the offense was committed. See RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed"); Barstad v. Stewart Title Guar. Co., Inc., 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002) (a statutory amendment will apply retroactively only when it is (1) intended by the legislature, (2) curative in that it clarifies or technically corrects

ambiguous statutory language, or (3) is remedial in nature). Here, it appears that the legislature intended RCW 9.94A.701 to apply retroactively.¹⁰ Thus, the provisions of RCW 9.94A.701 would apply to defendants sentenced after enactment of the statute regardless of the date of offense. This would include persons resentenced upon reversal of their conviction or sentence.

However, Franklin cites to no authority that mandates that a lawful sentence be reversed so that a sentence can be imposed pursuant to a statute that did not exist on the date of the offense, conviction or sentence. Where no authority is cited in support of a proposition, the court is not required to search out authority, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken. State v. Young, 89 Wn.2d 613, 625,

¹⁰ See Laws 2009, ch. 375 § 20; note to RCW 9.94A.501.

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.

It appears this new overall legislation scheme focused primarily on creating and imposing obligations on the Department of Corrections in supervising defendants on community custody. See RCW 9.94A.501; 2009 c 376 § 2; 2009 c 375 § 2.

574 P.2d 1171 (1978) (citing DeHeer v. Seattle Post-Intelligencer,
60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Franklin's sentence is
lawful and not subject to reversal.

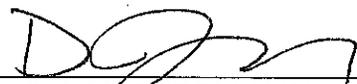
D. CONCLUSION

For the reasons cited above, this Court should affirm
Franklin's sentence.

DATED this 8 day of November, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

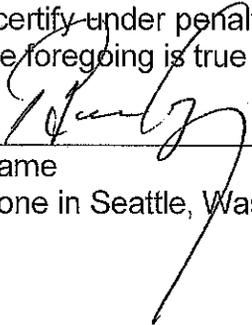
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Certificate of Service by Mail

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, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Answer to Motion to Reconsider, in STATE V. FRANKLIN, Cause No. 84545-0, in the Supreme Court 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.



Name

Done in Seattle, Washington

11-08-10
Date