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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW C. BRUCH,

Petitioner.

AMICUS CURIAE BRIEF OF
THE WASHINGTON DEPARTMENT OF CORRECTIONS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Department of Corrections (Department or DOC) administers sentences of adult felony offenders sentenced to prison or community custody. *See* RCW 72.02.210; RCW 9.94A.030(5). It has an interest in determining whether sentences are consistent with the law and also in administering sentences consistent with the law. This includes supervising for the correct length of time as specified in statute and in the judgment and sentence. If the judgment and sentence conflicts with the applicable statutes, the DOC is put in the undesirable position of having to administer a defective judgment and sentence and thereby violate the statutes. The exception is when the DOC is able to obtain a corrected judgment and sentence under post-sentence petition procedures. *See* RCW 9.94A.585(7). But that process can be a lengthy one.

Because the DOC has an interest in administering sentences that comply with the applicable statutes, it reviews all sentences it receives for errors. A common error may be an incorrectly listed length of community custody in the judgment and sentence. Thus, the DOC is familiar with the laws regarding community custody lengths. It also has the responsibility to administer early release for inmates and to correctly calculate the amount of early release credits available for each sentence. Furthermore, the DOC must correctly determine the statutory maximum expiration date

in each case and determine when to cease supervising an offender on community custody whose supervision would otherwise exceed the statutory maximum. As such, the DOC is familiar with the issue in this case regarding whether a sentence for second degree child molestation consisting of 116 months of imprisonment and a term of community custody of “at least” four months plus any earned early release time accrued at the time of release violates RCW 9.94A.701(9).

II. STATEMENT OF THE CASE

The DOC relies on the statement of the case in the State’s supplemental response, with the following addition. Bruch’s prison term of 116 months for his sex offenses is 3,530 days long. He is potentially eligible for early release at a rate of one-third of his sentence. RCW 9.94A.729(3)(e). One-third of 3,530 days is 1,176 days (rounded down). That is approximately 81 days in excess of three years. Bruch’s judgment and sentence imposes community custody of four months plus early release credits. CP 6. Adding the 81 excess days potentially available through early release to the four months specified in the judgment and sentence equals approximately 202 days in excess of the three-year term of community custody allowed in RCW 9.94A.701(1). In other words, if Bruch earns all of his early release credits, his community custody term length will be 202 days plus three years. Even without the four months

added, community custody consisting solely of early release time in his case would last 81 days in excess of three years.

III. ARGUMENT

Several statutes operate together to establish sentencing authority for judges to sentence felons to prison and community custody. RCW 9A.20.021 sets forth the maximum penalty. RCW 9.94A.510 sets the standard range of confinement the judge can choose from, within the maximum penalty. RCW 9.94A.701 sets forth the term lengths for community custody.

The duration of the prison sentence that the felon actually serves is determined by his or her good or bad behavior, as provided in RCW 9.94A.729. That statute states in RCW 9.94A.729(5) that for certain offenders, earned early release time is converted to community custody. RCW 9.94A.501 governs whether the felon will be supervised during the community custody term that the judge imposed (and during any concomitant period of community custody in lieu of earned early release).

Harmonizing these statutes, the DOC agrees with the State that the judgment and sentence will not violate RCW 9.94A.701(9) if it orders a community custody term consisting of “four months or the period of earned early release, whichever is greater.” Supplemental Brief of Respondent at 9. The clear language of RCW 9.94A.701(9) prohibits only

community custody terms that exceed the statutory maximum. Obviously, if a prison term does not exceed the statutory maximum, the early release portion of that prison term likewise will not exceed the statutory maximum. Thus, a community custody term consisting only of earned early release time will not violate RCW 9.94A.701(9).

Moreover, the judgment and sentence as currently worded does not violate RCW 9.94A.701(9). The judgment and sentence currently orders a community custody term consisting of “four months plus the period of earned early release.” If Bruch is released after serving only 78 months of his 116-month prison term—i.e., he is released 38 months early (one-third of his sentence)—his community custody term will not exceed the statutory maximum. Seventy-eight months of prison, plus four months of community custody, plus 38 months of community custody in lieu of early release equals 120 months. Thus, the current judgment and sentence is still within the statutory maximum of 120 months, and therefore it complies with RCW 9.94A.701(9).

RCW 9.94A.701(9) should not be read in isolation as Bruch advocates. Disregarding RCW 9.94A.729(5) when applying RCW 9.94A.701(9) results in the absurd situation in which offenders most in need of supervision are the offenders least likely to receive supervision. Under Bruch’s interpretation of RCW 9.94A.701(9), if a judge believes

that an offender's crime was serious enough to warrant imposing a prison term of the statutory maximum length, that offender cannot be released early to supervised community custody (because, under Bruch's interpretation, no definite term of community custody could have been set by the sentencing court without exceeding the statutory maximum) and instead that offender will be released early to no supervision at all, even if he or she has years left before reaching the statutory maximum. The clear intent of RCW 9.94A.701(9) is to prevent an offender from serving beyond the statutory maximum, not to prevent dangerous offenders from receiving supervision, while their less dangerous cohorts are supervised.

Although the DOC believes that the current language in the judgment and sentence, and the State's proposed language, do not violate RCW 9.94A.701(9), the DOC believes that both versions violate RCW 9.94A.701(1). In each case, additional language may be necessary so that the sentence complies with RCW 9.94A.701(1). The DOC respectfully submits that the judgment and sentence should specify that the community custody term should not exceed three years. The trial court could amend the sentence by imposing community custody of "four months *or* the period of earned early release, whichever is greater, not to exceed three years." Or it could amend the sentence by imposing community custody

of “four months *plus* the period of earned early release, not to exceed three years.” (Emphasis added only for clarity.)

RCW 9.94A.701(1) retroactively requires sex offenders such as Bruch to be sentenced to three years of community custody. Therefore, Bruch’s judgment and sentence should provide that his community custody term cannot exceed three years. The bill that amended RCW 9.94A.701(1) to require a set term of three years of community custody for sex offenders such as Bruch was passed in 2009. *See* Laws of 2009, ch. 375, § 5. It was made retroactive:

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

Laws of 2009, ch. 375, § 20. Bruch was sentenced after the July 26, 2009 effective date of the bill. He was sentenced on September 4, 2012. CP 7. Therefore, the amendment changing community custody to a three-year term applies to him, and the sentencing court was not authorized to impose more than three years of community custody.

In 2011, the legislature also retroactively amended the early release statute. The amended statute provides:

(5)(a) A person who is eligible for earned early release as provided in this section and who will be supervised by the

department pursuant to RCW 9.94A.501 or section 3 of this act, shall be transferred to community custody in lieu of earned release time;

Laws of 2011, ch. 40, § 4 (amending RCW 9.94A.729(5)). This amendment has the effect of allowing the DOC to supervise during the early release period only if supervision is required by RCW 9.94A.501. RCW 9.94A.501 in turn cross-references RCW 9.94A.701, the statute that provides the applicable community custody term lengths. *See* RCW 9.94A.501(4)(a). In other words, after the amendment, the DOC can supervise during the early release period only *so long as* it runs concurrently to a court-imposed community custody term. Supervision for longer than a court-imposed community custody term is prohibited. *See* RCW 9.94A.501(5) (“The department is not authorized to, and may not, supervise any offender sentenced to a term of community custody or any probationer unless the offender or probationer is one for whom supervision is required under this section or RCW 9.94A.5011”). Thus, if the court imposed solely four months of community custody, the DOC could not supervise for more than four months, even if Bruch had earned three years of early release, and his early release period was converted to community custody.

This 2011 amendment is retroactive: “[T]he provisions of this act apply to persons convicted before, on, or after the effective date of this

section.” Laws of 2011, ch. 40, § 42 (effective June 15, 2011). Therefore, the amendment applies to Bruch. As such, the DOC is not authorized to supervise him during early release time, except to the extent that the early release period is concurrent with a court-imposed community custody term that is consistent with RCW 9.94A.701. If the court fails to impose a community custody term, the DOC cannot supervise the offender, even during early release time.

RCW 9.94A.701(1) does not authorize the sentencing court to impose more than three years of community custody. Likewise, RCW 9.94A.729(5) does not authorize the DOC to supervise Bruch’s early release period beyond the three years provided for in RCW 9.94A.701(1). Because the judgment and sentence provides for a period of community custody that exceeds three years (assuming Bruch earns all his early release time), and the statute allows no more than three years, the judgment and sentence is in conflict with statute. The conflict can be resolved simply by amending the judgment and sentence to state that community custody shall not exceed three years.

Bruch argues that RCW 9.94A.729 is directed at the DOC, not the sentencing court, and therefore, the sentencing court does not have authority to impose community custody consisting of early release time. *See* Supplemental Brief of Petitioner at 10. But establishing the length of

community custody, as the court did in this case, is in no way equivalent to awarding early release time. It does not direct the DOC to actually award any specific amount of early release time. It simply orders the DOC to supervise during whatever early release time the DOC awards.

Moreover, unless the court in Bruch's case provides a length of community custody that is long enough to account for three years of early release time, the DOC cannot supervise for three years under RCW 9.94A.729(5) during the period of community custody in lieu of early release. *See* RCW 9.94A.501. The DOC needs a court order before it can supervise. And the length of supervision is set by the court, not the DOC. *See State v. Broadaway*, 133 Wn.2d 118, 942 P.2d 363 (1997) (trial court must specify a term of community custody; DOC has no authority to determine term length itself). Without the notation in Bruch's sentence regarding community custody during the early release period, the DOC is not authorized to supervise for more than four months, no matter the timing of early release.

IV. CONCLUSION

The case should be remanded for correction of the community custody period so that it does not violate RCW 9.94A.701(1). This can be accomplished by amending the period so that it is either "four months plus the period of earned early release, not to exceed three years" or "four

months or the period of earned early release, whichever is greater, not to exceed three years.”

RESPECTFULLY SUBMITTED this 14th day of August, 2014.

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Good afternoon. Please find the attached Motion for Leave to File Amicus Curiae Brief of the Washington Department of Corrections with Certificate of Service, and the Amicus Curiae Brief of the Department of Corrections with Certificate of Service.

Case name – State of Washington v. Matthew C. Bruch
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