

FILED

MAR 03, 2014

Court of Appeals
Division III
State of Washington

NO. 31705-6-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

EDUARDO FELIX

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney

by: **Brian V. Hultgrenn, #34277**
Deputy Prosecuting Attorney

1016 North Fourth Avenue
Pasco, WA 99301
Phone: (509) 545-3543

TABLE OF CONTENTS

A. COUNTERSTATEMENT OF THE ISSUES 1

 1. MAY THE COURT IMPOSE A TERM OF
 VARIABLE COMMUNITY CUSTODY WHEN
 SENTENCING AN INDIVIDUAL? 1

B. COUNTERSTATEMENT OF THE CASE..... 1

C. RESPONSE TO THE ARGUMENT 1

 1. THE COURT'S VARIABLE IMPOSITION OF
 COMMUNITY CUSTODY IS NO LONGER
 PERMITTED UNDER THE MOST RECENT CASE
 LAW..... 1

D. CONCLUSION 4

TABLE OF AUTHORITIES

CASES

In re Brooks, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009) 1, 3

In re Sentencing of Jones, 129 Wn. App. 626,
627-28, 120 P.3d 84 (2005)..... 3

State v. Boyd, 172 Wn.2d 470, 473, 275 P.3d 321 (2012) 2, 3

State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011)..... 2

State v. Winborne, 167 Wn. App. 320, 323-26,
273 P.3d 454 (2012)..... 3

State v. Winborne, 167 Wn. App. at 329-30,
citing State v. Hale, 94 Wn. App. 53, 971 P.2d 88 (1999) 3

A. COUNTERSTATEMENT OF THE ISSUES

1. MAY THE COURT IMPOSE A TERM OF VARIABLE COMMUNITY CUSTODY WHEN SENTENCING AN INDIVIDUAL?

B. COUNTERSTATEMENT OF THE CASE

Eduardo Felix (hereinafter appellant) was found guilty by jury verdict on May 2, 2013, of Attempted Robbery the First Degree and Unlawful Possession of a Firearm in the Second Degree (CP 18-19). Judgment and Sentence was entered on June 5, 2013 (CP 3-15). Appellant now appeals (CP 2).

Appellant's summary of the relevant facts is correct and the State would adopt that statement.

C. RESPONSE TO THE ARGUMENT

1. THE COURT'S VARIABLE IMPOSITION OF COMMUNITY CUSTODY IS NO LONGER PERMITTED UNDER THE MOST RECENT CASE LAW.

The Defendant challenges the community custody provision. The State concedes error on this point. The Defendant's term of community custody should be for a definite term of 18 months.

The confusion stems from an old case which gave us the "Brooks notation." In the case of *In re Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009), the defendant Brooks was sentenced to 120

months confinement and 18-36 months community custody. He sought review, arguing the combined punishment of confinement and supervision exceeded the ten-year statutory maximum. *Id.* The Washington Supreme Court held that the sentence was lawful, but should be amended to clarify that the combined term of confinement plus supervision should not exceed the maximum term. *In re Brooks*, 166 Wn.2d at 673, 675.

The so-called *Brooks* notation is no longer valid following amendments to the statute. Since *Brooks*, the Washington Supreme Court has revisited this issued twice. In *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011), the court decided that for defendants sentenced before certain statutory amendments took effect, ***the Department of Corrections***, not the courts, shall recalculate the term of community custody and set a specific length for the term of community custody. *State v. Franklin*, 172 Wn.2d at 840-41.

However, for defendants sentenced after July 26, 2009, it will be ***the trial court***, not the Department of Corrections, which shall reduce the term of community custody to avoid a sentence in excess of the statutory maximum. *State v. Boyd*, 172 Wn.2d 470, 473, 275 P.3d 321 (2012).

This Court in *State v. Winborne*, 167 Wn. App. 320, 323-26, 273 P.3d 454 (2012) recognized that the so-called “*Brooks* notation,” which provided for a term of community custody that was variable in nature, only addressed issues presented under then-existing law. Amendments to the SRA produced a different result. *State v. Winborne*, 167 Wn. App. at 326. The term of community custody should be determinative, and not flexible or dependent upon the defendant’s earned early release or good time. *State v. Winborne*, 167 Wn. App. at 329-30, citing *State v. Hale*, 94 Wn. App. 53, 971 P.2d 88 (1999); *In re Sentencing of Jones*, 129 Wn. App. 626, 627-28, 120 P.3d 84 (2005).

The Defendant Bolton was convicted and sentenced after 2009. *Brooks* does not control. *Winborne* and *Boyd* control.

The Appellant’s statutory maximum term on Count One is 10 years (or 120 months) (CP 5). The Appellant was sentenced to 87 months on Count One (CP 10). There is no possibility that his sentence of 87 months plus the statutory community custody term of 18 months will exceed the 120 month limit. Therefore, the judgment should simply impose a term of 18 months community custody *without regard for early release*. The sentence should be remanded for a definite term of 18 months of community custody.

D. CONCLUSION

Respondent requests that the Appellant's conviction should be affirmed, but the matter should remanded for imposition of a definite term of 18 months of community custody.

Dated this 3rd day of March, 2014.

Respectfully submitted,
SHAWN P. SANT
Prosecuting Attorney

By: 
Brian V. Hultgren
WSBA #34277
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

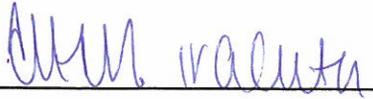
) SS.

County of Franklin)

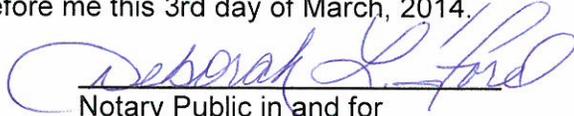
COMES NOW Abigail D. Iracheta, being first duly sworn on oath,
deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that on the 3rd day of March, 2014, a copy of the foregoing was delivered to Eduardo Felix, #347785, Appellant, Coyote Ridge Corrections Center, P.O. Box 769, Connell WA 99326-0769 by depositing in the mail of the United States of America a properly stamped

and addressed envelope; and to David N. Gasch, opposing counsel, gaschlaw@msn.com by email per agreement of the parties pursuant to GR30(b)(4).



Signed and sworn to before me this 3rd day of March, 2014.



Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2014

adi