

JUL 27 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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 OPENING BRIEF

Marla L. Zink
Attorney for Appellant

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A. SUMMARY OF ARGUMENT

The Sentencing Reform Act requires that a sentencing court reduce the term of community custody whenever a standard range sentence combined with a term of community custody exceeds the statutory maximum for the crime. Tishawn Winborne was sentenced to the statutory maximum term of confinement, which was also the standard range sentence. Nonetheless, the court did not reduce his term of community custody. Rather, the court sentenced Mr. Winborne to 12 months community custody. The court exceeded its statutory authority and this case must be remanded for resentencing.

B. ASSIGNMENT OF ERROR

The trial court exceeded its statutory authority in imposing its sentence for Mr. Winborne's guilty plea.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority. RCW 9.94A.701(9) requires that, where the combined term of community custody and confinement exceed the statutory maximum for an offense, the court must reduce the term of community custody. Where the trial court imposed a 60-month sentence for Class C felonies and imposed a

12-month term of community custody, must this Court correct the erroneous sentence?

D. STATEMENT OF THE CASE

Mr. Winborne pled guilty to three counts felony violation of a domestic violence no-contact order under RCW 26.50.110(5). CP 35. In light of Mr. Winborne's offender score, the standard range sentence for each count was 60 months (or five years). CP 37. The statutory maximum for this crime is also 60 months. CP 37; RCW 9A.20.021(1)(c); RCW 25.50.110(5); RCW 9.94A.030(48). The court sentenced Mr. Winborne to 60 months confinement. CP 39. In addition, the court imposed a 12-month term of community custody. CP 39. The court directed the Department of Corrections (DOC) that "the total terms of confinement and community custody must not exceed the statutory maximum sentence of 60 months." CP 40.

E. ARGUMENT

THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING A TERM OF COMMUNITY CUSTODY THAT, TOGETHER WITH THE STANDARD RANGE SENTENCE IMPOSED, EXCEEDED THE STATUTORY MAXIMUM SENTENCE.

- a. The SRA requires a sentencing court impose a determinate sentence in which the combined terms of confinement and supervision do not exceed the statutory maximum.

“A trial court only possesses the power to impose sentences provided by law.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The statutory maximum for an offense sets the ceiling of punishment that may be imposed. RCW 9A.20.021; In re Pers. Restraint of Brooks, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). A term of community custody must be authorized by the legislature. RCW 9A.20.021. The controlling statutes instruct the trial court that a term of community custody may not exceed the statutory maximum when combined with the prison term imposed. Id.; RCW 9.94A.701(9). RCW 9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

This Court reviews de novo whether a sentence is legally

erroneous. Brooks, 166 Wn.2d at 667.

Mr. Winborne pled guilty to three counts violation of a domestic violence no-contact order under RCW 25.50.110(5). That crime is a Class C non-violent felony with a 60-month statutory maximum. RCW 9A.20.021(1)(c); RCW 25.50.110(5); RCW 9.94A.030(48). The trial court imposed a term of 60 months confinement. CP 39. The court also imposed a term of 12 months community custody. CP 39. This sentence exceeds the 60-month statutory maximum sentence.

Though the court in this case instructed DOC that “the total terms of confinement and community custody must not exceed the statutory maximum sentence of 60 months[,]” the statute requires the court to itself reduce the term of community custody. RCW 9.94A.701(9). There is no statutory authority to leave this determination in the discretion of DOC. Instead, RCW 9.94A.701(9) specifically requires a reduction of the term of community custody, at the time the sentence is imposed, to ensure the total does not exceed the maximum. Thus, the sentence imposed here is erroneous.

Prior to the enactment of RCW 9.94.A.701(9) a different

result was permissible.¹ The Supreme Court concluded language similar to that used in the present judgment complied with then-existing statutes, primarily former RCW 9.94A.715. Brooks, 166 Wn.2d at 672. As Brooks itself recognized, that statute was repealed even while Brooks was pending. Id. at 672 n.4. With the repeal of RCW 9.94A.715, Brooks recognized that newly-enacted RCW 9.94A.701(9) would control the issue going forward. 166 Wn.2d at 672 n. 4.² Because the court here did not comply with the statute, Mr. Winborne's sentence is erroneous.

b. This Court must correct Mr. Winborne's sentence.

"Courts have the duty and power to correct an erroneous sentence upon its discovery." In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). The SRA limits the sentencing court's authority in this case to a total sentence of 60

¹ Engrossed Substitute Senate Bill 5288 amended RCW 9.94A.701 in 2009 to add the provision currently codified at subsection nine. Laws of 2009, ch. 375, § 5; RCW 9.94A.701(9). Section 7 of the same bill deleted the portion of RCW 9.94A.707 that had stated community custody could begin "at such time as the offender is transferred to community custody in lieu of earned release." Laws of 2009, ch. 375, § 7.

² The effect of RCW 9.94A.701(9) where the trial court imposes the statutory maximum term of confinement for a crime is pending before the Washington Supreme Court in State v. Franklin, No. 84545-0 (oral argument held June 14, 2011). In that case the trial court directed that the total amount of incarceration and community custody not exceed the statutory maximum. Supp. Br. of Pet. at 2, State v. Franklin, No. 84545-0.

months. Mr. Winborne respectfully asks this Court to remand for imposition of a proper sentence.

F. CONCLUSION

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

DATED this 25th day of July, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Zink', is written over a horizontal line.

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