

64331-2

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NO. 64331-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EDDIE DYSON,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 FEB 12 PM 3:10

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Gregory P. Canova, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
DYSON'S JUDGMENT AND SENTENCE STILL REQUIRES MODIFICATION	4
D. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Brooks

166 Wn.2d 664, 211 P.3d 1023 (2009) 3, 4

State v. Linderud

147 Wn. App. 944, 197 P.3d 1224 (2008)..... 2, 3

RULES, STATUTES AND OTHER AUTHORITIES

Law of 2009, ch. 375, § 5..... 3

RCW 9A.20.021 3

RCW 9A.28.020..... 2

RCW 9A.56.200..... 2

RCW 9.94A.533 3

RCW 9.94A.701..... 3, 4

A. ASSIGNMENT OF ERROR

Appellant's sentence for Attempted Robbery in the First Degree potentially exceeds the statutory maximum sentence for that offense.

Issue Pertaining to Assignment of Error

The total penalty imposed upon a defendant, including the period of confinement and the subsequent period of community custody, may not exceed the maximum penalty for the offense. Appellant's sentence for Attempted Robbery violates this prohibition. Is remand required?

B. STATEMENT OF THE CASE

Eddie Dyson was convicted of Attempted Robbery in the First Degree and Burglary in the First Degree. Each offense contained a deadly weapon sentencing enhancement. CP 7-8.

At sentencing, the court imposed an 87-month standard range sentence for the Burglary, plus a mandatory 24-month deadly weapon enhancement, for a total sentence of 111 months. CP 10. The court also imposed 18 to 36 months of community custody. CP 11. This sentence is not at issue.

Dyson's sentence for Attempted Robbery, however, is at issue. This is a class B felony with a maximum authorized sentence

of 120 months. See RCW 9A.56.200 (completed offense a class A felony); RCW 9A.28.020(3)(b) (attempt to commit a class A felony is a class B offense). The court imposed 96.75 months,¹ plus a mandatory 12-month deadly weapon enhancement, for a total of 108.75 months. CP 10. The court also imposed 18 to 36 months of community custody. CP 11. Therefore, Dyson's total potential sentence for this crime is 126.75 months to 144.75 months – a range that exceeds 120 months.

Dyson was sentenced in July 2009 and appealed, raising this very issue. CP 7, 16-25. The State conceded error and this Court remanded for amendment of the Judgment and Sentence to ensure Dyson's total sentence did not exceed 120 months. CP 27-28. Citing State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008), this Court said:

when the combination of confinement and community custody exceeds the maximum sentence, the sentence is indeterminate and must be remanded for imposition of a determinate sentence not exceeding the statutory maximum. This is true even if the judgment and sentence recites that the total sentence shall not exceed the statutory maximum. . . .

CP 27.

¹ Because Dyson committed an attempted crime, his standard range was calculated as 75% of that for a completed crime. See

Shortly after the mandate was issued, and before the matter could be heard in the Superior Court on remand, the Supreme Court decided In re Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). The Brooks Court overruled that portion of Linerud indicating that a sentence is indeterminate even where the sentencing court indicates the total sentence shall not exceed the statutory maximum. Brooks, 166 Wn.2d at 673-674. The Court held:

when a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum. . . .

Brooks, 166 Wn.2d at 675.

In addition, the Legislature has now amended RCW 9.94A.701(8) to provide 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 as provided in RCW 9A.20.021.

Law of 2009, ch. 375, § 5.

9.94A.533(2); CP 8.

Despite Brooks and RCW 9.94A.701(8), on remand, the sentencing court declined to modify Dyson's judgment and sentence, finding instead that the original judgment and sentence complied with Brooks. CP 31. Once again, Dyson timely filed his Notice of Appeal. CP 32-33.

C. ARGUMENT

DYSON'S JUDGMENT AND SENTENCE STILL REQUIRES MODIFICATION.

The Superior Court ruled that the original judgment and sentence complied with Brooks. This is likely the result of a mistaken assertion by the deputy prosecutor who appeared at the hearing on remand. She indicated she had checked the original judgment and sentence and it contained language making it clear the combination of prison and supervision could not exceed the statutory maximum sentence. Defense counsel did not correct this assertion. RP 3-4. The judgment contains no such language. See CP 7-15.

Under Brooks and RCW 9.94A.701(8), this Court should once again remand this case back to the sentencing court for clarification and modification of the judgment and sentence to ensure Dyson's total sentence does not exceed 120 months.

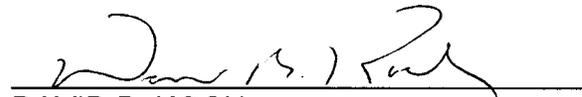
D. CONCLUSION

Dyson's case must be remanded again.

DATED this 12th day of February, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 61997-7-1
)	
EDDIE DYSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF FEBRUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EDDIE DYSON
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COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF FEBRUARY 2010.

x *Patrick Mayovsky*