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COURT OF APPEALS
DIVISION II

36969-9-II

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STATE OF WASHINGTON
BY _____
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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JAMES HIBBERD,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF COWLITZ COUNTY

Before the Honorable James J. Stonier, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The lower court erred when it failed to comply with CrR 7.8(c)(2) when it denied the appellant's motion to Modify Judgment and Sentence prior to holding a show cause hearing.

2. The lower court erred when it entered an order denying the appellant's CrR 7.8 motion to Modify Judgment and Sentence without a hearing because the appellant's motion made a substantial showing that he is entitled to relief.

3. The sentencing court violated the appellant's right to a jury trial under the Sixth Amendment to the United States Constitution and Article 1, § 21 of the Washington Constitution, when it imposed a sentence that included 72 months of incarceration followed by 36 to 48 months of community custody without obtaining a finding by a jury or stipulation by the appellant of facts to support a sentence in excess of the appellant's 75-month standard range maximum.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the lower court err in dismissing the motion without a hearing prior to entering an order fixing a time and place for hearing and directing the State to appear and show cause why the relief asked for should

not be granted, as required by CrR 7.8(c)(2). Assignments of Error 1 and 2.

2. Did the sentencing court violate the appellant's right to jury trial when it imposed a sentence that included 72 months of incarceration followed by 36 to 48 months of community custody without obtaining a finding by a jury or a stipulation by the appellant of facts to support a sentence in excess of the appellant's 75- month standard range maximum? Assignment of Error 3.

3. Does community custody constitute "imprisonment" or "total confinement" for purposes of analysis under *Blakely v. Washington*? Assignment of Error 3.

C. STATEMENT OF THE CASE

1. Procedural history:

Appellant Michael Hibberd was convicted in Cowlitz County Superior Court of three counts of child molestation in the second degree on December 21, 2004. Clerk's Papers [CP] at 101. Following direct appeal,¹ Hibberd was resentenced on December 18, 2006. CP at 1-14; 101. At resentencing, Hibberd's standard range for each count was 57 to 75 months. CP at 3. The court imposed a sentence of 72 months for each count, to be

¹*State v. Hibberd*, No. 32399-1-II, (Slip opinion filed June 14, 2006), available at 2006 Wash. App. LEXIS 1151.

served concurrently, followed by 36 to 48 months of community custody. CP at 3.

On October 4, 2007, Hibberd filed a *pro se* CrR 7.8 Motion to Modify Judgment and Sentence. CP at 15-39. Hibberd argues that community custody constitutes the same restrictions as “total confinement” and that his sentence when combined with community custody exceeds his standard range sentence of 75 months. CP at 17. In a letter to Hibbard dated October 11, 2007, the lower court judge denied the motion without hearing under CrR 7.8(c)(2), finding that the motion does not establish grounds for relief. CP at 41. Appendix A. A hearing was held October 18, 2007, but the lower court had denied the motion seven days earlier. The State filed a response to Hibberd’s motion on October 18, 2007. CP at 101-04.

D. ARGUMENT

1. **THE LOWER COURT ERRED WHEN IT DENIED THE APPELLANT’S MOTION PRIOR TO CONDUCTING A SHOW CAUSE HEARING, AS REQUIRED BY CrR 7.8(c)(2).**

On September 1, 2007, CrR 7.8(c)(2) was changed to provide that a superior court may only rule on the merits of a motion when the motion is timely filed and either (a) the defendant makes a substantial showing that he is entitled to relief or (b) the motion cannot be resolved without a factual

hearing. Only when these prerequisites are absent may the superior court transfer a timely petition to this court for consideration as a personal restraint petition. *State v. Smith*, ___ Wn. App. ___, 184 P.3d 666 (2008), No. 36858-7-II, (Slip opinion filed May 28, 2008), available at 2008 Wash. App. LEXIS 1256.

Under CrR 7.8(c), the Supreme Court has set out a specific procedure for the initial consideration of Motions for Relief from Judgment. It states:

(1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

CrR 7.8(c).

Under the plain language of the rule, the court must transfer a CrR 7.8 motion to the Court of Appeals as a personal restraint petition if it is not

timely. The court does not transfer the motion to the Court of Appeals if the motion is timely and if the defendant has either made a substantial showing that he or she is entitled to relief, or if resolution of the motion will require a factual hearing. CrR 7.8(c)(2). If, however, the case is not transferred to the Court of Appeals as a personal restraint petition, the rule requires the court to “enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.” CrR 7.8(c)(3).

Here, the trial court abused its discretion by denying the motion prior to conducting a hearing as required by CrR 7.8(c)(3). A hearing evidently did occur on October 18, seven days after the order denying the motion.

This Court reviews a ruling on a CrR 7.8 motion for abuse of discretion. *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997). A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The superior court did not comply with the rule, denying the motion prior to the hearing on October 18. Therefore the order should be vacated and the matter remanded to the superior court to conduct a show cause hearing in order to comply.

2. **THE SENTENCING COURT EXCEEDED THE STANDARD RANGE MAXIMUM OF 75 MONTHS WHEN IT IMPOSED A SENTENCE OF 72 MONTHS FOR EACH COUNT, FOLLOWED BY AN ADDITIONAL 36 TO 48-MONTH TERM OF COMMUNITY CUSTODY, THEREBY VIOLATING *BLAKELY V. WASHINGTON*.**

The lower court abused its discretion when it denied Hibberd's CrR 7.8 motion because the motion contains a substantial showing that he is entitled to relief. In his motion, Hibberd argued that by imposing community custody in addition to a sentence of 72 months, the sentencing court exceeded the maximum standard range of 75 months.

Moreover, the sentencing court erred on December 18, 2006, when it imposed a sentence of 72 months for each count to be served concurrently, followed by an additional 36 to 48-month term of community custody, in violation of *Blakely*. CP at 6.

Appellate review is allowed for the correction of legal errors committed during sentencing. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). Sentences must fall within the proper presumptive sentencing ranges set by the legislature. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Any fact other than that of a prior conviction that increases the applicable punishment must be found by a jury beyond a reasonable doubt, unless it is stipulated to by the defendant or the defendant waives his right to

a jury finding. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004).

Hibberd's standard range for each count of second degree child molestation was 57 to 75 months. In this case, Hibberd argues in his *pro se* motion that community custody imposes the same restrictions as total confinement and therefore should be considered imprisonment. CP at 17-21.

The sentencing court therefore violated *Blakely* when it imposed a 36 to 48 month period of community custody following the 72-month sentence because the total—108 to 120 months—exceeds the top of the standard range—75 months—and therefore constitutes an exceptional sentence in violation of RCW 9.94A.535. Hibberd's argument hinges on the assertion that community custody constitutes imprisonment and therefore must be included in the calculation of an offender's standard range.

a. Community custody constitutes imprisonment for purposes of *Blakely* analysis.

On review, Hibberd argues that community custody is tantamount to imprisonment and that any time spent under community custody must be considered as part of the period of total confinement.

“Community custody” is a portion of a sentence that is served in the community subject to controls placed on the offender's movement and

activities by the Department of Corrections. RCW 9.94A.030(5). It is defined

as:

. . . 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. . . .

RCW 9.94A.030(5).

A term of community custody begins either upon completion of the term of confinement, or when an offender is transferred to community custody in lieu of earned release. RCW 9.94A.710(1), RCW 9.94A.715(1).

Community custody is the "intense monitoring of an offender in the community." *In re Crowder*, 97 Wn. App. 598, 600, 985 P.2d 944 (1999). During the period of community custody the defendant remains under the supervision of the Department of Corrections.

Community custody imposes significant restrictions on an offender's constitutional freedoms. *See State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996). "A defendant is no less restricted when he is under community placement, particularly community custody, as when incarcerated." *Ross*, 129 Wn.2d at 287 (quoting *In re Caudle*, 71 Wn. App. 679, 683, 863 P.2d 570 (1993)); *see also, State v. Hurt*, Wn. App. 816, 829, 27 P.3d 1276 (2001).

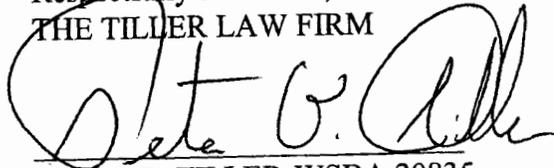
Hibberd contends that community custody imposes such significant restrictions as to constitute the kind of “punishment” contemplated by the *Blakely* Court. Therefore, if the combined total of confinement and community custody exceed the maximum standard range, then it is an exceptional sentence. But under *Blakely*, the sentencing court cannot impose an exceptional sentence unless additional factual findings are made by the jury or stipulated to by the defendant. *Blakely*, 124 S. Ct. at 2537. Because that did not occur here, Hibberd’s sentence is unlawful.

E. CONCLUSION

The lower court erred with it denied Hibberd’s CrR 7.8 motion prior to a show cause hearing, and erred when it denied the motion on the basis that the motion did not establish grounds for relief. The sentencing court erred when it imposed a sentence that exceeded the maximum of Hibberd’s standard range when the term of community custody is taken into consideration. Hibberd respectfully requests that this Court vacate his sentence and remand his case to the Superior Court for entry of an order noting that incarceration and community custody may not exceed the maximum of Hibberd’s standard range.

DATED: July 11, 2008.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller". The signature is written in a cursive style with a large, looping initial "P".

PETER B. TILLER-WSBA 20835
Of Attorneys for Michael Hibberd

A

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

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October 11, 2007

Michael James Hibberd
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Re: State vs. Michael Hibberd
Cowlitz County Cause No. 04-1-01380-9

BY AS
COWLITZ COUNTY
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SUPERIOR COURT

Dear Mr. Hibberd:

I received a copy of your Motion to Modify Judgment and Sentence with exhibits, Note for Motion Docket, and Declaration of Service by Mail.

Pursuant to CrR 7.8(c)(2) the motion is denied without a hearing. The affidavit / motion does not establish grounds for relief.

Sincerely,

James J. Stonier
Superior Court Judge

JJS:nww
xc:Cowlitz County Clerk

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STATE OF WASHINGTON,

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vs.

MICHAEL JAMES HIBBERD,

Appellant.

COURT OF APPEALS NO.
36969-9-II

COWLITZ COUNTY NO.
04-1-01380-9

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Opening Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Michael James Hibberd, Appellant, and Amie L. Hunt, deputy prosecuting attorney, by first class mail, postage pre-paid on July 11, 2008, at the Centralia, Washington post office addressed as follows:

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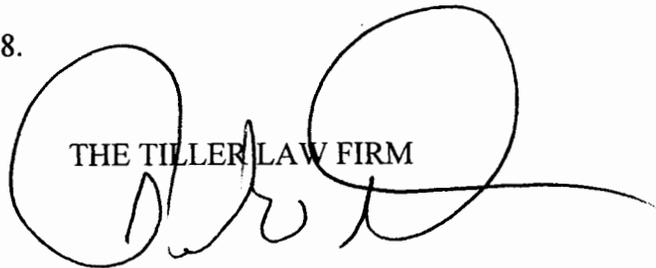
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Dated: July 11, 2008.

A large, stylized handwritten signature in black ink, appearing to read 'P. Tiller', is written over the printed text 'THE TILLER LAW FIRM'.

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CERTIFICATE OF
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