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No. 90021-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW BRUCH,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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 ORIGINAL

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A. ISSUE PRESENTED

In Matthew Bruch's case, the Sentencing Reform Act required the court to impose a sentence that included a determinate term of community custody which, in combination with the term of confinement, did not exceed the maximum term. RCW 9.94A.701. Mr. Burch's maximum term was 120 months, and he was sentenced to 116 months incarceration and community custody for "at least 4 months, plus all accrued earned early release time at the time of release." CP 7. Did the trial court impose an indefinite term of community custody that may exceed the required three-year term of community custody or result in a sentence that exceeds the statutory maximum term in violation of RCW 9.94A.701?

B. STATEMENT OF THE CASE

A Snohomish County jury convicted Matthew Bruch of two counts of child molestation in the second degree and two counts of rape of a child in the third degree. CP 49-52. Second degree child molestation is a Class B felony with a maximum term of 120 months. RCW 9A.44.086(2); RCW 9A.20.021(1)(b); CP 3. Rape of a child in the third degree is a Class C felony with a maximum term of 60 months. RCW 9A.44.079(2); RCW 9A.20.021(1)(c); CP 3.

The Honorable George F.B. Appel sentenced Mr. Bruch to concurrent standard-range sentences of 116 months for the child molestation charges and 60 months for the rape of a child counts.¹ CP 5-6.

At sentencing, the prosecutor acknowledged that RCW 9.94A.701(9) requires the court to set a term of community custody so that the offender's sentence does not exceed the statutory maximum term. CP 30-31 (citing State v. Boyd, 174 Wn.2d 480, 275 P.3d 321 (2012)). The prosecutor nonetheless urged the court to impose a term of community custody for the Class B felonies that included earned early release time. CP 30-32; 4RP 715-16. The prosecutor asserted that the Boyd Court did not address earned early release time, and "they seem to be restricting the court's discretion to impose a combination of confinement and community custody that will equal the statutory maximum in the real world, where we all live." CP 31. The prosecutor therefore recommended the court impose a term of community custody for "[120 – (116 – earned early release as determined by DOC)]." Id. Mr. Bruch argued that the court should impose a 4-month term of community custody. 4RP 719.

¹ The court did not impose a term of community custody for the rape of child counts. CP 7.

The court agreed that the prosecutor's recommendation was a "very clever way of getting around a decision which makes it very difficult to sentence, because I do not know what good time is going to be." 4RP 725. The court acknowledged that it had to "come up with a number," but nonetheless imposed community custody for a minimum of four months plus any earned early release time. Id. The Judgment and Sentence reads:

Count I for a period of * months

Count II for a period of * months

Count III for a period of 0 months

Count IV for a period of 0 months

* = at least 4 months, plus all accrued earned early release time at the time of release.

CP 7. The Judgment does not state that the term of community custody may not exceed three years or that the total sentence may not exceed 120 months. Id.

On appeal, Mr. Bruch argued that the term of community custody violated RCW 9.94A.701's mandate that the court set a definite term of community custody so that his sentence did not exceed the maximum term. Brief of Appellant at 28-32. In a three-paragraph opinion, the Court of Appeals upheld the sentence. Slip Op. at 9-10.

The Court of Appeals reasoned that the court had reduced the term of community custody to four months and the conversion of earned early release time to community custody is required by the earned early release statute. Id. at 10 (citing State v. Winkle, 159 Wn. App. 323, 245 P.3d 249 (2001), rev. denied, 173 Wn.2d 1007 (2012)). This Court granted review.

C. ARGUMENT

The trial court exceeded the sentencing authority granted by RCW 9.94A.701.

Mr. Bruch was subject to a three-year term of community custody under RCW 9.94A.701(1). Given the 116-month term of confinement ordered by the sentencing court, RCW 9.94A.701(9) required the court to reduce the term of community custody in order to create a sentence that did not exceed the 120-month maximum term.

The trial court exceeded its statutory authority by ordering a community custody term of “at least 4 months plus all accrued earned early release time at the time of release.” The term is indefinite, and may result in a term of community custody that exceeds three years. This Court should reverse the Court of Appeals decision upholding Mr. Bruch’s invalid sentence.

1. The superior court's authority to sentence a felony offender is derived from the SRA.

The Legislature sets the punishment for criminal offenses. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The superior court's power to sentence felony offenders derives from the Sentencing Reform Act (SRA). RCW 9.94A.505(1). RCW 9.94A.505 provides that the court "shall" impose a sentence "as provided in the following sections and as applicable to the case." RCW 9.94A.505(2)(a).

In Mr. Bruch's case, the court was required to impose a sentence within the standard range established in RCW 9.94A.510 and a term of community custody as set forth in RCW 9.94A.701. RCW 9.94A.505(2)(a)(i), (ii). The total sentence, however, could not exceed the statutory maximum term.

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 custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

RCW 9.94A.505(5).²

² RCW 9.94A.750 and .753 address restitution.

This Court reviews the legality of a sentence de novo. In re Personal Restraint of Brooks, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009). The review of Mr. Bruch's sentence requires this Court to construe the applicable sentencing statutes, which are also reviewed de novo. Leach, 161 Wn.2d at 184.

The court's primary duty in interpreting a statute is to "determine the legislature's intent." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the statute's meaning is clear, then "the court must give effect to that plain meaning as an expression of legislative intent." Id. "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language of the statute in which the provision is found, relative provisions, and the statutory scheme as a whole." Id. "If the statute is unambiguous, meaning it is subject to only one reasonable interpretation," the court's inquiry ends. State v. K.L.B., ___ Wn.2d ___, 2014 WL 2895451 at *2 (No. 88270-3, 6/26/14).

2. RCW 9.94A.701 requires the sentencing court to set a term of community custody so that the offender's sentence does not exceed the statutory maximum for the crime.

RCW 9.94A.701 provides for a three-year term of community custody for the crime of second degree child molestation. RCW

9.94A.701(1)(a).³ The statute also requires the court to reduce the term of community custody when necessary to avoid a sentence that exceeds the maximum term. RCW 9.94A.701(9); State v. Boyd, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The statute reads in relevant part:

(1) If an offender is sentenced to the custody of the department for one of the following crimes, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:

(a) A sex offense not sentenced under RCW 9.94A.507;
...

(9) 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. The term "shall" is presumptively a mandatory directive. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

In Boyd, this Court reviewed a sentence of 54 months confinement plus 12 months community custody, with the notation that the total term of confinement plus community custody could not exceed 60 months, which was the statutory maximum. Boyd, 174 Wn.2d at

³ Punishment is determined based upon the law in effect at the time of the commission of the crimes. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). The crimes at issue occurred sometime between January 26, 2007, and January 25, 2009. CP 3, 70-71. RCW 9.94A.701, applied retroactively to Mr. Bruch's September 6, 2010, sentence. Laws of 2009, ch. 375 § 20; Boyd, 174 Wn.2d at 473. amended.

472. Interpreting RCW 9.94A.701(9), the Boyd Court held that the sentence exceeded the maximum term, regardless of the notation, because “the trial court, not the Department of Corrections, was required to reduce Boyd’s term of community custody to avoid a sentence in excess of the maximum term.” Id. at 473; accord State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782, rev. denied, 177 Wn.2d 1016 (2013); State v. Winborne, 167 Wn. App. 320, 329, 273 P.3d 454, rev. denied, 174 Wn.2d 1019 (2012).

The Boyd Court’s interpretation of RCW 9.94A.701 is reinforced by the statute’s legislative history. Prior to 2009, terms of community custody were governed by Former RCW 9.94A.715. For certain offenders, including sex offenders, the 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 early release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer.” Former RCW 9.94A.715 (emphasis added) (repealed by Laws of 2009, ch. 28, §42, effective 6/26/09);⁴ accord Brooks, 166 Wn.2d at 668. In contrast, the 2009 legislation required the court to (1) impose a term of confinement, (2) order a fixed term of

⁴ For a more complete legislative history, see State v. Franklin, 172 Wn.2d 831, 836 n.5, 263 P.3d 585 (2011).

community supervision of 12, 18 or 36 months and (3) reduce the term of community custody if necessary to ensure the total sentence did not exceed the statutory maximum term. RCW 9.94A.701(1)-(3); Laws of 2009, ch. 375 § 5; Winborne, 167 Wn. App. at 329. By amending the statute, the legislature made it clear that the court is no longer permitted to set an indeterminate term of community custody, such as a term that includes earned early release time.

The trial court understood the statutory requirement that it set a definite term of community custody, but it violated this principle in Mr. Bruch's case. A term of "at least 4 months, plus all accrued earned early release time at the time of release" is not a determinate sentence. Instead, the sentence requires the Department of Corrections (DOC) to determine the actual length of community custody in violation of RCW 9.94A.701 and Boyd.

In addition, Mr. Bruch has the potential to earn early release credits of up to one-third of his sentence. RCW 9.94A.729(3)(e).⁵ One-third of 116 months is 38 and 2/3 months. Combined with the 4-month term of community custody, the court imposed a term of

⁵ Amendments to RCW 9.94A.729 subsequent to Mr. Bruch's sentencing have not changed the provisions at issue. Prior to June 2014, subsection (3)(e) was formerly found at (3)(d). Laws of 2014 ch. 130 § 4; Laws of 3013 2nd sp. s. ch. 13 §2; Laws of 2013 ch. 266 § 1.

community custody between 4 and 42 months. Not only is this an indefinite term, it has the potential to exceed the three-year term of community custody required by RCW 9.94A.701(1)(a). The trial court thus exceeded the sentencing authority granted by RCW 9.94A.701.

3. The earned early release time provisions of RCW 9.94A.729 govern the Department of Corrections, not the sentencing court.

In excusing the trial court's indeterminate term of community custody in Mr. Bruch's case, the Court of Appeals referenced RCW 9.94A.729(5), stating that "any earned early release time he earns on the confinement portion of his sentence must be converted to community custody." Slip Op. at 9. RCW 9.94A.729, however, is directed to the DOC, not the trial court. As shown above, the trial court is not permitted to add potential earned early release time to its community custody term.

The Court of Appeals logic is based upon its prior decision in State v. Winkle, 159 Wn. App. 323, 245 P.3d 249 (2001), rev. denied, 173 Wn.2d 1007 (2012). Winkle was sentenced to 60 months in prison, the statutory maximum term, for two counts of rape of a child in the third degree. Winkle, 159 Wn. App. at 327. The court added a term of community custody "for the entire period of earned early

release awarded under [Former] RCW 9.94A.728.” Id. In determining if the sentence conformed to the newly-enacted RCW 9.94A.701, the Court of Appeals reasoned that Winkle’s sentence could not exceed the statutory maximum term because RCW 9.94A.729 requires that sex offenders “shall be transferred to community custody in lieu of earned early release time.” Id. at 329 (quoting RCW 9.94A.729(5)). The Court of Appeals also relied upon Brooks for the proposition that sentencing the defendant to community custody for the period of earned early release did not render the sentence indeterminate. Id. at 330-31. The Court of Appeals’ interpretation of RCW 9.94A.701 is wrong.

RCW 9.94A.729 establishes that DOC may award earned early release credits to certain offenders at certain rates, requires DOC to perform a risk assessment for some offenders, and permits DOC to require a release plan for some offenders and temporarily deny release if the plan is inappropriate. The section relied upon by the Court of Appeals provides:

A person who is eligible for earned early release as provided in this section and who will be supervised by the department pursuant to RCW 9.94A.501 or 9.94A.5011, shall be transferred to community custody in lieu of earned early release time.

RCW 9.94A.729(5)(a).⁶ This statute does not direct the sentencing court in its setting of a term of community custody.

This interpretation of RCW 9.94A.729 is supported by RCW 9.94A.707, which mandates that community custody begin upon the completion of the offender's prison term, not the completion of confinement in lieu of early release.

Community custody shall begin: (a) Upon completion of the term of confinement; or (b) at the time of sentencing if no term of confinement is ordered.

RCW 9.94A.707(1). Like RCW 9.94A.701, the current version was part of 2009 amendments. Laws of 2009 ch. 375 §§ 5, 7. The prior language read:

Community custody shall begin: (a) Upon completion of the term or confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728(1); or (c) at the time of sentencing if no term of confinement is ordered.

Former RCW 9.94A.707 (2008).

⁶ RCW 9.94A.501 requires DOC to supervise a wide range of offenders, including any felony offender subject to community custody who is determined to have a high risk to reoffend; those convicted of sex offenses, serious violent offenses, failing to register as a sex offender; some DV offenders; offenders under the parole system; offenders determined to be danger mentally ill offenders; and offenders serving alternative sentences. RCW 9.94A.5011 addressed DOC supervision of defendants convicted in superior court of misdemeanor and gross misdemeanor offenses. Because he was convicted of rape of child in the third degree, Mr. Bruch will be supervised by DOC upon release. RCW 9.94A.501(4)(a).

The Court of Appeals' reliance upon Brooks for its holding that Mr. Bruch's term of community custody is not indeterminate is also misplaced. Brooks addressed a sentence under Former RCW 9.94A.715, which required the sentencing court to set a term of community custody that was indeterminate – either the range provided by statute or the period of earned early release, whichever was longer. Brooks, 166 Wn.2d at 668. Brooks cited the definition of determinate sentence to hold that a sentence under Former RCW 9.94A.715 was not indeterminate even though DOC would eventually set the actual length of community custody instead of the court. Id. at 674 (citing Former RCW 9.94A.030(21)). Now found at RCW 9.94A.030(18), that definition reads:

“Determinate sentence” means a sentence that states with exactitude the number of years, months, or days of total confinement, of partial confinement, of community custody, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned early release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

RCW 9.94A.030(18).

The current sentencing scheme requires a fixed term of community custody which must be reduced if the term will result in a

sentence that exceeds the statutory maximum. RCW 9.94A.701.

Unlike the statute at issue in Brooks, the term of community custody must be set by the court and must be definite. Id. The definition of determinate sentence merely explains that the fact that an offender may earn early release credits does not render the definite term of confinement indeterminate. RCW 9.94A.030(18). It does not transform the indefinite sentence imposed by the sentencing court into one that complies with RCW 9.94A.701.

Winkle's reasoning has been fatally undermined by more recent decisions of this Court. The Boyd Court interpreted the plain language of the 2009 amendments to RCW 9.94A.701 to require the sentencing court to reduce a term of community custody whenever necessary to avoid exceeding the statutory maximum term. Boyd, 174 Wn.2d at 472-73. Boyd made it clear that that responsibility could not be passed on to DOC as it has been in Mr. Bruch's case.

In addition, the Franklin Court explained that RCW 9.94A.729 does not govern the trial court's imposition of community custody, but instead instructs DOC as to when community custody begins. State v. Franklin, 172 Wn.2d 831, 837 n.8, 263 P.3d 585 (2011).

Franklin maintains that RCW 9.94A.729, which provides for transfer to community custody in lieu of earned

release, does not relieve the trial court of its duty under RCW 9.94A.701 to set fixed – rather than variable – terms of community custody. . . . Franklin contends that RCW 9.94A.729 simply instructed DOC as to when community custody begins and does not authorize the sentencing court to impose community custody in lieu of earned release. In contrast, he argues, only RCW 9.94A.701 and RCW 9.94A.702 (which governs community custody for offenders sentenced to one year or less of confinement) authorize the sentencing court to impose community custody. C.f. RCW 9.94A.505(2)(a)(ii) (indicating that “the court shall impose” community custody pursuant to RCW 9.94A.701 and .702). Accordingly, Franklin urges this court to overturn State v. Winkle, in which the Court of Appeals held that former RCW 9.94A.729(5)(a) (2010) allowed the trial court to impose a term of community custody in lieu of earned release.

The plain meaning of the relevant statutes support Franklin’s contention that RCW 9.94A.701 and RCW 9.94A.702 – not RCW 9.94A.729 – govern the trial court’s imposition of community custody at the time of sentencing.

Id. (emphasis added) (internal citation omitted).

The Franklin Court did not reach the issue of Winkle’s validity because Franklin was sentenced before 2009 and the statute therefore required DOC, and not the trial court, to adjust his length of community custody under the retroactive statute. Franklin, 172 Wn.2d at 837 n.8, 840-42. This Court should take the opportunity to abrogate Winkle in deciding Mr. Bruch’s case.

RCW 9.94A.729 does not govern the trial court's imposition of a definite term of community custody. The Court of Appeals incorrectly reasoned that the indefinite term of community custody in this case was authorized by RCW 9.94A.701 because Mr. Burch's earned early release time will be served in community custody in lieu of earned early release. This Court should reverse the Court of Appeals because Mr. Bruch's sentence violates RCW 9.94A.701.

4. Mr. Bruch's sentence must be reversed and remanded for the imposition of a four-month term of community custody.

"Courts have the duty and power to correct an erroneous sentence upon its discovery." In re Personal Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). The trial court set a variable term of community custody that violated its sentencing authority under RCW 9.94A.701(1) and (9) and required DOC to determine Mr. Bruch's term of community custody. See Boyd, 174 Wn.2d at 473 (trial court, not DOC, required to reduce sentence). Mr. Burch's sentence must be vacated and remanded for the imposition of a term of community custody that complies with RCW 9.94A.701. Id.

D. CONCLUSION

Instead of complying with RCW 9.94A.701, the trial court gave Matthew Bruch an indeterminate term of community custody with no proviso that the term of community custody cannot exceed three years or that the total sentence may not exceed 120 months. Mr. Bruch asks this Court to reverse the Court of Appeals and remand his case for resentencing.

DATED this 28th day of July 2014.

Respectfully submitted,



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IN THE SUPREME COURT OF STATE OF WASHINGTON

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)	
Respondent,)	
)	NO. 90021-3
)	
MATTHEW BRUCH,)	
)	
Petitioner.)	

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Supplemental Brief of Petitioner

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