

NO. 37002-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFF JONES,

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY \_\_\_\_\_

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 00-1-01046-8

BRIEF OF RESPONDENT

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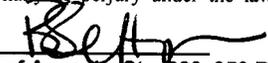
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DATED August 13, 2008, Port Orchard, WA   
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim that the trial court erred in failing to credit his excess prison time against his term of community custody is without merit when the plain language of RCW 9.94A.625(3) states that any period of community custody shall be tolled during any period of time the offender is in confinement for any reason?

2. Although Division Three recently held in *State v. Knippling* that a defendant is entitled to have any excess prison time credited against his or her community custody term, the State respectfully asks this court to follow the dissenting opinion in *Knippling* and hold that: (1) the plain language of RCW 9.94A.625(3) prohibits such a credit; and, (2) that the *Knippling* opinion was wrongly decided because it ignores the plain language of RCW 9.94A.625(3) and creates a conflict between two statutes.

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY AND FACTS

On November 20, 2000 the Defendant was sentenced after entering a guilty plea to a charge of Child Molestation in the First Degree (committed from November 1998 to November 1999). CP 42, App.'s Br. at 2.<sup>1</sup> The court

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<sup>1</sup> The Appellant's brief contains citations to the Clerk's Papers that do not appear to correspond to the Index of Clerk's Papers that the State has received. The facts of the present case, however, are essentially not in dispute. The State's citations will be to the Index of Clerk's Papers and to the Appellant's Brief.

imposed an exceptional sentence of 130 months in prison, followed by 36 months of community custody. CP 42. The Defendant appealed the exceptional sentence, but this Court affirmed the sentence in an unpublished opinion. *See, State v. Jones*, No. 26697-1-II, filed December 28, 2001. This court also dismissed later petition in which the Defendant challenged his exceptional sentence. *See Order Dismissing Pers. Restraint of Jones*, No. 29487-7-II, filed March 4, 2003.

In 2006, the Defendant filed a motion challenging (for the first time) the inclusion of certain juvenile convictions in the calculation of his offender score. The Defendant's motion was transferred to the Court of Appeals as a personal restraint petition, and in January of 2007 the Court of Appeals granted the Defendant's petition after the State conceded error. *See Order Granting Pers. Restraint of Jones*, No. 34872-1-II, filed January 9, 2008.

As a result, the trial court amended the Defendant's Judgment and Sentence on April 30, 2007. CP 5. The trial court amended the Judgment and Sentence by imposing 51 months in prison (rather than the original 130 months), but the court did not amend the previous imposition of 36 months of community custody. CP 51.

On September 21, 2007 the Defendant filed a CrR 7.8 motion and a memorandum of authorities arguing that the sentence of 51 months in prison

followed by 36 months of community custody exceeded the statutory maximum because the total time imposed (when the prison term and community term were added together) exceeded the top of the standard range.

CP 9-13. In a second memorandum of authorities filed on October 18, 2007 the Defendant argued that any time he spent in prison in excess of 51 months should be credited against his 36 month term of community custody. CP 28.

In response to the Defendant's motion, the State argued that the court's sentence did not exceed the statutory maximum because the statutory maximum was life in prison pursuant to RCW 9A.44.083 and RCW 9A.20.021. CP 21. The State also argued that there was no statutory authority for crediting time in prison against a community custody term and that the plain language of RCW 9.94A.625(3) precluded the court from awarding the credit sought by the Defendant. CP 21.

The trial court denied the Defendant's motion and entered written Findings of Fact and Conclusion of Law. CP 42. With respect to the issue of crediting any excess prison time against the community custody term, the trial court specifically held that,

#### **VI.**

That there is no statutory authority allowing the court to award credit against a term of community custody for time spent in prison, even if the prison time was ultimately in excess of the term imposed at a resentencing hearing. Rather, RCW 9.94A.625(3) provides that "Any period of community custody, community placement, or community supervision

shall be tolled during any period of time the offender is in confinement **for any reason.**"(Emphasis added).

**VII.**

That because the Defendant's request for credit against his community custody term is not authorized by any statute and because the request is contrary to the plain language of RCW 9.94A.625(3), the Defendant's request must be denied.

**VIII.**

That, in addition to the analysis set out above, because of the unique and important functions that are served by community custody, this court is not inclined to reduce a community custody term following a conviction for a sex offense without specific authority requiring (or even allowing) the court to do so.

CP 42. This appeal followed.

**III. ARGUMENT**

- A. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO CREDIT HIS EXCESS PRISON TIME AGAINST HIS TERM OF COMMUNITY CUSTODY IS WITHOUT MERIT BECAUSE THE PLAIN LANGUAGE OF RCW 9.94A.625(3) STATES THAT ANY PERIOD OF COMMUNITY CUSTODY SHALL BE TOLLED DURING ANY PERIOD OF TIME THE OFFENDER IS IN CONFINEMENT FOR ANY REASON.**

In the present appeal the Defendant notes that he had already served more than 51 months in prison and the time the trial court amended the judgment and sentence and the Defendant argues that the trial court erred in denying his request that the time he spent in prison in excess of 51 months be credited against the 36 month community custody term. App.'s Br. at 1.

This claim is without merit because the Defendant's request for credit is contrary to the plain language of RCW 9.94A.625(3), which states that any period of community custody shall be tolled during any period of time the offender, is in confinement for any reason.

The State does not dispute that the Defendant was in prison for longer than 51 months. The Defendant was originally sentenced to an exceptional sentence of 130 months on November 20, 2000, and as outlined above, this court affirmed the Defendant's conviction and sentence. See, CP 42; *State v. Jones*, No. 26697-1-II, filed December 28, 2001; *Order Dismissing Pers. Restraint of Jones*, No. 29487-7-II, filed March 4, 2003. Approximately five years later, in 2006, the Defendant filed a CrR 7.8 motion (that was eventually transferred to the court of appeals as a PRP), and, after a concession by the State that the Defendants juvenile convictions washed out, the court of appeals remanded the case. See *Order Granting Pers. Restraint of Jones*, No. 34872-1-II, filed January 9, 2008. The trial court then amended the judgment and sentence and imposed a sentence of 51 months, but by this time the Defendant had spent more than 51 months in custody and the trial court, therefore, ordered that the Defendant be released immediately. CP. 7.

The Defendant's argument that any time he spent in prison in excess of 51 months should be credited against the 36 months term of community custody, however, is contrary to the plain language of RCW 9.94A.625(3)

which states that community custody is tolled while an offender is in prison for any reason, and thus the trial court did not err.

RCW 9.94A.710 provides, among other things, that when a court sentences a person for a sex offense committed on or after June 6, 1996, and before July 1, 2000, the court shall, in addition to other terms of the sentence, sentence the offender to community custody for three years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer.

As the Defendant's crime occurred from November of 1998 to November of 1999, RCW 9.94A.710 required the court to impose 36 months of community custody. In addition, the statute provides that at any time prior to the completion of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. RCW 9.94A.710(3). Nothing in RCW 9.94A.710 authorizes the court to give an offender credit against his term of community custody for excess time he spent in prison following a favorable appeal.

The only statute that specifically addresses the issue before this court is RCW 9.94A.625(3), which provides that,

Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason.

The trial court cited RCW 9.94A.625(3) in its findings of fact and conclusions of law and held that the Defendant's request for credit must be denied because it was "contrary to the plain language of RCW 9.94A.625(3)." CP 42. As outlined below, the trial court did not err.

When the meaning of a statute is clear on its face, a court is to assume that the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

Applying the plain language of RCW 9.94A.625(3) to the present case, the Defendant's term of community custody "shall" be tolled during the period that he was in confinement, regardless of the reason. Thus, the Defendant's 36 month term of community custody (which was imposed as part of his original sentence and was not disturbed by the 2007 order amending the judgment and sentence) was tolled during the time that the Defendant was in prison, regardless of the reason.

Although not squarely on point, Division One of the Court of Appeals dealt with a similar issue in *State v. Gartrell*, 138 Wn. App. 787, 158 P.3d 636 (2007). In *Gartrell*, the defendant was given a SSOSA sentence in which he was to serve six months in confinement followed by three years of community custody, with the rest of the sentence suspended. *Gartrell*, 138 Wn. App. at 789. Eleven months into his term of community custody, the court revoked the SSOSA sentence and imposed 20 months confinement followed by 36 to 48 months of community custody. *Gartrell*, 138 Wn. App. at 789. Pursuant to RCW 9.94A.670(10), the trial court gave the defendant credit for the six months he had spent in prison prior to the revocation, but the court refused to give the defendant credit against his 36 to 48 months of community custody for the eleven months he had already spent on community custody prior to the revocation. *Gartrell*, 138 Wn. App. at 789. On appeal, the court held that “the trial court properly refused to credit community custody time against the reimposed sentence, noting that community custody was different than confinement, and that the statute did not require the credit the defendant sought. *Gartrell*, 138 Wn. App. at 790-91.

In the present case, the Defendant’s situation (and any perceived unfairness in this regard) is substantially the same as the situation of the defendant in *Gartrell*, where the court of appeals found no basis for a credit against a mandatory community custody term.

**B. ALTHOUGH DIVISION THREE RECENTLY HELD IN *STATE V. KNIPPLING* THAT A DEFENDANT IS ENTITLED TO HAVE ANY EXCESS PRISON TIME CREDITED AGAINST HIS OR HER COMMUNITY CUSTODY TERM, THE STATE RESPECTFULLY ASKS THIS COURT TO FOLLOW THE DISSIDENTING OPINION IN *KNIPPLING* AND HOLD THAT: (1) THE PLAIN LANGUAGE OF RCW 9.94A.625(3) PROHIBITS SUCH A CREDIT; AND, (2) THAT THE *KNIPPLING* OPINION WAS WRONGLY DECIDED BECAUSE IT IGNORES THE PLAIN LANGUAGE OF RCW 9.94A.625(3) AND CREATES A CONFLICT BETWEEN TWO STATUTES.**

Although not cited by the Defendant, a recent majority opinion of Division Three of the Court of Appeals held that a defendant is entitled to have any excess prison time credited against his term of community custody. *See, In re Pers. Restraint of Knippling*, 144 Wn. App. 639, 183 P.3d 365 (2008).<sup>2</sup> Judge Sweeney, however, filed a dissenting opinion in *Knippling*, and the State urges this court to follow the reasoning in Judge Sweeney's dissent as it follows the plain language of the RCW 9.94A.625(3) and points out that the majority's reading of the statute creates a conflict with other another statute.

In *Knippling*, the defendant was resentenced, following a successful appeal, to a term of 17 months. *Knippling*, 144 Wn. App. 639, 183 P.3d at

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<sup>2</sup> Appellant's counsel would have been unaware of the *Knippling* opinion because the opinion was filed on May 20, 2008, roughly a month after the Appellant filed his brief in the present

366. The defendant, however, had already served 41 months in prison by the date of the resentencing, and the defendant argues that he should have been given credit against his 18 to 36 months of community custody for the extra 24 months he was incarcerated beyond his eventual standard range sentence. *Id.* The State argued that credit was not authorized due to RCW 9.94A.625(3).

The majority held that RCW 9.94A.625(3) was not controlling and that RCW 9.94A.715(1) stated that community custody begins upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. *Knippling*, 144 Wn. App. 639, 183 P.3d at 366-67. The majority, therefore, reasoned that the defendant had completed his term of confinement 24 months before he was actually released from prison and that his community custody thus began 24 months before he was released. *Id.*

In the dissenting opinion, Judge Sweeney stated that, by definition, community custody means that portion of the sentence served “in the community,” and that the defendant was not “in the community” during those months when he was in prison. *Knippling*, 144 Wn. App. 639, 183 P.3d at 367, citing RCW 9.94A.030(5). In addition, Judge Sweeney found that the

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case.

plain language of RCW 9.94A.625(3) was controlling, and that the term of community custody began only when the defendant was released from confinement into the community. *Id.*

The State urges this court to adopt the reasoning of Judge Sweeney's dissent for the reasons stated by Judge Sweeney and because the majority opinion in *Knippling* creates a conflict between two statutes.

Under Washington law, when two statutes apparently conflict, they are read to harmonize and to reconcile their meanings whenever possible. *In re Personal Restraint of King*, 110 Wn.2d 793, 799, 756 P.2d 1303 (1988); *State v. Danner*, 79 Wn. App. 144, 149, 900 P.2d 1126 (1995). Statutes must be read together to achieve a "harmonious total statutory scheme ... which maintains the integrity of the respective statutes." *State v. O'Neill*, 103 Wn.2d 853, 862, 700 P.2d 711 (1985). Furthermore, the rule of lenity does not apply where statutes are unambiguous or can be reconciled in a way that reflects the legislature's clear intent. *See State v. O'Brien*, 115 Wn. App. 599, 603, 63 P.3d 181 (2003).

The *Knippling* majority opinion creates a conflict whereby an offender's term of community custody is deemed to begin while the offender is in prison despite the fact that RCW 9.94A.030(5) defines "community custody" as a portion of an inmate's sentence "served in the community

subject to controls placed on the offender's movement and activities by the department.” If an inmate's term of community custody were not tolled while in confinement, it would be possible for the term of community custody to begin (and potentially expire) expire even though the inmate never lived in the community subject to conditions imposed by the Department. This circumstance would conflict with the statutory definition of “community custody” because it would allow a term of community custody to be served in confinement and not “in the community” subject to Department controls. See RCW 9.94A.030(5). In short, the Knippling opinion (citing 9.94A.715(1)) holds that community custody can be deemed to have started while an offender is still in prison despite the fact that community custody is, by definition, a portion of a sentence served in the community. RCW 9.94A.030(5).

If, on the other hand, this court were to apply RCW 9.94A.625(3) according to its plain language and hold that the term of community custody is tolled during any period of incarceration, then community custody would not begin until the offender was actually in the community and there would be no conflict with RCW 9.94A.030(5). As this approach follows the plain language of RCW 9.94A.625(3) and harmonizes and reconciles its meaning with RCW 9.94A.030(5), this construction is the preferred construction under Washington law.

For all of these reasons, the State respectfully asks this court to follow the reasoning outlined in Judge Sweeney's dissent and hold that the plain language of RCW 9.94A.625(3) controls, and that the reasoning of the majority opinion in *Knippling* is incorrect and creates an unnecessary conflict among statutory provisions.

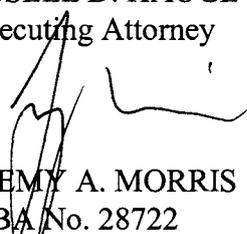
#### IV. CONCLUSION

For the foregoing reasons, the trial court's denial of the Defendant's CrR7.8 motion should be affirmed.

DATED August 13, 2008.

Respectfully submitted,

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