

68576-7

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No. 68576-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN BASCOMB,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court exceeded its statutory authority by imposing a variable term of community custody.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 9.94A.701 requires a trial court impose one of three determinate terms of community custody set forth in that statute depending upon the seriousness of the offense. Following a 2009 amendment to that statute and repeal of former RCW 9.94A.715, courts can no longer impose a variable term dependent upon a person's release from confinement. Instead, RCW 9.94A.701(9) provides that where the combined term of confinement and community custody exceed the statutory maximum for an offense, the trial court must reduce the term of community custody. Where the sentencing court imposed a determinate term and, in the alternative, a variable term and ordered Mr. Bascomb to serve whichever proved longer, did the court exceed its authority?

C. STATEMENT OF THE CASE

Mr. Bascomb was convicted following a jury trial of one count of violating a court order. CP 41. Because of his offender score of 8, Mr. Bascomb's standard range was 60 months. CP 42. The trial court

imposed 60 months of confinement, and in addition imposed 12 months community custody. CP 44-45.

D. ARGUMENT

The trial court erred in imposing alternative terms of community custody.

“A trial court only possesses the power to impose sentences provided by law.” *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.701(9) provides:

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.

Following 2009 amendments to RCW 9.94A.701, and elimination of former RCW 9.94A.715, a trial court no longer has the authority to impose a variable term of community custody. *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). Instead, *Franklin* recognized,

[u]nder the amended statute, a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing. RCW 9.94A.701(1)- (3); *cf.* former RCW 9.94A.715(1).

Franklin, 172 Wn.2d at 836. The Court more recently clarified that for persons sentenced after August 2009, the trial court and not the

Department of Corrections is responsible for fixing the appropriate term of community custody. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

Violation of a court order is a Class C Felony if the person has two prior convictions for violating a court reoder. RCW 26.50.110(5).

The jury found Mr. Bascomb had two prior convictions. CP 35. The statutory maximum for Mr. Bascomb's offense is 60 months confinement. RCW 9A.20.021(1)(c). Based upon an offender score of 8, Mr. Bascomb's standard range was 60 months. CP 42. The trial court imposed that term. CP 44.

RCW 9.94A.701(1)(a) authorizes a one-year term of community custody for Mr. Bascomb's offense. The trial court imposed that term. CP 45. However, the Judgment and Sentence adds:

The term of community custody shall be reduced by the Department of Corrections if necessary so that the total amount of incarceration and community custody does not exceed the maximum term of sentence for any offense, as specified in this judgment.

CP 45.

Boyd specifically rejected the use of similar language, recognizing that RCW 9.94A.701(9) requires the trial court set a specific term of community custody and that that term when combined

with the term of confinement not exceed the statutory maximum. 174 Wn.2d at 471-72. Here, because Mr. Bascomb's standard range sentence was 60 months, RCW 9.94A.701(9) does not permit the imposition of a term of community custody, nor does it permit the trial court to delegate to DOC the responsibility of setting the term of community custody.

The Court must strike both the term of community custody as well as the additional language permitting DOC to set a term at a later date.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Bascomb's sentence.

Respectfully submitted this 28th day of November, 2012.



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STATE OF WASHINGTON,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] KEVIN BASCOMB 927623 LARCH CORRECTIONS CENTER 15314 NE DOLE VALLEY RD YACOLT, WA 98675</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF NOVEMBER, 2012.

X _____ *[Handwritten Signature]*

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