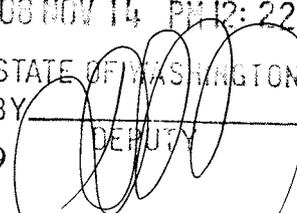


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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

NO. 36969-9-II  
Cowlitz Co. Cause NO. 04-1-01380-9

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

STATE OF WASHINGTON,

Respondent,

v.

**MICHAEL JAMES HIBBERD,**

Appellant.

---

**BRIEF OF RESPONDENT**

---

SUSAN I. BAUR  
Prosecuting Attorney  
AMIE HUNT/#31375  
Deputy Prosecuting Attorney  
Attorney for Respondent

Office and P. O. Address:  
Hall of Justice  
312 S. W. First Avenue  
Kelso, WA 98626  
Telephone: 360/577-3080

*P.M. 11-12-2008*

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### **A. ANSWERS TO ASSIGNMENTS OF ERROR**

1. The trial court never entered an order denying the appellant's motion to Modify Judgment and Sentence making the Defendant's appeal untimely.
2. Should this Court treat the Superior Court's denial as an order, the denial of the motion was made in error.
3. Community Custody does not constitute imprisonment or total confinement
4. Hibberd's sentence does not violate *Blakely*.

### **B. STATEMENT OF THE CASE**

The State agrees with the Statement of the Case given in the opening brief of the appellant Michael James Hibberd with the following exceptions and additions:

Judge James Stonier sent a letter dated October 11, 2007 to the Defendant stating: "Pursuant to CrR 7.8(c)(2) the motion is denied without a hearing. The affidavit / motion does not establish grounds for relief." CP 106. Judge Stonier never entered an order denying the Defendant's Motion.

### C. ARGUMENT

#### 1. THE DEFENDANT'S APPEAL IS IMPROPERLY BEFORE THE COURT, AS THE SUPERIOR COURT NEVER ENTERED AN ORDER DENYING THE DEFENDANT'S MOTION TO MODIFY HIS JUDGMENT AND SENTENCE.

Hibberd argues that the trial court erred when it denied his motion for relief from judgment before first holding a show cause hearing under CrR 7.8(c)(3). However, the Superior Court has never entered an order denying the Defendant's motion. CP 106. Rather, the court sent a letter to the defendant stating: "Pursuant to CrR 7.8(c)(2) the motion is denied without a hearing. The affidavit / motion does not establish grounds for relief." CP 106.

According to Rule of Appellate Procedure 2.2(a)(9) a party may only appeal from superior court orders granting or denying a motion for Amendment of Judgment. WA RAP 2.2(a)(9) (2008). Since the Defendant has not filed for discretionary review and there is no order from which to appeal, the Defendant's appeal is premature and should be denied.

**2. SHOULD THE COURT FIND THE TRIAL COURT'S LETTER IS AN ORDER, THE TRIAL COURT ENTERED THE ORDER IN ERROR**

Should the Court decide to treat Judge Stonier's letter as an order and consider the appeal, the State agrees the trial court's order was entered in error; however, the trial court's error was in failing to transfer the motion to the Court of Appeals for consideration as a personal restraint petition.

A trial court's CrR 7.8 rulings are reviewed for an abuse of discretion. *See State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). A trial court abuses its discretion when it bases its decision on untenable grounds. *See State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). With its most recent amendments having taken effect September 1, 2007, CrR 7.8(c)(2) provides as follows:

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.

WA CrR 7.8(c)(2)(2008). If the trial court retains the motion, it is then required to hold a show cause hearing. *See CrR 7.8(c)(3)*.

Here, the trial court found Hibberd's motion / affidavit did not establish grounds for relief, but did not make a finding Hibberd's motion was not time-barred and did not find a factual hearing was required. CP 106. Given the trial court's lack of findings, Criminal Rule 7.8 required the trial court to transfer Hibberd's motion to the Court of Appeals for consideration as a personal restraint petition. If the trial court had made findings, it would not have been subject to any subsequent requirement to hold a show cause hearing.

### **3. HIBBERD'S SENTENCE DOES NOT VIOLATE *BLAKELY***

Hibberd argues his sentence is invalid because the aggregate of his sentence and community custody exceeds the statutory maximum standard range sentence for his offense – 75 months. He asserts that his sentence violates his Sixth Amendment right to a jury trial as set out in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

#### **a. COMMUNITY CUSTODY DOES NOT CONSTITUTE IMPRISONMENT FOR PURPOSES OF A BLAKELY ANALYSIS.**

The Defendant argues community custody is tantamount to imprisonment and any time spent under community custody must be considered as part of the period of total confinement.

The State legislature defines “community custody” 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) (2008). Additionally, the legislature defines total confinement as “confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.” RCW 9.94A.030(47) (2008) (RCW 72.64.050 and 72.64.060 deal with work or labor camps established by the State).

Mr. Hibberd argues community custody is akin to total confinement because of the restrictions on a person’s liberty. However, when statutory language is unambiguous, the court will not look outside of the plain meaning of the statute to determine legislative intent. See State v. Delgado, 148 Wa.2d 723, 727-28, 63 P.3 792 (2003). Courts interpret statutes strictly and literally. See id. In the present case, the statute is not subject to more than one interpretation and it is clear total confinement

means confinement in a prison setting, not community custody. The legislature had the opportunity to add community custody to the definition of total confinement and chose not to do so. The court should not look farther than the statute to determine the definition of total confinement.

The Defendant argues the restrictions of community custody constitute the kind of punishment contemplated by the *Blakely* court. However, he does not cite to any language in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed 2d 403 (2004), for this proposition. In *Blakely*, the United States Supreme Court contemplated a defendant's prison sentence above the Standard Range sentence. It stated:

[t]he judge... could not have imposed the exceptional 90 month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, “[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.

*Blakely*, 542 U.S. 296, 304 citing *State v. Gore*, 143 Wash.2d 288, 315-316, 21 P.3d 262 (2001). No where in *Blakely* does it state punishment includes community custody or a standard range sentence may not exceed the total period of months including community custody.

Hibberd also cites to *State v. Ross*, 129 Wn.2d 279 (1996) to support his argument. However, citation to Ross is misplaced. In *State v. Ross*, the defendant moved to withdraw his guilty plea as involuntary because he was not informed of a 12-month mandatory community custody range. *See State v. Ross*, 129 Wn.2d at 280. *Ross* held community custody was a direct consequence of the plea because community custody enhanced the defendant's sentence or altered the standard of punishment. *See id* at 285-86. *Ross* did not address the issues in this case, namely standard range sentences or any limitation of the court's authority to impose community custody. *Ross* merely stated a defendant is entitled to know all the direct consequences of his plea. *See id.* at 286.

Under the Sentence Reform Act a court shall impose a sentence within the standard range established in RCW 9.94A.510 or 9.94A.517 and RCW 9.94A.710 and RCW 9.94A.715 relating to community custody. *See* RCW 9.94A.505 (2008). Revised Code of Washington section 9.94A.510 sets out the standard prison time for offenses. *See* RCW 9.94A.510 (2008). Section 9.94A.715, states the court shall, in addition to the other terms of the sentence, impose community custody range

established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer. See RCW 9.94A.715 (2008). Section 9.94A.850 grants the Sentencing Guidelines Commission the authority to set the community custody range. See RCW 9.94A.850. The Commission established this term under Washington Administrative Code section 437-20-010 as 36 to 48 months. See WAC 437-20-010 (2007).

Based upon the Sentencing Reform Act, it is clear the Washington State legislature makes a standard range sentence as the months of total confinement plus any community custody time.

**b. THE IMPOSITION OF COMMUNITY CUSTODY AND PRISON DOES NOT VIOLATE BLAKELY.**

Hibberd argues the imposition of community custody and prison time constitutes a sentence in violation of *Blakely*. Hibberd's argument lacks merit. The trial court imposed a standard range sentence of 72 months incarceration plus 36-48 months community custody. Any fact, other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). According to *Blakely*, the term "statutory

maximum” means “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. at 303. It is “not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *State v. Kinneman*, 155 Wn.2d 272, 278, 119 P.3d 350 (2005) (quoting *Blakely*, 542 U.S. at 302).

The addition of a term of community custody does not implicate *Blakely* because it does not require any additional factual findings before the mandatory term of community custody is imposed. Hibberd’s guilty finding, without additional findings, supports the imposition of his standard range sentence plus the 36-48 months community custody. RCW 9.94A.715(1) states that when a court sentences a person to the custody of the department of corrections for a violent offense committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned early release. Because child molestation in the second degree is a sex offense, the applicable community custody range in Hibberd’s case is

36-48 months. See RCW 9.94A.030(42)(a)(i); RCW 9A.44.086; WAC 437-20-010.

Thus, the applicable statutes required the trial court to impose community custody without finding any facts other than those included in the jury's finding of guilt. For these reasons, Hibberd's sentence does not violate *Blakely's* jury trial requirements.

#### D. CONCLUSION

The trial court erred in failing to transfer Hibberd's motion to the Court of Appeals for consideration as a personal restraint petition. If this court chooses to decide Hibberd's motion for relief from judgment on its merits, it should deny Hibberd any relief from the judgment, as the imposition of community custody did not violate *Blakely*.

Respectfully submitted this November 10, 2008.

SUSAN I. BAUR  
Prosecuting Attorney

By:

  
AMIE L. HUNT/WSBA # 31375  
Deputy Prosecuting Attorney  
Representing Respondent

## APPENDIX A

### CrR 7.8 RELIEF FROM JUDGMENT OR ORDER

**(a) Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

**(c) Procedure on Vacation of Judgment.**

(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.

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
v. ) NO. 36969-9-II  
 )  
MICHAEL JAMES HIBBERD, ) AFFIDAVIT OF MAILING  
 )  
 Appellant. )

Michelle Sasser, being first duly sworn, on oath deposes and says: That on November 12, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

MR. PETER B. TILLER  
THE TILLER LAW FIRM  
P.O. BOX 58  
CENTRALIA, WA 98531

CLERK, COURT OF APPEALS  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402

each envelope containing a copy of the following documents:

- 1. RESPONDENT'S BRIEF
- 2. Affidavit of Mailing.

Michelle Sasser

SUBSCRIBED AND SWORN to before me this November 12, 2008.

Nedrick Moore  
Notary Public in and for the State  
of Washington residing in Cowlitz  
Co. My commission expires: 020910