

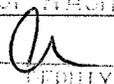
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COURT OF APPEALS
DIVISION II

NO. 39895-8-II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL HERBERT PANNELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz, Judge

No. 02-1-04226-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court correctly deny the defendant credit for time spent in community custody during a suspended sentence?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecuting Attorney (the State) charged Daniel Herbert Pannell (the defendant) with one count of incest in the first degree on September 10, 2002, Cause No. 02-1-04226-2. CP 1-2. The State later amended the charge, adding four counts of child molestation in the second degree. CP 19-21. Defendant pled guilty to all charges; the court sentenced him to 116 months on August 22, 2003. CP 50-52. Pursuant to RCW 9.94A.670¹, the court suspended the sentence and placed the defendant in community custody as part of the special sex offender sentencing alternative (SSOSA). *Id.*

The State received a violation report regarding the defendant in May 2006, and petitioned for a revocation hearing on May 16. CP 57-76,

¹ RCW 9.94A.345 states that "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." Pursuant to statute, the sentencing guidelines in effect during September 2002 will be cited throughout the brief.

53-56. On June 23, 2006, after considering the facts of the violation report, the court revoked the suspended sentence, committing the defendant to the Department of Corrections for the original sentence for 116 months, with an additional three to four years of community placement. CP 80-81.

On June 22, 2009, the defendant filed a motion to vacate the sentence and remand for re-sentencing under CrR 7.8(b). CP 82-86. The defendant corresponded with the Prosecuting Attorney's office over the following months, explaining that the sentence imposed exceeded the statutory maximum sentence. CP 114-120. The State agreed that the combined term of confinement and post-confinement community custody required clarifying language to be in compliance with *In re Brooks*, 166 Wn.2d 664, 673, 211 P.3d 1023 (2009); CP 114. The defendant disagreed with the suggested clarifying order as it did not count time spent in community custody under his SSOSA. CP 119-120. The State scheduled a hearing to address his concerns. CP 122.

At a hearing on September 25, 2009, the court determined that the sentence should be clarified to reflect that the total time the sentence may be imposed on the defendant is ten years. RP 5-6. The court issued an order specifying that this time included incarceration in the Pierce County Jail, time within the Department of Corrections, and any time spent in

community custody once released from the Department of Corrections.

CP 123.

On October 14, 2009, defendant filed a notice of appeal to the Court of Appeals, seeking review of the Superior Court's judgment. CP 124.

C. ARGUMENT.

1. THE COURT APPROPRIATELY CORRECTED THE DEFENDANT'S SENTENCE WITH LANGUAGE THAT CONFORMS WITH *IN RE BROOKS*.

The defendant's original sentence was for 116 months confinement, followed by three to four years of community custody. CP 50-52. When rendering sentences that include both confinement and community custody, "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 for the crime." RCW 9.94A.505(5). When a sentence exceeds the statutory maximum due to a combination of confinement and community custody, the court must include language to specify that the total time for which the sentence may be imposed cannot exceed the maximum. *In re Brooks*, 166 Wn.2d 664, 673, 211 P.3d 1023 (2009); *State v. Sloan*, 121 Wn. App. 220, 224, 87 P.3d 1214 (2004).

When the defendant moved to have his sentence vacated, the court added appropriate language making it consistent with *Brooks*. RP 5-6. The specific language stated that, “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 and on community custody post release from the Department of Corrections.” CP 124. As required by *Brooks*, the clarification conforms to the requirement that “under no circumstances may the offender serve more than the statutory maximum.” 166 Wn.2d at 673. The court appropriately amended the defendant’s sentence to ensure that he would not be subject to it for greater than the period allowed.

2. THE SUPERIOR COURT DID NOT ERR WHEN IT REFUSED TO CREDIT THE DEFENDANT FOR TIME SPENT IN COMMUNITY CUSTODY AS PART OF A SUSPENDED SENTENCE.

The defendant claims that time spent in community custody compliant with his SSOSA sentence should be credited towards his total sentence time. RP 7-8. Whether or not community custody under a suspended sentence should be credited towards the reinstated sentence is a matter of statutory interpretation, requiring de novo review. *State v. Ramirez*, 140 Wn. App. 278, 290, 165 P.3d 61 (2007); *State v. Armendariz*, 160 Wn.2d. 106, 110, 156 P.3d 201 (2007). When interpreting statutes that are plain on their face, the court considers the

plain meaning as the expression of the intended legislative purpose for the statute. *State v. Flowers*, 154 Wn. App. 462, 225 P.3d 476 (2010).

Considering the text of the confinement, community custody, and SSOSA statutes, the trial court correctly denied credit to the defendant for community custody time served under the SSOSA.

The court gives offenders credit towards a sentence only for confinement. During standard sentencing, the court “shall give the offender credit for all *confinement time* served before the sentencing.” RCW 9.94A.505(6) (emphasis added). For offenders with a suspended sentence pursuant to a SSOSA assignment that is later revoked, “[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(10) (emphasis added). Since the statute specifies that only confinement time may be credited towards a sentence, whether or not community custody falls within the definition of confinement must be determined.

The Sentencing Reform Act (SRA) states that “‘Confinement’ means total or partial confinement.” RCW 9.94A.030(10). Total confinement “means confinement inside the physical boundaries of a facility or institution ... for twenty-four hours a day.” 9.94A.030(42). The defendant did not reside within a state facility or institution during the period of community custody. CP 35-49. Therefore, the defendant was not in “confinement.”

“Partial confinement” is defined as “confinement for no more than one year” either in a facility appropriate for total confinement or as “work release, home detention, work crew, and a combination of work crew and home detention.” RCW 9.94A.030(31). Here, the court sentenced the defendant to community custody for the extent of his original sentence pursuant to a SSOSA arrangement; it did not include work release, work crew, or home detention programs. CP 35-49. Since he did not participate in one of the programs constituting partial confinement, nor did he reside in a state facility, his period of community custody cannot be credited towards his reinstated sentence.

Defendant also argues that by failing to acknowledge time spent in community custody, the court violated the statutory maximum sentence imposed by RCW 9.94A.505(5). App. Br. at 5. Although community custody can be a part of a sentence, it may also be “imposed pursuant to [RCW 9.94A.670 and other statutes].” RCW 9.94A.030(5).

When the court imposes a SSOSA, it “may *suspend the execution of the sentence* and impose the following conditions of suspension: (a) The court shall place the offender on community custody for the length of the suspended sentence...” RCW 9.94A.670(4) (emphasis added). The court orders community custody as an alternative to the original sentence. Furthermore, “[t]he court may revoke the suspended sentence at any time during the period of community custody and *order execution of the*

original sentence [under specific conditions].” RCW 9.94A.670(10) (emphasis added). Upon revocation, the SSOSA reverts to the sentence originally imposed; the court need only credit the original sentence for “[a]ll *confinement* time served during the period of community custody ...” *Id* (emphasis added). As long as the court credits all confinement time, a judgment and sentence valid under RCW 9.94A.505(7) at original sentencing remains valid when reinstated.

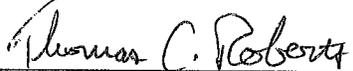
Time spent in community custody does not constitute confinement and does not apply to a sentence reinstated by a SSOSA revocation; nothing obligated nor permitted the court to credit the defendant with the period of time spent in community custody pursuant to RCW 9.94A.670(10). The Court of Appeals came to the same conclusion in *State v. Gattrell*, where a defendant with a previously revoked SSOSA claimed credit for time spent in community custody. 138 Wn. App. 787, 158 P.3d 636 (2007). The court held that “[t]he court properly refused to credit community custody time against the reimposed sentence.” *Id.* at 791. The statutory analysis coupled with precedent direct the appropriate outcome. The court’s decision was in accord with the applicable statutes and the ruling of *Gattrell*.

D. CONCLUSION.

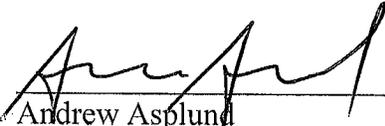
A defendant serving a suspended sentence under a SSOSA, who has the suspension revoked, cannot claim credit for the community custody time. RCW 9.94A.670(10) only allows credit for confinement time during the SSOSA period. The relevant statutes indicate that community custody time does not fall within the bounds of confinement. Therefore, the court properly amended the defendant's sentence to be consistent with applicable statute and the rule set forth in *Brooks*. For the reasons argued, the State respectfully requests that the defendant's sentence be affirmed.

DATED: July 15, 2010.

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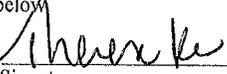
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Andrew Asplund
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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APPENDIX "A"

Appendix A

Selected Portions of Adult Sentencing Guidelines Manual, 2002

RCW 9.94A.030 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

...

(5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to *RCW 9.94A.505(2)(b), 9.94A.650 through 9.94A.670, 9.94A.690, 9.94A.700 through 9.94A.715, or 9.94A.545, served in the community subject to controls placed on the offender's movement and activities by the department. For offenders placed on community custody for crimes committed on or after July 1, 2000, the department shall assess the offender's risk of reoffense and may establish and modify conditions of community custody, in addition to those imposed by the court, based upon the risk to community safety.

...

(10) "Confinement" means total or partial confinement.

...

(26) "Home detention" means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.

...

(31) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

...

(42) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

...

(46) "Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community that complies with *RCW 9.94A.725.

...

(48) "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school.

RCW 9.94A.505 Sentences. (*Effective until July 1, 2004.*)

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

...

(5) Except as provided under *RCW 9.94A.750(4) and 9.94A.753(4), 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 for the crime as provided in chapter 9A.20 RCW.

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

...

(10) In any sentence of partial confinement, the court may require the offender to serve the partial confinement in work release, in a program of home detention, on work crew, or in a combined program of work crew and home detention.

RCW 9.94A.670 Special sex offender sentencing alternative.

...

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this section. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(a) The court shall place the offender on community custody for the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.712, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

...

(9) If a violation of conditions occurs during community custody, the department shall either impose sanctions as provided for in *RCW 9.94A.737(2)(a) or refer the violation to the court and recommend revocation of the suspended sentence as provided for in subsections (6) and (8) of this section.

(10) The 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. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.