

NO. 41808-8-II

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

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL MAPLES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Larkin

No. 05-1-01577-4

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

 1. Whether the trial court had authority to order that the defendant “perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC”? 1

 2. Whether the trial court had authority to order that, during community placement, the defendant’s residence location and living arrangements be subject to prior approval of DOC? 1

 3. Whether there is statutory authority for DOC to require the defendant to provide a release plan, including an approved residence, before releasing him to community custody in lieu of earned early release? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT 3

 1. UNDER FORMER RCW 9.94A.120(8), THE TRIAL COURT HAD THE POWER TO REQUIRE THAT THE DEFENDANT HAVE A RESIDENTIAL PLAN BEFORE BEING RELEASED ON COMMUNITY PLACEMENT. ... 3

 2. CALCULATION OF EARNED EARLY RELEASE CREDITS AND DETERMINATION OF A RELEASE DATE IN ACCORDANCE WITH THAT CALCULATION IS WITHIN THE AUTHORITY OF THE DEPT. OF CORRECTIONS. 9

D. CONCLUSION..... 9-10

Table of Authorities

State Cases

<i>Hale v. Wellpinit School District No. 49</i> , 165 Wn. 2d 494, 509, n. 6, 198 P. 3d 1021 (2009).....	6
<i>In re F.D. Processing, Inc.</i> , 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).....	7
<i>In re Personal Restraint of Capello</i> , 106 Wn. App. 576, 24 P. 3d 1074 (2001).....	4, 5, 8
<i>In re Personal Restraint of Stewart</i> , 115 Wn. App. 319, 339, 75 P. 3d 521 (2003).....	6
<i>In re Personal Restraint of Williams</i> , 121 Wn. 2d 655, 665, 853 P. 2d 444 (1993).....	9
<i>State v. Franklin</i> , -Wn. 2d -, -P. 3d – (2011)(2011 WL 4837266).....	6, 7
<i>State v. Maples</i> , #38096-0-II, noted at 157 Wn. App. 1065 (2010)(2010 WL 3639919).....	2
<i>State v. Ward</i> , 123 Wn.2d 488, 498, 869 P.2d 1062 (1994).....	8

Statutes

RCW 9.94A.120(8)(b)	3
RCW 9.94A.120(8)(c)	4, 5
RCW 9.94A.150.....	4, 9
RCW 9.94A.360(2).....	2
RCW 9.94A.701(9).....	6
RCW 9.94A.728.....	4, 6, 9
RCW 9.94A.728(2).....	5

RCW 9.94A.729..... 9
RCW 9.94A.729(5)(c) 7
RCW 9.94A150(12)..... 4

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court had authority to order that the defendant “perform affirmative acts necessary to monitor compliance with orders of the court as required by DOC”?
2. Whether the trial court had authority to order that, during community placement, the defendant’s residence location and living arrangements be subject to prior approval of DOC?
3. Whether there is statutory authority for DOC to require the defendant to provide a release plan, including an approved residence, before releasing him to community custody in lieu of earned early release?

B. STATEMENT OF THE CASE.

1. Procedure

This case went to trial on an Amended Information which charged the defendant with one count of murder in the second degree. CP 8. The defendant was originally sentenced on July 25, 2008. CP 59-71.

On September 21, 2010, the Court of Appeals affirmed the conviction, but remanded the case to the sentencing court for the court to determine whether the defendant had been crime free in the community for ten years after his 1977 robbery conviction. *See, State v. Maples,*

#38096-0-II, noted at 157 Wn. App. 1065 (2010)(2010 WL 3639919). If he had spent ten years crime-free in the community, the 1977 robbery would “wash out” and his offender score would be lower. *See*, former RCW 9.94A.360(2). The trial court was to re-sentence the defendant in accordance with its findings and correct calculation of the offender score.

2. Facts

The substantive facts can be found in this Court’s initial opinion. *Maples*, slip op., at 1-3. Briefly, the defendant murdered Christine Blais, a co-worker at a Tacoma shipyard on October 8, 1988. The State did not have sufficient evidence to charge and try the defendant until 2005.

On February 2, 2011, the trial court examined the offender score issue. The State had no proof that the defendant had been in custody regarding the prior robbery conviction. Therefore, the state conceded that the defendant’s offender score was 6. 2/2/2011 RP 3. The standard sentencing range was 195-260 months of incarceration. CP 124.

Defense counsel argued for the middle of the standard range. 2/2/2011 RP 10. She further argued that the Dept. of Corrections (DOC) had no authority to require a residential plan before releasing the defendant to community placement. 2/2/2011 RP 11.

The court sentenced the defendant to the high end of the standard range, 260 months. 2/2/2011 RP 13, CP 127. The court imposed 12 months of community placement, with the same conditions as had been ordered in 2008. 2/2/2011 RP 14, CP 128. The court remarked that, in

light of the defendant's criminal history, the defendant should have an address to report to. *Id.* The court denied the defendant's request to delete that requirement. *Id.*

C. ARGUMENT.

1. UNDER FORMER RCW 9.94A.120(8), THE TRIAL COURT HAD THE POWER TO REQUIRE THAT THE DEFENDANT HAVE A RESIDENTIAL PLAN BEFORE BEING RELEASED ON COMMUNITY PLACEMENT.

a. Sentence conditions in 1988.

At the time that the defendant committed the murder, in 1988, A defendant under community placement was subject to standard conditions, unless waived by the court:

- (i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (ii) The offender shall work at department of corrections-approved education, employment, and/or community service;
- (iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;
- (iv) An offender in community custody shall not unlawfully possess controlled substances; and
- (v) The offender shall pay supervision fees as determined by the department of corrections.

Former RCW 9.94A.120(8)(b).

In addition, the trial court could impose special conditions:

- (i) The offender shall remain within, or outside of, a specified geographical boundary;

- (ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (iii) The offender shall participate in crime-related treatment or counseling services;
- (iv) The offender shall not consume alcohol;
- (v) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
- (vi) The offender shall comply with any crime-related prohibitions.

Former RCW 9.94A.120(8)(c). Further, under former RCW 9.94A.150(12), an offender on community supervision could be required to report to a community corrections officer (CCO) and notify the CCO of any change in the offender's address or employment. In order to monitor compliance with any of the conditions, it may be necessary for DOC to require an affirmative act; such as requiring production of rent receipts to prove residence; be tested for the presence of drugs or alcohol; or produce receipts or work records regarding employment or community service.

The subject matter of when and how a person could be released to community custody was governed by former RCW 9.94A.150. That statute was recodified as RCW 9.94A.728.

b. Retroactive legislative findings in 2002.

The defendant is correct that in *In re Personal Restraint of Capello*, 106 Wn. App. 576, 24 P. 3d 1074 (2001), the petitioner raised a similar issue as the defendant here. In that PRP case, DOC refused to

release Capello, a sex offender, for his earned early release unless he had an approved residence to go to. *Capello*, at 582. The Court of Appeals held that DOC did not have the statutory authority to impose the residence requirement. *Id.*, at 583. At the same time, the Court affirmed that the sentencing court did have the authority to impose this condition: “Former RCW 9.94A.120(8)(c) provides that “the court” may order “special” conditions of community placement. One of those special conditions was preapproval of living arrangements.” *Id.*, at 583.

However, in 2002, the Legislature acted in specific response to *Capello*. The Legislature made clear that DOC’s authority to require pre-approval of the prisoner’s residence plan had always existed, dating back to the 1988 statute:

Intent--2002 c 50: “The legislature has determined in RCW 9.94A.728(2) that the department of corrections may transfer offenders to community custody status in lieu of earned release time in accordance with a program developed by the department of corrections. It is the legislature's intent, in response to: *In re: Capello* 106 Wn. App. 576 (2001), to clarify the law to reflect that the secretary of the department has, and has had since enactment of the community placement act of 1988, the authority to require *all offenders*, eligible for release to community custody status in lieu of earned release, to provide a release plan that includes an approved residence and living arrangement prior to any transfer to the community.” [2002 c 50 § 1.]

Application--2002 c 50: "This act applies to *all offenders* with community placement or community custody terms currently incarcerated either *before, on, or after* March 14, 2002." [2002 c 50 § 3.]

RCW 9.94A.728, legislative history (emphasis added).

The Court of Appeals found this retroactivity provision unconstitutional in *In re Personal Restraint of Stewart*, 115 Wn. App. 319, 339, 75 P. 3d 521 (2003), under a separation of powers analysis. However, that holding is of doubtful authority where, in *Hale v. Wellpinit School District No. 49*, 165 Wn. 2d 494, 509, n. 6, 198 P. 3d 1021 (2009), the Supreme Court specifically rejected the *Stewart* separation of powers analysis.

Recently, in *State v. Franklin*, -Wn. 2d -, -P. 3d - (2011)(2011 WL 4837266), the Supreme Court construed the retroactivity provision of another section of the SRA, RCW 9.94A.701(9). That statute was enacted in 2009 to reduce the term of community custody when the total terms of confinement and community custody exceed the statutory maximum. The legislature authorized DOC, not the sentencing court, to adjust the length of community custody for those serving terms of confinement or community custody by modifying the end date for community custody.

Franklin had been convicted in 2007. He challenged the retroactive authority of DOC to alter the terms of his sentence, and requested to be resentenced by the trial court.

In denying Franklin's request, the Supreme Court observed that: "While statutory amendments generally apply only prospectively, an amendment may apply retroactively "if the Legislature so intended.""
Franklin, supra, slip op. at 4, citing *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). The Court also stated that it could look to sources other than the statutory text, such as the legislative history, to determine whether the legislature intended the amendment to apply retroactively. *Id.* After reviewing the legislative history and declaration of retroactivity, the Court concluded that the amendments were retroactive to Franklin's case. *Id.*

In its 2002 statements of intent and application, the Legislature clearly expressed that, since 1988, DOC has had the authority to require any inmate to have an approved residence before being released to community custody. It is equally clear that this authority existed at the time that the defendant committed the murder, and at the time of sentencing.

Further evidence of the general intent of the Legislature regarding requiring an approved residence prior to community custody is found in RCW 9.94A.729(5)(c):

The department may deny transfer to community custody in lieu of earned release time if the department determines an offender's release plan, including proposed residence location and living arrangements, may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the

sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety. The department's authority under this section is independent of any court-ordered condition of sentence or statutory provision regarding conditions for community custody;

In the present case, the court twice ordered that the defendant have an approved residence before being released on community custody. CP 66, 128. When the condition was brought to the court's attention through the defendant's objection at the second sentencing, the court specifically endorsed the requirement. 2/2/2011 RP 14. If there is any error in this case, it is, in an odd twist of the situation in *Capello*, that the statute authorizes DOC to require the residence plan, but not the trial court.

- c. The 2002 legislative findings were not ex post facto.

A law is ex post facto only if it disadvantages the person affected by it- i.e., it "alters the standard of punishment which existed under prior law." *State v. Ward*, 123 Wn.2d 488, 498, 869 P.2d 1062 (1994). The 2002 legislative finding did not dictate any change in punishment for the crime. It did not lengthen the defendant's sentence, nor add substantive terms. It clarified what the intent of the Legislature always had been, including at the time that the defendant had committed the crime. The policy or procedure intended by the Legislature for DOC to carry out is a concern for public safety and the offender's transition to the community. The defendant's standard range sentence remained the same.

2. CALCULATION OF EARNED EARLY RELEASE CREDITS AND DETERMINATION OF A RELEASE DATE IN ACCORDANCE WITH THAT CALCULATION IS WITHIN THE AUTHORITY OF THE DEPT. OF CORRECTIONS.

Under RCW 9.94A.728, 729, and former RCW 9.94A.150, DOC has the sole authority to calculate earned early release from prison. A DOC decision that wrongly denies an inmate good time credits unlawfully restrains the inmate and can be challenged in a PRP. The institution in which the offender is actually incarcerated retains complete control over the good time credits granted to offenders within its jurisdiction. *In re Personal Restraint of Williams*, 121 Wn. 2d 655, 665, 853 P. 2d 444 (1993).

If DOC fails to release the defendant to community custody in accordance with RCW 9.94A.728 and 729, the defendant may seek redress in the form of a PRP. Until such time as DOC violates the law or the defendant's rights regarding his release, this issue is premature for review.

D. CONCLUSION.

The trial court ordered conditions of sentence that were authorized by statute. Even if the trial court did not have the authority to require an

approved residence plan for community custody, DOC did have that authority. The State respectfully requests that the sentence and conditions imposed be affirmed.

DATED: November 23, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas Roberts by K. Proden
Thomas C. Roberts 11/23/11
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.23.11 *[Signature]*
Date Signature

PIERCE COUNTY PROSECUTOR

November 23, 2011 - 4:11 PM

Transmittal Letter

Document Uploaded: 418088-Respondent's Brief.pdf

Case Name: ST. V. MAPLES

Court of Appeals Case Number: 41808-8

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

karecrite@aol.com