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NO. 61481-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

JOHN CHARLES FRANKLIN,
Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN -9 PM 5:01

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

The Honorable Catherine Shaffer

APPELLANT'S SUPPLEMENTAL BRIEF

ELIZABETH ALBERTSON
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR.

12. Under State v. Linerud, the court improperly imposed an indeterminate sentence on counts I and III.

B. SUPPLEMENTAL STATEMENT OF FACTS.

At Mr. Franklin's sentencing hearing on February 22, 2008, he was sentenced to 68 months incarceration on count I (assault in the third degree), and 120 months on count III (possession of cocaine with the intent to deliver). CP 217.

The court entered an Order Modifying Judgment and Sentence on June 11, 2008. CP ___ (Sub. No. 113). Noting that Mr. Franklin was mistakenly sentenced beyond the statutory maximum on several counts, the court resentenced Mr. Franklin to 60 months incarceration on counts I, IV, VII, and VIII. CP ___ (Sub. No. 113). The court also added 9-18 months community custody on count I and 9-12 months community custody on count III. CP ___ (Sub. No. 113).

The court then entered a second Order Modifying Judgment and Sentence on September 5, 2008. CP ___ (Sub. No. 117) to state the following:

> On Count I, the defendant is sentenced to 9 to 18 months community custody or for the entire period of earned early release awarded under RCW

> 9.94A.728, whichever is longer. On Count I, the total amount of incarceration and community custody shall not exceed 60 months.
>
> On Count III, the defendant is sentenced to 9 to 12 months community custody or for the entire period of earned release awarded under RCW 9.94A.728, whichever is longer. On Count III, the total amount of incarceration and community custody shall not exceed 120 months.

C. ARGUMENT.

UNDER STATE V. LINERUD, THE COURT IMPOSED AN INDETERMINATE SENTENCE, REQUIRING REMAND FOR SENTENCING ON COUNTS I AND III.

Assault in the third degree is a class C felony and carries a maximum statutory penalty of five years incarceration and/or a ten thousand dollar fine. RCW 9A.20.021; RCW 9A.36.031. Possession of cocaine with the intent to deliver is a class B felony and carries a maximum statutory penalty of ten years incarceration and/or a twenty five thousand dollar fine. RCW 69.50.401. Under RCW 9.94A.505(5), "a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime."

The SRA requires imposition of a determinate sentence, which is defined in RCW 9.94A.030 as "a sentence that states with

exactitude the number of actual years, months, or days of total confinement, of partial confinement, [or] of community supervision." In State v. Linerud, 147 Wn. App. 944, 947, 197 P.3d 1224 (2009), the defendant was sentenced to 43 months of incarceration and 36-48 months of community custody. The Judgment and Sentence included a notation that the combination of prison time plus community custody could not exceed the statutory maximum of sixty months. Id. On appeal, this Court struck down the sentence as an indeterminate sentence, holding that "a sentence is indeterminate when it puts the burden on the DOC rather than the sentencing court to ensure that the inmate does not serve more than the statutory maximum." Id. at 948. The court ruled that sentencing courts "must limit the total sentence they impose to the statutory maximum." Id. at 951. This Court has continued to follow the ruling in Linerud in the recent decisions of State v. Durrett, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 1508567 at *4 (June 1, 2009); State v. Hagler, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 1474704 at *3-4 (May 26, 2009); State v. Berg, 147 Wn. App. 923, 941, 198 P.3d 529 (2008).

The facts in this case are virtually identical to those in Linerud. On count I, Mr. Franklin was sentenced to 60 months of

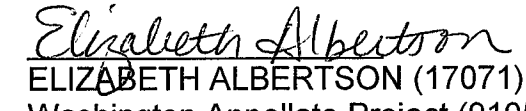
incarceration plus 9-18 months of community custody. On count III, Mr. Franklin was sentenced to 120 months of incarceration plus 9-12 months of community custody. The sentencing court sentenced Mr. Franklin to more than the statutory maximum penalty on counts I and III, and then attempted to delegate to DOC the obligation to ensure that the statutory maximum penalty was not exceeded. Under Linerud, the sentence constitutes an indeterminate sentence and is unlawful.

D. CONCLUSION.

Because the court improperly imposed an indeterminate sentence, the sentences imposed on counts I and III must be reversed, and the case remanded for resentencing.

DATED this 9th day of June, 2009.

Respectfully submitted,



ELIZABETH ALBERTSON (17071)
Washington Appellate Project (91052)
Attorneys for Appellant

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	)	
JOHN FRANKLIN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DANIEL KALISH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JOHN FRANKLIN 862280 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF JUNE, 2009.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711