

FILED
Oct 14, 2011
Court of Appeals
Division III
State of Washington

NO. 29711-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

TISHAWN WINBORNE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. ARGUMENT IN REPLY 1

BECAUSE THE TERM OF COMMUNITY CUSTODY
PLUS THE TERM OF CONFINEMENT EXCEEDS THE
STATUTORY MAXIMUM FOR THE CRIME, THE
COURT EXCEEDED ITS AUTHORITY AND THE
SENTENCE MUST BE VACATED AND REMANDED 1

B. CONCLUSION 4

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Brooks, 166 Wn.2d 664,
211 P.3d 1023 (2009) 2

In re Pers. Restraint of Call, 144 Wn.2d 315,
28 P.3d 709 (2001) 2

In re Pers. Restraint of Carle, 93 Wn.2d 31,
604 P.2d 1293 (1980) 1

State v. Franklin, No. 84545-0, Slip. Op., __ Wn.2d __,
__ P.3d __ (October 13, 2011)..... 2, 3

Statutes

RCW 9.94A.701 1, 2, 3

A. ARGUMENT IN REPLY

BECAUSE THE TERM OF COMMUNITY CUSTODY PLUS THE TERM OF CONFINEMENT EXCEEDS THE STATUTORY MAXIMUM FOR THE CRIME, THE COURT EXCEEDED ITS AUTHORITY AND THE SENTENCE MUST BE VACATED AND REMANDED.

In his opening brief, Mr. Winborne argued the trial court exceeded its authority under the Sentencing Reform Act when it sentenced him to a term of confinement equal to the statutory maximum for the crime and also imposed a 12-month term of community custody. RCW 9.94A.701(9) specifically requires the “court” to reduce the term of community custody “whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.” Therefore the sentence was erroneous and must be corrected. See In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (trial court’s sentencing authority is limited to power provided by law); In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001) (“Courts have the duty and power to correct an erroneous sentence upon its discovery.”).

In response, the State argues In re Pers. Restraint of Brooks controls Mr. Winborne’s case. In re Pers. Restraint of Brooks, 166

Wn.2d 664, 668, 211 P.3d 1023 (2009); Resp. Br. at 2. As explained in Mr. Winborne's opening brief, the State's argument is wrong. The decision in Brooks was limited to sentences imposed under RCW 9.94A.715, which was repealed and partly replaced in 2009 by the statute relied on by Mr. Winborne, RCW 9.94A.701(9). Brooks, 166 Wn.2d at 672 n.4 (recognizing post-2009 sentences would be controlled by the then-recently-enacted RCW 9.94A.701(9)).

Subsequent to the filing of Mr. Winborne's opening brief, our Supreme Court decided State v. Franklin, No. 84545-0, Slip. Op., ___ Wn.2d ___, ___ P.3d ___ (October 13, 2011). In that case, Mr. Franklin argued that RCW 9.94A.701(9) applied retroactively to his 2008 sentence, which exceeded the statutory maximum but provided direction to the Department of Corrections (DOC) that the total term of confinement and community custody could not exceed the statutory maximum. Slip. Op. at 3-4. The Supreme Court held that, for sentences imposed prior to the effective date of the amendment of the Sentencing Reform Act (i.e. before 2009), "DOC has an explicit obligation [under provisions of the legislation] to reset the termination dates for community custody." Slip. Op. at 12. Sentencing courts have no such obligation with regard to sentences

imposed prior to 2009. *Id.* “In sum, for individuals *sentenced before the effective date of ESSB 5288 [2009]*, the responsibility lies with DOC—not the sentencing court—to bring preamendment terms of community custody into compliance with the new sentencing requirements by adjusting the end date for community custody.” *Id.* at 12-13 (emphasis added).

Because the Franklin Court considered the effect of RCW 9.94A.701(9) only upon sentences imposed prior to 2009, the case does not control the error in Mr. Winborne’s sentence. Mr. Winborne’s sentence was imposed January 5, 2011. CP 35. The sentence is thus governed by RCW 9.94A.701(9) and the retroactivity provisions considered in Franklin do not apply.

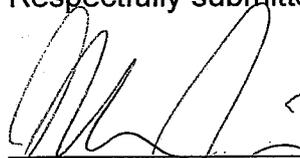
Because Mr. Winborne’s sentence violates the plain language of RCW 9.94A.701(9), which requires “the court” to reduce the term of community custody to ensure the total sentence does not exceed the statutory maximum, it must be corrected.

B. CONCLUSION

Because the court imposed a sentence in excess of its statutory authority, the sentence must be vacated and remanded.

DATED this 14th day of October, 2011.

Respectfully submitted,



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RESPONDENT,)	
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v.)	NO. 29711-0-III
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF OCTOBER, 2011.

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