

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

COURT OF APPEALS

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STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
JOHN A. BOOTH, JR.)
)
Appellant.)

No. 37790-0-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, John Booth, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See Attached Brief

Additional Ground 2

See Attached Brief

CERTIFICATE OF SERVICE

I certify that I mailed
copies of SAG
to Lum Golden, Buckland &
& Mistry
9/19/08

If there are additional grounds, a brief summary is attached to this statement.

Date: 9-15-08

Signature: [Signature]

No. 37790-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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BY

STATE OF WASHINGTON,
RESPONDENT,
VS.
JOHN BOOTH, JR.
APPELLANT.

Lewis County Superior Court
Cause No. 04-1-00325-8

Appellant's Pro se supplemental brief

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A. Identity of petitioner

Petitioner John Booth pro se, brings forth his pro se supplemental brief as per Rule 10.10 Statement of additional grounds for review

B. Decision below

Lewis county superior court erroneously decided booth's 7.8 motion .

C. Issues presented for review

[i]. What is the appropriate remedy to reflect that a sentence ,including community custody cannot exceed the statutory maximum?

[ii]. Can the court consider a defendants potential to earn good time credits when a statutory maximum sentence is imposed in conjunction with community custody?

[iii] Can the court reduce the amount of community custody that the Rcw. mandates in order to keep the petitioner in prison longer?

D. Statement of the case

Petitioner Booth accepted an alford plea for two counts of Second degree Assault with a deadly weapon enhancement on one count. All of which are "Class -B " felonies with a 120 month maximum sentence. Booth's standard range on each count is listed as 63-84 months, with a weapons enhancement of 12 months to raise the standard range to 63-84 months, with a mandatory community custody of 18-36 months. Petitioner originally sought relief CrR 7.8 in lewis county superior court in may 2008. the court ordered that the whole sentence not exceed 120 months and to remove the mandatory 18-36 months community custody and change it to 18-24 months. Booth then appealed that faulty decision and here we are.

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ARGUMENT

Petitioner John Booth was sentenced to a term of 96 months in the [total confinement] in the department of corrections. The court also sentenced Booth to 18-36 months of community custody, essentially giving Booth a sentence of 114-132 months. The term of community custody exceeds the statutory maximum. Rcw 9.94a.030 [47] 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 24 hours a day, or pursuant to Rcw 72.64.050 and 72.64.060. Rcw 9.94a.030[45] defines statutory maximum as the maximum length of time for which a offender may be confined as punishment for a crime as prescribed in chapter Rcw 9a.20, Rcw 9.92.010, the statute defining the maximum penalty for a crime. Rcw 9.94a.030[6] "community custody range" means the minimum and maximum period of community custody as part of a sentence under Rcw 9.94a.715, as established by the commission or the legislature under Rcw 9.94a.850, for crimes committed on or after July 1st 2000. Rcw 9.94a.030[5] "community custody" means that portion of an offenders sentence of confinement "in lieu of" earned early release time served in the community subject to the controls placed on the offenders movements and activities by the Department. Petitioner, asserts that the language, "because prisoners who earn early release credits, and transfer to community custody status ["in lieu of"] earned early release or imposed pursuant to Rcw 9.94a.505[2][b], served in the community and subject to controls placed on the offenders movements and activities by the department is ambiguous in the sense that the words "in lieu of" is susceptible to more than one interpretation. The phrase [community custody "in lieu of" earned early release] is ambiguous in the sense that it offers community custody and or early release and is misleading. in lieu of. Instead of or in place of; in exchange or return for < the creditor took a note in lieu of cash>, Black's law Dictionary, eighth edition. In lieu of. In substitution for or in place of. Ballentines law dictionary third edition. Booth also asserts The rule of lenity applies to this ambiguous phrase "in lieu of". W.D. Wash. 1992. "rule of lenity" requires that where there is ambiguity in criminal statute, doubts are to be resolved in favor of the defendant. U.S.v. Petrykievicz 809 F.Supp.794--Statut 241[1].

If criminal statute is susceptible to more than one interpretation, "Rule of Lenity" requires interpretation most favorable to the criminal defendant. State v. Dunn, 82 Wn.app 122 916 P.2d 952, State V. Riles, 135 Wn.2d.326,957 P.2d 655 State V. McGee, 122 Wn.2d 783,864 P.2d 912, State V. Martin; 102 Wn. 2d 300, State V. Gore, 101 Wn. 2d 481.

The presumptive sentence ranges for total confinement do not include periods of community placement, there is no legislative statement of intent on whether community placement is included within or is in addition to the [standard range sentence Rcw 9.94a.030[44]]. As our supreme court in Bernhard, The definition of standard range is not precise: Although somewhat ambiguous on the issue, the statutory language suggests that 'standard range' is a multifaceted concept embracing both the duration and conditions of the sentence imposed. Bernhard at 538. State V. Bernhard, 108 Wn. 2d 527, 538, 741 P.2d.1 1987 Rcw 9.94a.030[18] "a determinate sentence must state with exactitude the actual number of actual years, Months, or days of total confinement, Of partial confinement, of community supervision, The number of actual hours or days of community service work, or dollars or terms of a fine or restitution The court of appeals in both Vanoli and Sloan erroneously concluded that because prisoners who earn early release credits and transfer to community custody status in lieu of earned early release, have not yet served the maximum. Vanoli, 86 Wn App. at 655 937 P. 2d 1116; State V Sloan, 121 Wn. App.220, 87 P.3d 1214.

Taking good time into account when setting a length of a sentence is improper. Fisher, 108 Wn. 2d at 429n.6

Under the SRA, earned early release time may be considered only after the offender has begun serving his sentence. See Rcw 9.94a.728[1], 9.94a.150[1]. Moreover, it would be inappropriate to impose a sentence outside the standard range based on an entirely speculative prediction of the likely behavior of an offender while in confinement. Fisher, 108 Wn. 2d at 429. State V. Ross, 71 Wn. App. 556, 861 P.2d 473, 883 P.2d 329. An analysis of good nature is of this nature is not permitted. State V. Fisher, 108, Wn.2d 419 [1987].

Goodtime plays no role until confinement begins and credits are earned. RCW 9.94a.150[1]. There is no guarantee that credits will ever be earned either because the prisoner fails to qualify or because the legislature alters the rules. State v. Ross, 71 Wn. App. 556; State V. Buckner 74, Wn. App 889. Rcw 9.94a.7281 Legislative declaration-earned early release time is not an entitlement. The legislature retains full control over the right to revise the percentages of earned release time available to offenders at any time. In State V. Jones, 118 Wn. App. 199, 96 P.3d 258 the court recognized that since 1981, the SRA has been amended by 175 session laws, an average of almost eight per year! It has become so astoundingly and needlessly complex that it cannot possibly be both used both quickly and accurately. It is extremely difficult to identify what statute applies to a given crime, much less to coordinate that statute with others that may be related. That is why you see the malicious prosecution and lengthy sentences handed out today. The situation was recognized but not yet remedied- it may have

even been exacerbated by whole sale recodifications in 2001

The SRA screams for simplification.

Booth further asserts that even if he is transferred to community custody , booth will still be subject to the same enhanced penalties as if he were serving a sentence of total confinement. RCW 9.94a.634 Procedure-penalty gives the department complete control over the offender. The offender must comply with all orders, obey curfew which is essentially partial confinement the offender is subject to warrantless and harassing searches of his residence and or person. A defendant is no less restricted when he is under community custody as when incarcerated. Defendants who commit crimes while on community placement are subject to enhanced penalties. State V. Miles, 66 Wn. 2d 1012 [1992].

Booth asserts that a sentence imposed by the court is a clear error in light of the United States Supreme Court's holding in Blakely V. Washington; ___ U.S. ___, 124 S.Ct.2531, 159 L.Ed.2d 403 [2004]. The Blakely court found that the Sixth amendment right to jury trial makes unconstitutional the imposition of any sentence above the statutory maximum prescribed by the facts or found by a jury or admitted by a defendant. Id. at 2536. Under the Washington criminal code Assault in the second degree is a class b felony and carries a statutory maximum sentence of ten years. The washington sentencing reform act further limited the sentencing range to 63-84 months plus a mandatory 18-36 months community placement. The 96 months plus 36 months is clearly in violation of all the precedents set by every court that has ever ruled on anything justly.

In Cunningham V. California 549 U.S. ___ [2007] the court firmly upheld Blakely. Cunningham also stated "A fact underlying an enhancement Cannot do double duty; IT cannot be used to impose an upper term sentence and on top of that, an enhanced term Penal code§1170 [b]

With that being said a weapon enhancement cannot both be a determinate sentence that you can receive no possible early release and a standard range enhancer. The weapon enhancement has to be one or the other, I argue this because as stated in Knotek 136 Wn.App.412; 149 P.3d 676; [2006] [13] "otherwise the effective maximum for a class a felony is the top end of the standard sentencing range" The fact that my current Assault 2 convictions are class b felonies makes no difference it is all the same when you look at it objectively.

Blakely clarified the United States Supreme Courts earlier opinion in Apprendi V. New Jersey, 530 U.S.466, 120 S.Ct 2348, 147l. Ed 2d. 435 [2000] which held that "other than a fact of a prior conviction any fact that increases the crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt" 530 U.S. at 490 (emphasis added). The court in blakely explained that the statutory maximum referenced in Apprendi "is the maximum sentence a Judge may impose solely on the basis of the facts referenced in the jury verdict or admitted by a defendant. Blakely, 542 U.S. at 303.

With all that being said the most that Booth Can be sentenced to is 84 months- the top of the standard range and the weapons enhancement must be included in that 84 months. I am not saying that the weapons enhancement is unconstitutional but the way it is being applied as a enhancer of standard ranges and as flat time does leave alot to be desired because it does double duty and punishes you twice for the same thing.

The Rcw's state that Booth must be sentenced to a mandatory community custody range of 18-36 months my attorney quoted the exact Rcw's. So when my erroneous 96 month sentence is reduced it should be by 12 months of my time not my community placement. The sentencing court is merely trying to insult the intellegence of everyone involved by using the wording that they did in my amendment. I think they got that from Sloan and that is a case that is mis applied as it deals with prior versions of the SRA and was no longer in effect when Booth was sentenced. And to clarify it more my attorney has done a sufficient job of the issue.

Because Booth's judgement and sentence not only fails to clarify that the term of community custody cannot exceed the statutory maximum Booth's sentence must be vacated because Booth was sentenced to more than the statutory maximum term of total confinement allowed for under the SRA's. The judgement and sentence does not reflect that Booth's sentence is a determinate sentence, the presumptive sentence ranges for total confinement does not include periods of community custody, and there is no legislative intent whether community custody is included in or is in addition to the standard range sentence. Booth also asserts that the sentence must be vacated and remanded for resentencing because of the ambiguous phrase "in lieu of" offers two options, one of which is earned early release and or community custody, not both, thus making the statute susceptible to more than one interpretation.

The states argument of a prisoner earning goodtime is a misplaced argument based on this courts decision in State V. Fisher, 108 Wn. 2d. Because the Court of appeals Division one affirmed State V. Zavala-reynoso, 127 Wn.App.At 124 the obvious thing to do is reduce my time by 12 months leaving my 18-36 month community custody intact, applying the laws and the rule of lenity.

This case should be remanded for resentencing for so many reasons not all of them I have covered here because of my limited experience.

Respectfully submitted by JOHN BOOTH jr

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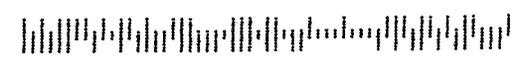
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