

No. 94971-9

NO. 74899-8-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

FILED
November 7, 2016
Court of Appeals
Division I
State of Washington

In re the Personal Restraint Petition of:

DEREK E. GRONQUIST,

Petitioner.

SUPPLEMENTAL
RESPONSE OF THE
DEPARTMENT OF
CORRECTIONS

Respondent, the Department of Corrections (Department or DOC) submits this Supplemental Response per this Court's Order.

I. INTRODUCTION

On October 6, 2016, a ruling was entered by this Court directing the Department to file a supplemental response addressing Gronquist's contention that the calculation of the maximum expiration (Max Ex) date for his consecutive sentences is inconsistent with decisions addressing maximum term expiration dates for successive felony convictions. The Court asked Respondent to distinguish how Gronquist's case differs from those addressed in *In re St. Peter v. Rhay*, 56 Wn.2d 297, 352 P.2d 806 (1960), and *In re Pers. Restraint of Paschke*, 61 Wn. App. 591, 811 P.2d 694 (1991). Gronquist's case is different from those cases because they address different sentence structures than Gronquist's. Gronquist is not a parolee, but instead is subject to a determinate sentence that includes a separate and distinct community custody term.

II. ARGUMENT

A. **With Consecutive Sentences, The Maximum Expiration Date For The “Child” Starts On The ERD Of The “Parent” Because The ERD Is When The Department “Releases” Or Transfers The Offender To Begin Serving Confinement Time On The Consecutive Sentence**

The Max Ex defines the total time the offender may be confined for a crime, and the Max Ex period begins when the offender is first taken into custody for the crime. When the offender has a single sentence, or multiple concurrent sentences, the Max Ex start date is the date the judgment and sentence is signed or when the offender was placed in custody on the sentence (the offender of course would receive credit for any time served on the charge and conviction before sentencing). *See In re Costello*, 131 Wn. App. 828, 830 (2006); RCW 9.94A.505(6) (sentencing court shall give the offender credit for all confinement time served before sentencing if that time was solely in regard to the offense for which the offender is being sentenced).

With consecutive offenses, however, the Max Ex on the second sentence starts the day the offender is “released” or transferred from the first sentence to begin serving the second sentence. *In re Paschke*, 61 Wn. App. 591, 593-94 (1991). Although one could argue the statutes delay the start of the second sentence until the maximum expiration of the first sentence, Washington courts have rejected an interpretation of the statutes

that would postpone the running of the second sentence until the first sentence has completely expired. *Id.* (citing *St. Peter v. Rhay*, 56 Wn.2d 297, 352 P.2d 806 (1960), *State ex rel. Mason v. Superior Court*, 44 Wn.2d 67, 265 P.2d 253 (1954)).

Instead, courts consistently have held that “[t]he maximum term expiration date for each felony is calculated from the date on which, but for successive felonies, the prisoner would have been released from confinement.” *Paschke*, 61 Wn. App. at 594 (citing *St. Peter*, 56 Wn.2d at 300); *see also In re Peterson*, 99 Wn. App. 673, 676, 995 P.2d 83 (2000) (applying *Paschke*); *State v. Larson*, 56 Wn. App. 323, 332, 783 P.2d 1093 (1989) (third consecutive sentence begins to run when defendant finishes serving the first two); *In re Akridge*, 90 Wn.2d 350, 354, 581 P.2d 1050 (1978) (consecutive sentence begins when offender is paroled from prior sentence to consecutive sentence). Although most of the case law on this issue concerns pre-SRA sentencing, the result is the same under the SRA because the relevant statutory language governing consecutive sentences is essentially the same under both schemes. *Compare* RCW 9.92.080(1) *with* RCW 9.94A.589(2)(a) and (5).

In summary, therefore, the Max Ex start date for the second of two sentences ordered to run consecutively is the ERD of the first sentence.

B. The Max Ex Clock Tolls, Preserving Earned Early Release Time, When The Offender Serves Confinement Time Attributable Solely To Another Cause

RCW 9.94A.707 provides that “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.” Under this statute, an offender cannot serve community custody until he actually is released from total confinement. For an offender eligible for community custody in lieu of earned early release under RCW 9.94A.729(5), his community custody cannot begin until he is released to the community. If, however, the offender owes confinement time on a consecutive sentence, he is not released from confinement on the ERD of the first sentence, but rather is transferred to begin serving confinement on the second sentence. Because he is not actually released from confinement, his community custody in lieu of early release would not begin, but rather would toll pending completion of the consecutive confinement term.

RCW 9.94A.171(3) supports this conclusion. The statute provides, with certain exceptions not relevant here, that the term of community custody shall be tolled during any period of time the offender is in confinement for any reason. Thus, the term of community custody owed in lieu of earned early release on the parent cause should toll while the offender is in total confinement on the child cause. The community

custody time will toll until the offender is released from total confinement on all the consecutive sentences.

RCW 9.94A.589(5) similarly supports this conclusion. In pertinent part, that statute provides that “[i]n the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences.” This statute requires the offender to serve the confinement sentence on the child cause before the offender serves the community custody portion of the parent cause. Thus, when the offender is released on the ERD of the parent cause to begin serving the child cause, the community custody portion of the parent cause will be postponed until the offender serves the confinement on the child cause. The offender will then serve the community custody on the parent cause after release from confinement on any child causes. If the community custody portion of the parent cause were not tolled while the offender served his confinement on the child cause, the offender would effectively serve part of his consecutive sentence concurrently, contravening RCW 9.94A.589(5) and his judgment and sentence.

Washington case law also supports the conclusion that the remaining time on the parent cause tolls while the offender is serving the consecutive child cause sentence, and the offender must serve that time on

community custody in lieu of earned early release for the parent cause upon completion of the sentence of total confinement for the child cause. In *State v. Acrey*, 97 Wn. App. 784 (1999) and *State v. Cameron*, 71 Wn. App. 653 (1993), the Court of Appeals considered situations where the offender had two concurrent sentences, with one shorter sentence containing a term of supervision, and one longer sentence without a term of supervision. Under the statutes, the offender first served the two terms of confinement imposed for the two counts, followed by the term of supervision. In both cases, the court held the term of supervision tolled while the offender finished serving the longer confinement term on the second count. *Acrey*, 97 Wn. App. at 787-88; *Cameron*, 71 Wn. App. at 656-57.

The same reasoning applies in the case of consecutive sentences. The offender must serve the sentences of confinement first, and the community custody tolls while the offender is in confinement. Because the offender would have been on community custody in lieu of earned early release as of the ERD, this time tolls and the offender must serve this time after completing the sentence of confinement on the consecutive child cause.

The Washington Supreme Court's ruling in *State v. Jones*, 172 Wn.2d 236, 257 P.3d 616 (2011), supports this conclusion as well. In

Jones, the Court held that an offender was not entitled to credit against the term of community custody for excess time he was held in confinement after his sentence was amended. In that case, the offender was originally sentenced to 130 months confinement, followed by 36 months community custody. *Id.* at 239. The sentence was later held invalid, and was amended to 51 months confinement, and 36 months community custody. *Id.* By the time the sentence was amended, the offender had already served 81 months in confinement. *Id.* The offender contended the excess time in confinement should be applied to his term of community custody. *Id.* at 239-40.

Applying the prior version of the tolling statute, the Court held that the community custody tolled as a result of confinement, even erroneous confinement, and the offender was not entitled to credit his erroneous confinement time against his community custody time. *Id.* at 242-49. Even though the tolling statute has been amended, the result is the same under the current statute. The term of community custody tolls while the offender is confined. The offender's confinement on the second consecutive sentence tolls the community custody portion of the parent cause.

Gronquist argues that the time on the two earlier causes should continue to run despite his transfer to the final cause under the rule that a

sentence continues to run until it expires, notwithstanding parole. *See Paschke*, 61 Wn. App. at 595 (citing *January v. Porter*, 75 Wn.2d 768, 776-77, 453 P.2d 876 (1969); *State v. Jennings*, 45 Wn. App. 858, 860, 728 P.2d 1064 (1986)). But this rule applies to pre-SRA indeterminate sentences, not SRA determinate sentences, because of a unique distinction between parole and community custody. The courts recognize that parole is part of the sentence of confinement imposed by the superior court – parole is simply an act of grace that allows the offender to serve that sentence of confinement in the community rather than in prison. *January v. Porter*, 75 Wn.2d at 774. Because the offender is serving the same sentence, the sentence continues to run even though the offender is on parole.

In contrast, community custody and confinement are distinct sentence elements. *See State v. Jones*, 172 Wn.2d at 244-45 (recognizing statutory difference between term of confinement and term of community custody, and holding the offender is not entitled to credit time in confinement against community custody); *also, compare* RCW 9.94A.030(8) (defining confinement to mean partial or total confinement) *with* RCW 9.94A.030(5) (defining community custody to mean time “served in the community subject to controls placed on the offender’s movement and activities by the department.”). Community custody,

whether imposed by the court or served in lieu of early release, cannot run while the offender remains confined. RCW 9.94A.707. The community custody on a parent cause, therefore, tolls and is served once the offender has finished the sentence of confinement on the child cause.

Gronquist's Max Ex date is correctly calculated because he must still complete the terms of community custody for each sentence after he is released from total confinement. Because his community custody is in lieu of confinement, it must still be included in the Max Ex calculation.

III. CONCLUSION

Because the Department correctly calculated Gronquist's Max Ex date, Respondent respectfully requests that this court deny Gronquist's petition.

RESPECTFULLY SUBMITTED this 7th day of November, 2016.

ROBERT W. FERGUSON
Attorney General

s/ Annie L. Yu
ANNIE L. YU, WSBA #45365
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
AnnieY@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the SUPPLEMENTAL RESPONSE OF THE DEPARTMENT OF CORRECTIONS on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid

TO:

DEREK E. GRONQUIST DOC #943857
WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA WA 99362

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

EXECUTED this 7th day of November, 2016, at Olympia, Washington.

s/ Cherrie Melby
CHERRIE MELBY
Legal Assistant
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
CherrieK@atg.wa.gov