

NO. 68916-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
OCT 31 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MANSOUR HEIDARI,

Appellant.

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

The Honorable Jim Rogers, Judge

BRIEF OF APPELLANT

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Sentencing Reform Act 2

A. ASSIGNMENT OF ERROR

The sentencing court erroneously sentenced appellant to community custody rather than community placement.

Issue Pertaining to Assignment of Error

Sentences are imposed in accordance with the law at the time of the offense. When appellant committed his offense, Washington law required community placement. Did the sentencing court err when it imposed a period of community custody?

B. STATEMENT OF THE CASE

In 2002, a jury convicted Mansour Heidari of (count 1) Rape of Child in the First Degree, (count 4) Child Molestation in the Second Degree, and (count 5) Child Molestation in the Third Degree. CP 20. In a Personal Restraint Petition, Heidari successfully argued the evidence was insufficient to support the conviction in count 4, and his case was remanded to strike that conviction and for resentencing. CP 74-96.

On remand, the Honorable Jim Rogers properly vacated the molestation conviction and corrected the seriousness level on count 1 by reducing it from 12 to 11. RP 4-5; CP 21, 109-110. Judge Rogers imposed concurrent sentences of 115 months on count 1

and 20 months on count 5, well below the 162-month sentence Heidari received in 2002. CP 23, 112. On count 1, he also sentenced Heidari to a two-year period of community custody.¹ CP 112. Heidari timely filed a Notice of Appeal. CP 119-129.

C. ARGUMENT

HEIDARI'S SENTENCE SHOULD INCLUDE A PERIOD OF COMMUNITY PLACEMENT RATHER THAN COMMUNITY CUSTODY.

Judge Rogers mistakenly sentenced Heidari to community custody rather than community placement. "Any sentence imposed under [RCW 9.94A] shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. The period for Heidari's crime in count 1 is March 29, 1995 to March 28, 1998. CP 109.

At the time Heidari was sentenced in 2002, the SRA provided:

- (2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

¹ Judge Rogers did not impose community custody on count 5 because Heidari had already served the statutory maximum sentence for Child Molestation in the Third Degree. CP 112.

- (a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

Former RCW 9.94A.700(2)(a) (2002).

This two-year period is consistent with former RCW 9.94A.120(8)(b) (1995), the statute in effect at the beginning of the charged period in count 1. That statute was amended in 1996 to require a two-year community placement term if the sex offense was committed after July 1, 1990, but before June 6, 1996. For sex crimes after June 6, 1996, sentencing courts were required to impose community custody for three years. See Laws 1996, ch. 275, sec. 2. Because count 1 includes periods before and after June 6, 1996, and the State was never required to prove the act occurred after June 6, 1996, the lesser two-year community placement term applies. See In re Personal Restraint of Hartzell, 108 Wn. App. 934, 94533 P.3d 1096 (2001); see also State v. Parker, 132 Wn.2d 182, 192, 937 P.2d 575 (1997).

Community custody and community placement are not identical. "Community custody" means "that portion of an inmate's sentence of confinement in lieu of earned early release time served in the community subject to controls placed on the inmate's

movement and activities by the department of corrections.” Former RCW 9.94A.030(4) (1995). “Community placement” means:

that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release. Community placement may consist entirely of community custody, entirely postrelease supervision, or a combination of the two.

Former RCW 9.94A.030(5) (1995). “Postrelease supervision” is “that portion of an offender’s community placement that is not community custody.” Former RCW 9.94A.030(26) (1995); see also In re Smith, 139 Wn. App. 600, 603 n.1, 161 P.3d 483 (2007) (“community placement, and community custody are different types of sentences”).

When a sentencing court mistakenly confuses community custody with community placement or vice versa, the proper remedy is to remand for correction of the sentence. See State v. Hudnall, 116 Wn. App. 190, 193 n.2, 198, 64 P.3d 687 (2003). That is the remedy here.²

² Undersigned counsel recognizes this change probably could be accomplished without this Court’s involvement. The parties could stipulate to the correction and dismiss the appeal. The issue is being raised in this brief, however, because currently it is unclear

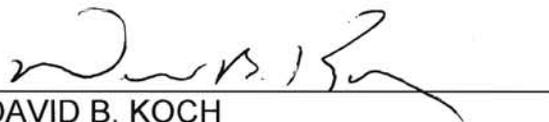
D. CONCLUSION

This Court should order the sentencing court to impose 24 months of community placement rather than 24 months of community custody.

DATED this 31st day of October, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

if Mr. Heidari will be filing a Statement of Additional Grounds raising additional issues. A stipulation at this point would not necessarily end the appeal.

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v.)	COA NO. 68916-9-I
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MANSOUR HEIDARI,)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCTOBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MANSOUR HEIDARI
4525 164TH
APT. J-183
LYNNWOOD, WA 98087

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2012.

x Patrick Mayovsky