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DIVISION II

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IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

DANIEL HERBERT PANSELL,

Petitioner.

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PETITION FOR REVIEW

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Court of Appeals No. 39895-8-II  
Appeal from the Superior Court of Pierce County  
Superior Court Cause Number 02-1-04226-2  
The Honorable Katherine Stolz, Judge

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## TABLE OF CONTENTS

I.	IDENTITY OF PETITIONER.....	1
II.	COURT OF APPEALS DECISION.....	1
III.	ISSUES PRESENTED FOR REVIEW .....	1
IV.	STATEMENT OF THE CASE .....	1
V.	ARGUMENT & AUTHORITIES .....	3
VI.	CONCLUSION .....	7

## TABLE OF AUTHORITIES

### CASES

<u>In re Personal Restraint of Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009).....	5
<u>In re Personal Restraint of Tobin</u> , 165 Wn.2d 172, 196 P.3d 670 (2008).....	6
<u>State v. Gartrell</u> , 138 Wn. App. 787, 158 P.3d 636 (2997) .....	7
<u>State v. Sloan</u> , 121 Wn. App. 220, 87 P.3d 1214 (2004) .....	5
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007).....	6
<u>State v. Zavala-Reynoso</u> , 127 Wn. App. 119, 110 P.3d 827 (2005) .....	5

### OTHER AUTHORITIES

RAP 13.4(b).....	4
RCW 9.94A.505.....	5, 6
RCW 9.94A.670.....	4, 6, 7
RCW 9.94A.701.....	5, 6

**I. IDENTITY OF PETITIONER**

The Petitioner is Daniel Herbert Pannell, Defendant and Appellant in the case below.

**II. COURT OF APPEALS DECISION**

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 39895-8-II, which was filed on November 16, 2010. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

**III. ISSUES PRESENTED FOR REVIEW**

Did the trial court err when it denied Appellant credit for the time he spent on community custody prior to the revocation of his suspended sentence, where Appellant spent nearly three years on community custody under DOC supervision as a condition of his suspended sentence, and where the combined terms of confinement and community custody imposed by the court already exceed the statutory maximum?

**IV. STATEMENT OF THE CASE**

On July 25, 2003, Daniel Herbert Pannell pleaded guilty to one count of first degree incest (RCW 9A.64.020) and four counts of second degree child molestation (RCW 9A.44.086). (CP 6-15)

Pannell's standard range for was 87-116 months, and the statutory maximum for the crimes was 10 years (120 months). (CP 38)

On August 22, 2003, the court sentenced Pannell under the Special Sex Offender Sentencing Alternative (SSOSA) to 116 months of confinement followed by three years of community custody. (CP 37, 39, 40, 41, 50) The court suspended Pannell's sentence, and directed that Pannell be "placed on community custody under the charge of DOC for the length of the suspended sentence[.]" (CP 41) Because of the length of time already served in custody pending resolution and sentencing, Pannell was released into community custody on the day of sentencing. (CP 35, 41

On May 16, 2006, the State filed a petition alleging that Pannell had violated the terms of his community custody, and asked the court to revoke Pannell's suspended sentence. (CP 53-56) The court granted the State's petition, revoked the suspended sentence, and ordered that Pannell serve 116 months in confinement followed by 3-4 years of community placement. (CP 79-80)

On June 22, 2009, Pannell filed a pro se Motion to Modify under CrR 7.8, asserting that the combined total of his term of

incarceration (116 months) and term of community placement (36-48 months) would exceed the 120-month statutory maximum. (CP 82-86)

At a hearing on September 25, 2009, the prosecutor and the court agreed that the sentence imposed had the potential to exceed Pannell's statutory maximum, and that the Judgment and Sentence should be amended. (RP 5-6; CP 114) But the prosecutor disputed Pannell's assertion that the time he spent on community custody prior to revocation should be counted toward the 120-month statutory maximum. (RP 5-6, 7) The court agreed with the prosecutor, and found that the community custody served under the suspended sentence was not equivalent to "confinement." (RP 7-8)

The court entered an order amending the Judgment and Sentence, which stated:

The total time that Defendant can be under this sentence is 120 months. This includes time spent in the Pierce County Jail[, in] the Department of Corrections & on Community Custody post release from the Department of Corrections.

(CP 123) Pannell timely appealed, but the Court of Appeals affirmed his sentence. (CP 124)

#### **V. ARGUMENT & AUTHORITIES**

The issues raised by Pannell's petition should be addressed

by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals and this Court. RAP 13.4(b).

Under the SSOSA statute, a trial court may suspend an offender's term of confinement and impose "[a] term of community custody equal to the length of the suspended sentence . . . and require the offender to comply with any conditions imposed by [DOC]." RCW 9.94A.670(5)(b). That is what the court did when it originally sentenced Pannell in 2003; the court imposed a 116-month sentence, ordered that it be suspended, and ordered that Pannell be placed on community custody. (CP 41) Pannell was on community custody and under orders to comply with specific conditions, until the suspended sentence was revoked in 2006.<sup>1</sup> (CP 41, 53-54, 83) When the court revoked the suspended sentence, it imposed 116 months of confinement to be followed by 3-4 years of additional community placement. (CP 80)

However, a trial court may not impose a sentence providing for a term of confinement, community supervision, community

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<sup>1</sup> The trial court "may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment." RCW 9.94A.670(11).

placement, or community custody that, when added together, exceeds the statutory maximum for the crime. RCW 9.94A.505(5); RCW 9.94A.701(8); State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004). In his CrR 7.8 motion, Pannell correctly pointed out that the total term of confinement combined with the term of community custody ordered in this case exceeds the 120-month statutory maximum. (CP 84-85)

When a term of confinement and community custody imposed by the trial court has the potential to exceed the statutory maximum for the crime, the trial court must explicitly state that “the combination of confinement and community custody shall not exceed the statutory maximum.” In re Personal Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). The parties and the court all agreed that such an explicit statement was necessary in this case. (CP 114, 123) But the trial court’s order specifically excluded the portion of community custody served by Pannell prior to revocation. (CP 123)

This exclusion exceeded the trial court’s sentencing authority

and violated the terms of the Sentencing Reform Act.<sup>2</sup> A trial court may impose a sentence only as authorized by statute. See In re Personal Restraint of Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008). And the court cannot impose a term of confinement and community custody that punishes an offender in excess of the statutory maximum. RCW 9.94A.505(5); RCW 9.94A.701(8).<sup>3</sup>

Nothing in the Sentencing Reform Act (SRA) or SSOSA statute directs a trial court or DOC to deny an offender credit for time spent on community custody if a SSOSA is later revoked.<sup>4</sup> And the SRA specifically forbids a combined term of confinement and community custody that exceeds the statutory maximum. RCW 9.94A.505(5); RCW 9.94A.701(8). The trial court here exceeded its statutory authority when it denied Pannell credit for the time he spent on community custody before his suspended

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<sup>2</sup> When a trial court's decision on a CrR 7.8 motion turns on a question of law, the appellate court reviews the decision *de novo*. See State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

<sup>3</sup> RCW 9.94A.505(5) states that "a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime[.]" RCW 9.94A.701(8) states that "[t]he 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[.]"

<sup>4</sup> The SSOSA statute directs that "[a]ll confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked." RCW 9.94A.670(11) This conforms with other sections of the SRA requiring that an offender receive credit for time spent in confinement prior to sentencing. See RCW 9.94A.505(6). But the SSOSA statute is silent in regards to credit, or lack of credit, for time served in community custody.

sentence was revoked. If Pannell does not receive credit for this time, then he will be punished for a length of time that exceeds the 120-month statutory maximum.

In rejecting Pannell's argument, the Court of Appeals relied on State v. Gartrell, 138 Wn. App. 787, 158 P.3d 636 (2997). (Opinion at 2) In that case, Division 2 held that time spent on community custody under a SSOSA suspended sentence is not "confinement," so Gartrell was not entitled to credit for his community custody time under RCW 9.94A.670(11). Gartrell, 138 Wn. App. at 790-91.

Gartrell argued that his community custody time should be credited as if it were "confinement" time. But that is not Pannell's argument here. Rather, it is Pannell's position that his time on community custody should count towards time served towards his statutory maximum, just as any other term of community custody would be counted. The Court of Appeals' reliance on Gartrell was therefore misplaced.

## **VI. CONCLUSION**

Pannell has already spent nearly three years under DOC supervision while on court-ordered community custody. The trial court has no authority to deny him credit for that time. Pannell's

case should be remanded for entry of a new order amending the judgment to specify that the combination of confinement and community custody (both pre and post-revocation) shall not exceed the 120-month statutory maximum.

DATED: December 14, 2010

*Stephanie Cunningham*

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Attorney for Daniel H. Pannell

**CERTIFICATE OF MAILING**

I certify that on 06/07/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Tom Roberts, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Daniel H. Pannell, DOC# 848771, Monroe Correctional Complex - TRU, PO Box 888, Monroe, WA 98272-0888.

*Stephanie Cunningham*

STEPHANIE C. CUNNINGHAM, WSBA #26436

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# APPENDIX

Unpublished Opinion, State v. Pannell, No. 39895-8-II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 39895-8-II.

Respondent,

v.

DANIEL HERBERT PANNELL,

UNPUBLISHED OPINION

Appellant.

WORSWICK, J. — Daniel Pannell appeals the trial court's denial of credit for time he spent in community custody under the Special Sex Offender Sentencing Alternative (SSOSA) against his re-imposed sentence. We affirm.<sup>1</sup>

FACTS

On July 25, 2003, Pannell pleaded guilty to one count of first degree incest and four counts of second degree child molestation. On August 22, 2003, the trial court sentenced Pannell to 116 months of confinement, giving him credit for 348 days he had spent in Pierce County Jail, and suspending the remainder to be served as community custody under SSOSA.

On June 23, 2006, the court revoked Pannell's suspended sentence after he was terminated from his sex offender treatment program for failure to make progress and for failure to pay for treatment. The court reimposed the 116 months of confinement and added three to four years of community placement.

On June 22, 2009, Pannell moved to vacate his sentence, arguing that the combination of his term of confinement and his term of community placement exceeds the 120-month statutory

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<sup>1</sup> A commissioner of this court initially considered Pannell's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

maximum sentence for his crimes. The State agreed and proposed language that the total time served would not exceed the statutory maximum and that Pannell would receive credit for times when he was in total confinement. However, Pannell also wanted the time he had served under community custody from 2003 to 2006 credited against his reimposed sentence.

On September 25, 2009, the court entered an order stating

The total time that Defendant can be under this sentence is 120 months. This includes time spent in the Pierce County Jail; [i]n the Department of Corrections & on community custody post release from the Department of Corrections.

CP 123.

Pannell argues that the trial court erred in denying him credit for time served in community custody from 2003 to 2006 under his SSOSA suspended sentence against his reimposed sentence. But in *State v. Gartrell*, 138 Wn. App. 787, 791, 158 P.3d 636 (2007), we held otherwise. We held that time spent on community custody under a SSOSA suspended sentence is not “confinement,” so Gartrell was not entitled to credit for that time under RCW 9.94A.670(10).<sup>2</sup> 138 Wn. App. at 790. Thus, we held that the trial court “properly refused to credit community custody time against the reimposed sentence.” 138 Wn. App. at 791. Pannell’s argument fails.

Pannell also argues that denying him credit for time served in community custody under his SSOSA suspended sentence results in the possibility of him serving more than the statutory maximum sentence. When a sentence contains a term of confinement and a term of community custody that, when combined, may exceed the statutory maximum sentence for the crime, the court must include language specifying that the total time for the sentence cannot exceed the

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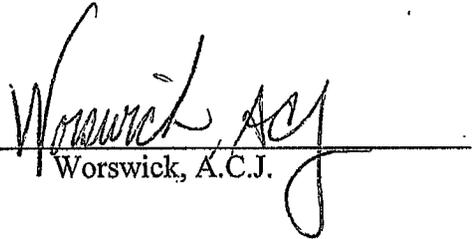
<sup>2</sup> RCW 9.94A.670(10) provides in pertinent part that “[a]ll confinement time served during the period of community custody [under a SSOSA suspended sentence] shall be credited to the offender if the suspended sentence is revoked.”

39895-8-II

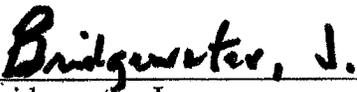
statutory maximum. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 673, 211 P.3d 1023 (2009); *State v. Sloan*, 121 Wn. App. 220, 224, 87 P.3d 1214 (2004). Here, the court added the appropriate language, making the sentence consistent with *Brooks*. And as discussed above, time served on a suspended sentence in community custody under SSOSA is not credited against the reimposed sentence when the suspended sentence is revoked. *Gartrell*, 138 Wn. App. at 791. The trial court did not err when it entered the 2009 order.

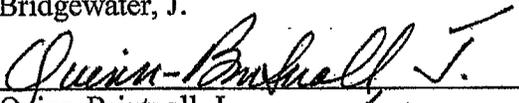
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
Worswick, A.C.J.

We concur:

  
Bridgewater, J.

  
Quinn-Brintnall, J.