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STATE OF WASHINGTON
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NO. 90021-3

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW C. BRUCH,

Petitioner.

SUPPLEMENTAL
BRIEF OF RESPONDENT

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 ORIGINAL

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I. ISSUE

This court granted review limited to “the sentencing issue.” That issue can be paraphrased as follows:

Did the trial court err in sentencing the defendant to community custody for “at least 4 months, plus all accrued earned early release time at the time of release”?

II. STATEMENT OF THE CASE

The defendant (petitioner), Matthew Bruch, was convicted of two counts of second degree child molestation and two counts of third degree rape of a child. The issue on review involves only the sentences for the child molestation counts. Those crimes were committed between January 6, 2007 and January 25, 2009. CP 3.

Sentence was imposed on September 4, 2012. The court determined that the standard sentence range was 87-116 months for each count of child molestation. CP 5. The maximum sentence is 10 years imprisonment. RCW 9A.44.086(2), RCW 9A.20.021(1)(b). The court sentenced the defendant to 116 months' confinement for each child molestation count, to be served concurrently. CP 6. The court ordered community custody “for a period of at least 4 months, plus all accrued earned early release time at the time of release.” CP 7.

III. ARGUMENT

A. STATUTORY BACKGROUND.

This case requires the court to address the interactions among several related statutory provisions. Two statutory schemes are potentially relevant: the statutes existing at the time of the crime, and those existing at the time of sentencing.

1. Statutes Existing At Time Of Crime.

Throughout the charging period (1/26/07 to 1/25/09), sentences of community custody were governed by the following statute:

When a court sentences a person to the custody of the department [of corrections] for a sex offense ..., 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; [or] (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)...Former RCW 9.94A.715(1), as amended by Laws of 2006, ch. 130, § 2.¹ The community custody range for sex offenses was 36 to 48 months. WAC 437-20-010.

¹ RCW 9.94A.715 was amended during the charging period, but the amendment did not change the language quoted above. Laws of 2008, ch. 276, § 305.

RCW 9.94A.728 dealt with earned early release. Under subdivision (1)(c), the maximum earned early release for a sex offense (other than a class A felony) was one-third of the sentence. Under subdivision (2)(b), a person convicted of a sex offense was eligible for "transfer to community custody status in lieu of earned early release time pursuant to subsection (1) of this section." Former RCW 9.94A.728, as amended by Laws of 2007, ch. 483, § 304.

A separate statute limited community custody sentences to the statutory maximum:

[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 as provided in chapter 9A.20 RCW.

Former RCW 9.94A.505(5), as amended by Laws of 2002, ch. 290, § 17.² Under this statute, sentencing courts were not required to reduce the period of community custody in order to stay within the statutory maximum. The sentence had to provide, however, that the combination of confinement plus community custody could not

² An amendment to RCW 9.94A.505 took effect during the charging period, but it did not change the language quoted above. Laws of 2006, ch. 73, § 6 (eff. 7/1/07).

exceed the statutory maximum. In re Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009).

2. Statutes Existing At Time Of Sentencing.

This sentencing scheme was substantially altered by a 2009 statute. That statute eliminated community custody ranges. Instead, it provided a flat three-year term of community custody for sex offenses. RCW 9.94A.701(1)(a), as amended by Laws of 2009, ch. 475 § 5. The statute contained a new provision for sentences of community custody exceeding the statutory maximum:

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.

Former RCW 9.94A.701(7).³

Chapter 375 contained a retroactivity provision:

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 probation with the department, or sentenced after the effective date of this section [July 26, 2009].

Laws of 2009, ch. 375, § 20. When sentencing occurs after the effective date of this statute, the sentencing court should reduce the

³ This provision is now codified as RCW 9.94A.701(9).

term of custody to avoid a sentence in excess of the statutory maximum. The procedure approved in Brooks no longer applies. State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012).

Chapter 375 did not, however, alter the statutory provisions relating to earned early release. In a contemporaneous statute, those provisions were re-codified with some changes. The provisions dealing with community custody in lieu of earned early release were deleted from RCW 9.94A.728. Laws of 2009, ch. 455, § 2 (eff. 8/1/09). Comparable provisions were re-enacted into a new section:

A person who is eligible for earned early release as provided in this section and who is convicted of a sex offense ... shall be transferred to community custody in lieu of earned early release time.

Id. § 3 (eff. 7/26/09).⁴

With regard to this defendant, the statutory provisions dealing with earned early release have remained substantially unchanged from the beginning of the charging period to the present time. He is eligible for up to a one-third reduction on his sentence –

⁴ The current version of this statute provides for community custody in lieu of earned early release for any person who “will be supervised by the department pursuant to RCW 9.94A.501 or RCW 9.94A.5011.” RCW 9.94A.729(5)(a). RCW 9.94A.501(4)(a) provides for the supervision of all felony sex offenders who are sentenced to community custody, regardless of their risk classification.

that is, a reduction of up to 38 $\frac{2}{3}$ months. This reduction will not, however, be an outright release. Rather, the defendant will be transferred to community custody in lieu of any earned early release.

B. UNDER THESE STATUTES, DEFENDANTS SERVE A COMMUNITY CUSTODY TERM EQUAL TO THE REDUCED STATUTORY PERIOD OR THE PERIOD OF EARNED EARLY RELEASE, WHICHEVER IS GREATER.

The ultimate issue to be decided by this court is what sentence should be imposed in light of these statutory provisions. Under RCW 9.94A.701, the sentencing court should reduce the term of community custody to remain within the statutory maximum. In the present case, the court did this: it reduced the three-year term of community custody to four months. CP 7. Four months community custody plus 116 months of confinement equals 120 months, the statutory maximum.

Under RCW 9.94A.729, any award of good time will be brought about by a transfer to community custody. The defendant may thus serve a term of community custody that exceeds four months, if he receives a greater award of good time. The sentencing court provided for this as well.

The defendant points out that the conversion of earned early release to community custody is carried out by the Department of Corrections, not the trial court. This does not prevent the court from referring to that conversion in the judgment. For example, in the standard Judgment and Sentence form prescribed by the Administrator for the Courts, there is a provision requiring the defendant to "abide by any additional conditions imposed by DOC under RCW 9.94A.704." WPF CR 84.0400 at 5. That statute authorizes the Department to impose "additional conditions of community custody based upon the risk to public safety." RCW 9.94A.704(2)(a). If those conditions are violated, sanctions are imposed by the Department, not the court. RCW 9.94A.6332(5). So the authority governing these conditions is similar to the authority to convert earned early release to community custody: the power lies with the Department, not the court. Yet no one has argued that the inclusion of these provisions in a sentence is somehow illegal.

Nor does inclusion of such a provision have any impact on the defendant's rights. Under RCW 9.94A.729, any reduction of the sentence for sex offenders by earned early release is accomplished by a transfer to community custody. This would occur whether it is specified in the judgment or not. The inclusion of such a provision

in the judgment does not lengthen the period of community custody – it simply notifies the defendant what that period will be.

Despite all of this, the action taken by the sentencing court in the present case was erroneous in one respect. Under RCW 9.94A.729, a defendant who receives earned early release is “transferred to community custody in lieu of earned early release time.” It thus appears that the period of transfer counts against the period of community custody ordered by the court. If the court-ordered period is longer, the defendant will serve that period, with credit for the period in lieu of earned early release. If the period in lieu of earned early release is longer, the defendant will serve that period, which will then also satisfy the court-ordered period. In effect, the defendant will serve the longer of (a) the community custody period specified by statute (reduced if necessary to stay within the statutory maximum) or (b) the period of earned early release.

In this case, the trial court attempted to add the two. That is, the court ordered the defendant to serve a term of community custody equal to the reduced statutory period *plus* the period in lieu of earned early release. Absent an exceptional sentence, such a sentence does not appear to be authorized by statute. The State

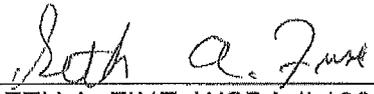
therefore concedes that the sentencing court erred in attempting to add the two periods. The sentence should be corrected accordingly.

IV. CONCLUSION

The case should be remanded for correction of the community custody period. The correct period should be four months or the period of earned early release, whichever is greater.

Respectfully submitted on July 28, 2014.

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Snohomish County Prosecuting Attorney

By: 
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Deputy Prosecuting Attorney
Attorney for Respondent

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From: OFFICE RECEPTIONIST, CLERK
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Good Afternoon...

RE: State v. Matthew Bruch
Supreme Court No. 90021-3

Please accept for filing the attached pleading: State's Supplemental Brief of Respondent

Thank you.

Diane.

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