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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of

JEFFREY BROOKS,

Petitioner.

**AMICUS CURIAE BRIEF OF
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS**

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A. ISSUE

Where a defendant's standard range prison term and standard community custody range might exceed the statutory maximum sentence, may a sentencing court order that community custody be the statutory range or ". . . the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer . . ."?

B. RELEVANT FACTS

Brooks was convicted by a jury of three counts of attempted first degree robbery and one count of residential burglary. As amended, his judgment and sentence provides as to the robbery counts:

- 1) 120 months in confinement;
- 2) followed by 18-36 months of community custody, "or the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer . . .";
- 3) that the total of confinement and community custody on all counts may not exceed 120 months.

Supplemental Br. of Petitioner, Appendix at 5 (page 3 of judgment) and Appendix at 23-24 (agreed order amending judgment).

Brooks has challenged his sentence, arguing that it is indeterminate, violates the separation of powers doctrine, and is otherwise unlawful. Oral argument is scheduled for May 28, 2009.

C. ARGUMENT

WAPA agrees with the general arguments presented by the Whatcom County Prosecuting Attorney on behalf of the State of Washington. Brooks' sentence is determinate, it is not a delegation of the sentencing court's authority, and it is otherwise lawful.

Brooks will not serve a sentence beyond the statutory maximum unless the Department of Corrections ignores the express language on the judgment and ignores statutes that plainly require it to release a defendant from custody or community placement once he has reached the statutory maximum sentence.

WAPA provides this amicus curiae brief to clarify a single legal point that arose when the opinion was amended in the recent case of State v. Linderud, 147 Wn. App. 944, 197 P.3d 1224 (2008), upon denial of the State's motion to reconsider. Namely, the question is whether a trial court may, as part of a judgment and sentence, order that an offender serve the longer of either a community custody range or the period of earned early release.

Brooks addresses that argument in his reply brief but the Respondent was not able to address it in its briefing because the amended Linderud opinion was filed on the same date as

Respondent's brief was due. Thus, there is a gap in the briefing. Because this issue is relevant in this case and in many pending direct appeals, WAPA sets forth below its analysis on this point.

Brooks argues in his reply brief that the trial court should have imposed a sentence that "elected one of two options" regarding community custody. Reply Br. of Petitioner at 5. He argues that the court has authority to impose *either* a range of community custody *or* the balance of earned early release as custody, but not both. Id. Brooks is mistaken. The trial court can, and did, enter an order that required whichever option results in the longer period of community custody, up to the statutory maximum sentence.

The court's authority is established by the Sentencing Reform Act in a section entitled "Community custody for specified offenders--Conditions." The statute provides in relevant part:

When a court sentences a person to the custody of the department . . . the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the *community custody range* established under RCW 9.94A.850 *or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer.* The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728

(1) and (2) . . . Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

RCW 9.94A.715(1).

The plain language of this provision establishes that the sentencing court has the authority to order a range of months, or the period of earned early release, whichever is longer. The provision does not require that the court choose one option or the other at sentencing. Indeed, choosing one option or the other would be impossible since the court cannot know which period is longer until the offender has earned early-release credit, i.e., until he has served his sentence. The only logical reading of the statute is that it requires the court to impose a period of community custody that is either the range or the period of earned release, whichever is longer. DOC then supervises the offender for the period of earned early release, if that period is longer than the 18-36 month range, or it will supervise during the required range of months.

Applied to this case the order functions as follows. Brooks will be eligible for 40 months of community custody if he earns his full early release credit (one-third of 120 months confinement is 40). If Brooks commits infractions in prison, however, and earns only 30 months of earned release credit, his community custody range

will be for the 18-36 month range, up to the maximum of 120 months of combined confinement and community custody. Using this language, the court can exercise its full measure of discretion and impose a community custody term that is appropriate based on Brooks' earned early release credit.

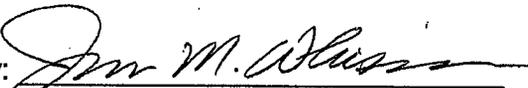
D. CONCLUSION

WAPA respectfully asks this Court to expressly endorse the sentencing court's language imposing as a community custody term either a range or the period of earned release, whichever is longer. This interpretation of RCW 9.94A.715(1) provides the court with the maximum flexibility in imposing sentences like the one in Brooks' case, where the combined standard range prison term and community custody range approach the maximum sentence.

DATED this 28th day of April, 2009.

Respectfully submitted,

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