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NO. 94971-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

DEREK E. GRONQUIST

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

The superior court imposes the maximum sentence of confinement, and the Department of Corrections lacks authority to reduce or otherwise alter the maximum sentence. Similarly, the court determines whether multiple sentences run consecutively or concurrently, and the Department lacks authority to convert consecutive sentences into concurrent sentences. Simply put, the maximum sentence imposed by the court remains the maximum sentence, and consecutive sentences remain consecutive, unless and until the court amends the sentence. The Department may not shorten or otherwise alter the maximum sentence by reducing the sentence length or altering its consecutive nature.

Here, the superior court sentenced Gronquist to three consecutive 114-month sentences for a total maximum sentence of 342 months. Gronquist contends the sentence expired in November 2016, but that would only be a passage of 276 months. Starting from February 28, 1995, when the Department received custody of Gronquist, and giving him credit for time served in jail, the 342 months will not pass until May 31, 2022. That is when the maximum sentence will expire. The Department may not alter that maximum expiration date, either by reducing the length of the sentence, or by changing the consecutive nature of the sentence.

II. STATEMENT OF THE CASE

A. Gronquist was Convicted of Three Sex Offenses and Received a Total Maximum Sentence of 342 Months

A jury convicted Gronquist of three counts of attempted first-degree kidnapping, committed with sexual motivation. Appendix A, at 1.¹ The crimes are sex offenses as a result of the jury's finding of sexual motivation. RCW 9.94A.030(47)(c). The superior court imposed an exceptional sentence of 114-months confinement for each of the three convictions, and ordered that the three sentences would run consecutively to each other. Appendix A, at 3. The three 114-month sentences equals a maximum sentence of 342 months. In addition, the court imposed a term of community placement. Appendix A, at 3. The court later clarified that the combined sentence of confinement and community placement would not exceed the statutory maximum of 360 months. Appendix C.

The Department of Corrections received custody of Gronquist on February 28, 1995. Appendix B, at 30. Giving Gronquist credit for the 453 days he served in jail prior to February 28, 1995, the Department determined that the 342-month sentence expires on May 31, 2022. Appendix B, at 1; Appendix D.

¹ The referenced appendices were submitted with the answer to the motion for discretionary review.

Each individual 114-month sentence equals 9.5 years, or 3,469 days. Running the sentences consecutively to each other equals 342 months, or 28.5 years, or 10,407 days. Starting from February 28, 1995, when the Department received custody of Gronquist, and giving him credit for 453 days of time served, the 342 months/28.5 years/10,407 days will not pass until May 31, 2022. Appendix D; Appendix F, at ¶ 8. Review of a calendar or time/date calculator shows the sentence expires on May 31, 2022.²

B. As a Convicted Sex Offender, Gronquist is not Entitled to Early Release, But May Only Transfer to Community Custody in Lieu of Early Release at the Discretion of the Department

In administering Gronquist’s sentence, the Department began with the presumption that an offender will remain confined until the expiration of the maximum sentence. RCW 9.94A.728(1) (“No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:”); *see also State v. Rogers*, 112 Wn.2d 180, 183, 770 P.2d 180 (1989) (“The statute prohibits early release absent existence of one of the statutory exceptions.”).

² Gronquist points to a prior calculation of the maximum sentence that incorrectly set the expiration date as November 17, 2016. But that calculation failed to account for the full 342-month sentence imposed by the court. Appendix F, at ¶¶ 6 and 7. The Department fixed the calculation error with a new programming system that accounts for the full sentence imposed by the superior court. Appendix F, at ¶¶ 8 and 9.

The most common statutory exception is the earned early release program. RCW 9.94A.728(1)(a); RCW 9.94A.729. But Gronquist’s convictions for sex offenses render him statutorily ineligible for that early release program. *In re Mattson*, 166 Wn.2d 730, 733, 214 P.3d 141 (2009). Instead, as a sex offender, Gronquist may only become eligible, in accordance with the program developed by the Department, for transfer to community custody status “in lieu of” early release. *Mattson*, 166 Wn.2d at 733 and 739; RCW 9.94B.090; RCW 9.94A.728(1)(a); RCW 9.94A.729(5).

Sex offenders do not have a right to transfer to community custody upon reaching their early release date. *Mattson*, 166 Wn.2d at 737-43. Rather, the Department has discretion to grant or deny transfer to community custody, based upon an assessment of risk. RCW 9.94A.729(5)(c); RCW 9.94B.090; *Blick v. State*, 182 Wn. App. 24, 30-32, 328 P.3d 952 (2014). Moreover, with consecutive sentences, the Department cannot transfer an offender to community custody until the offender completes the required confinement time on each sentence. *See* RCW 9.94A.589(5) (“In the case of consecutive sentences, all periods of total confinement shall be served before any . . . community supervision, or any other requirement or conditions of any of the sentences.”). To date, the Department has determined that an assessment of risk precludes transferring Gronquist to community custody status, so he remains in prison. Appendix F, at ¶ 11.

Even when the Department transfers offenders to community custody, the offenders remain under the sentence of confinement, albeit in the community, until the expiration of the maximum sentence ordered by the court. *See* RCW 9.94A.030(5) (community custody is “that portion of an offender’s sentence of confinement in lieu of earned release time. . . .”); *State v. Bruch*, 182 Wn.2d 854, 863, 346 P.3d 724 (2015) (recognizing that the “in lieu of” community custody is part of the sentence of confinement). If the offender violates a condition while on community custody, the Department may return the offender to prison to finish serving the unexpired portion of the maximum sentence of confinement. RCW 9.94A.633(2)(a). Thus, whether in prison or transferred to community custody, Gronquist will continue serving the sentence of confinement imposed by the superior court until expiration of the maximum sentence on May 31, 2022.

C. The Department Determined that Gronquist’s Maximum Sentence Ends on May 31, 2022

The Department tracked the time Gronquist served on each individual sentence for each count, rather than tracking the entire sentence as one single unit. The Department “started” the sentence for count I upon receiving custody of Gronquist, giving him credit on that count for time served in jail. Appendix D (Time Start Date for cause AB). Then, although Gronquist was not eligible for early release, the Department “started” the

sentence for count II on the early release date for count I. Appendix D (Time Start Date for cause AC; ERD for cause AB). The Department similarly “started” the sentence for count III on the early release date for count II. Appendix D (Time Start Date for cause AD; ERD for cause AC). When the Department “started” time on count II, the Department necessarily “stopped” the time on count I. Similarly, when the Department “started” the time on count III, the Department “stopped” the time on count II. The “stopped” portion of each sentence is the time Gronquist would have been eligible for consideration of transfer to community custody “in lieu of” early release, if he did not have to serve the second and third consecutive sentences. *See* RCW 9.94B.090; RCW 9.94A.589(5).

The “start” dates and “stoppage” time are simply an administrative timekeeping method to track the time an offender actually serves on a particular sentence. The Department tracks the sentences by individual count, and not just as a single sentence under the judgment and sentence, for a number of reasons, including the fact that sentences on different counts may earn early release credits at different percentage rates. *See* RCW 9.94A.729(3). If the Department had tracked Gronquist’s time as a single sentence, it would have resulted in the same end result. Starting from February 1995 (with credit for time served), and tracking the sentence as a single unit, 342 months would end in May 2022.

III. ARGUMENT

A. The Department May Not Reduce the 342-Month Maximum Sentence Imposed by the Superior Court

Gronquist argues that the maximum sentence on his 342-month sentence of confinement expired on November 17, 2016, after just 276 months, rather than on May 31, 2022, which would be the full 342 months. Gronquist's argument essentially requires the Department to reduce the maximum sentence imposed by the superior court by 66 months. The Department lacks authority to reduce the maximum sentence.

The power to order punishment by imprisonment lies exclusively in the courts. *Honore v. Washington State Bd. of Prison Terms & Paroles*, 77 Wn.2d 697, 700, 466 P.2d 505 (1970). The Department has no power to reduce, increase, or otherwise alter the maximum sentence imposed by the superior court. *Id.*; *In re Little*, 95 Wn.2d 545, 549, 627 P.2d 543 (1981). Rather, the defendant remains subject to the maximum sentence imposed by the court until released by pardon, death, or expiration of the maximum sentence. *Honore*, 77 Wn.2d at 700 (citing *In re Scott v. Callahan*, 39 Wn.2d 801, 239 P.2d 333 (1951)). Simply put, the Department lacks authority to reduce the length of the maximum sentence imposed by the court. *Honore*, 77 Wn.2d at 700; *Little*, 95 Wn.2d at 549. Since the Department may not reduce the 342-month sentence to 276 months, the maximum sentence remains 342 months and does not expire until May 31, 2022.

B. The Department May Not Parole Gronquist, or Otherwise Convert the Consecutive Sentences into Concurrent Sentences to Reduce the Maximum Sentence

Gronquist argues that because the Department “started” the consecutive sentences for each count on the early release dates of the prior counts, the sentences necessarily ran and the maximum sentence expired early. But Gronquist fails to recognize that the determinate sentence on one count necessarily “stopped” when he “started” serving the determinate sentence on another count because the Department cannot parole him or otherwise convert the consecutive sentences into concurrent sentences.

To support his position, Gronquist relies on case law governing indeterminate sentences. Under the indeterminate sentencing system, the parole board may parole an offender early from one sentence to begin serving another sentence. RCW 9.95.110. When that happens, the prior sentence continues to run and the offender serves both sentences at the same time. *See, e.g., In re Paschke*, 61 Wn. App. 591, 593-94, 811 P.2d 694 (1991) (citing *St. Peter v. Rhay*, 56 Wn.2d 297, 300, 352 P.2d 806 (1960); *State ex rel. Mason v. Superior Court*, 44 Wn.2d 67, 265 P.2d 253 (1954)); *In re Peterson*, 99 Wn. App. 673, 676, 995 P.2d 83 (2000) (board may parole offender from an indeterminate sentence to a determinate sentence). But this rule does not apply to determinate sentences.

The Legislature abolished parole for determinate sentences when passing the Sentencing Reform Act (SRA). *See* RCW 9.95.900. Under the SRA, the Department may not parole an offender early from one determinate sentence to begin serving another sentence. In fact, the SRA limits the power to release an offender early. RCW 9.94A.728(1). The Department may release an offender from a sentence early only where the statute explicitly authorizes the early release. RCW 9.94A.728(1).

The statute does allow release for offenders who are eligible for the early release program. RCW 9.94A.728; RCW 9.94A.729. Under the program, the Department will release those offenders upon reaching their early release date. Thus, if Gronquist were eligible for the early release program, the sentences on counts I and II would have ended on their respective early release dates, and the Department would have released him outright on his early release date for count III (the same early release date if the sentence is treated as one 342-month sentence). But as a sex offender, Gronquist is statutorily ineligible for the early release program.

The Department may not parole Gronquist, or release him early from his sentence of confinement. Rather, Gronquist must serve the full sentence of confinement (each of the 114-month sentences for a total of 342 months) either in prison, or on community custody “in lieu of” early release. *See* RCW 9.94B.090; RCW 9.94A.729(5).

The Department also may not award credit on multiple sentences when an offender is just serving one of the many consecutive sentences. *See In re Costello*, 131 Wn. App. 828, 834, 129 P.3d 827, 830 (2006). The Department may not allow Gronquist to serve two consecutive sentences simultaneously because awarding him credit on two consecutive sentences “would unlawfully render the sentences partially concurrent.” *Id.*; *Stephens v. State*, 186 Wn. App. 553, 559, 345 P.3d 870 (2015).

“Washington law requires that sentences be either fully consecutive to or fully concurrent with one another.” *Costello*, 131 Wn. App. at 834 (citing *State v. Grayson*, 130 Wn. App. 782, 125 P.3d 169 (2005)). Washington law does not allow hybrid sentences that are partially consecutive and partially concurrent. *State v. Smith*, 142 Wn. App. 122, 127, 173 P.3d 973 (2007). Moreover, the Department lacks authority to change the consecutive nature of the sentence ordered by the court. *See State v. Broadaway*, 133 Wn.2d 118, 942 P.2d 363 (1997); *Dress v. Dept. of Cor.*, 168 Wn. App. 319, 279 P.3d 875 (2012). The Department may not convert the court ordered consecutive sentences into partially consecutive, partially concurrent sentences. *See In re Phelan*, 97 Wn.2d 590, 596-97, 647 P.2d 1026 (1982) (board lacked authority to change concurrent/consecutive nature of sentences); *Brooks v. Rhay*, 92 Wn.2d 876, 602 P.2d 356 (1979) (same); *In re Chapman*, 105 Wn.2d 211, 713 P.2d 106 (1986) (same).

Although the Department “started” the time on count II at the early release date for the sentence on count I, and “started” the time on count III on the early release date for count II, the Department did not parole Gronquist or release him early. The Department did not change the consecutive nature of the sentences. Instead, the Department simply made an administrative timekeeping calculation that stopped counting time on the sentence for one count and started counting time on the sentence of the next count. The Department correctly determined that Gronquist was not entitled to credit against the sentences on multiple counts when he “started” one consecutive sentence and “stopped” serving the other sentence.

The Department also correctly “stopped” time on the sentence for each prior count once Gronquist began serving the sentence on the subsequent count. The “stopped” portion of each sentence is the time Gronquist would be eligible for transfer to community custody “in lieu of” early release. RCW 9.94B.090; RCW 9.94A.729. But Gronquist could not transfer to community custody on counts I and II until he completed the required confinement time on the sentence for count III. RCW 9.94A.589(5) (“In the case of consecutive sentences, all periods of total confinement shall be served before any . . . community supervision, or any other requirement or conditions of any of the sentences.”). Gronquist had to first serve the required confinement time before transferring to community custody.

Even if he had submitted an approved plan, the Department could not have transferred Gronquist to community custody on the early release date of the sentence for count I because Gronquist still had to serve the sentences for counts II and III. The Department also could not transfer Gronquist to community custody for count II until he served the sentence for count III. The community custody portion of the sentences for counts I and II therefore necessarily “stopped” or “tolled” while Gronquist served the sentences on counts II and III respectively. RCW 9.94A.171(3) (term of community custody tolls during any period of time the offender is in confinement for any reason); *see also State v. Jones*, 172 Wn.2d 236, 257 P.3d 616 (2011) (period of community custody tolls during confinement even when the confinement is subsequently determined to be invalid).

Thus, the Department properly “stopped” the community custody “in lieu of” time on count I while Gronquist served the sentences on count II and count III, and properly “stopped” the community custody “in lieu of” time on count II while Gronquist served the sentence on count III. If the community custody “in lieu of” time on the prior consecutive sentences did not toll during confinement on the subsequent consecutive sentences, then Gronquist would effectively serve part of his consecutive sentences concurrently, contravening RCW 9.94A.589(5), RCW 9.94A.171(3), and the express order of the judgment and sentence.

C. The Department Properly Exercised Its Discretion in Deciding not to Transfer Gronquist to Community Custody

As a sex offender, Gronquist does not have a right to release upon reaching his early release date. *Mattson*, 166 Wn.2d at 740. Rather, Gronquist only has the right to have the Department follow its policy and properly exercise its discretion in deciding whether to transfer him to community custody in lieu of early release. *Id.*; *In re Crowder*, 97 Wn. App. 598, 601, 985 P.2d 944 (1999). Gronquist does not show the Department has acted arbitrarily and capriciously, or otherwise abused its discretion, in deciding not to transfer him to community custody.

The statute provides the Department with significant authority to determine when an offender should transfer to community custody. *Bruch*, 182 Wn.2d at 863. The Department may confine the offender in prison up to the expiration of the maximum sentence if the Department determines the offender should not transfer to community custody. *Bruch*, 182 Wn.2d at 863; *Mattson*, 166 Wn.2d at 739. The Department may deny transfer to community custody if it would pose a risk of re-offense or a risk to public safety. *Mattson*, 166 Wn.2d at 739. Here, the Department correctly exercised its discretion not to transfer Gronquist to community custody because the proposed plan posed too great a risk. Appendix F, at ¶ 11. Gronquist fails to show an abuse of discretion, and he fails to show unlawful restraint.

IV. CONCLUSION

Because the maximum sentence imposed by the superior court does not expire until May 31, 2022, and the Department properly exercised its discretion in deciding not to transfer Gronquist to community custody, Gronquist does not show he is under unlawful restraint. The Court should affirm the Court Of Appeals' ruling denying the personal restraint petition.

DATED this 3rd day of July, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the SUPPLEMENTAL BRIEF OF RESPONDENT with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 3rd day of July, 2018, at Olympia, Washington.

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