

89243-1

NO. 43437-7-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CLINTON ALLEN PRATHER,

Petitioner.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	PAGE
I. STATEMENT OF CASE.....	1
II. ISSUES PRESENTED.....	1
III. SHORT ANSWERS.....	1
IV. ARGUMENT.....	1
A. THE TRIAL COURT DOES NOT HAVE THE AUTHORITY TO REDUCE THE APPELLANT'S TERM OF COMMUNITY CUSTODY.....	1
B. THE APPELLANT'S OPERABILITY ARGUMENT HHE SUPREME COURT.....	3
V. CONCLUSION	4

TABLE OF AUTHORITIES

	Page
Cases	
<u>In re Personal Restraint of Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009)	2, 3
<u>State v. Boyd</u> , 174 Wn.2d 470, 275 P.3d 321 (2012)	2
<u>State v. Franklin</u> , 172 Wn.2d 831, 263 P.3d 585 (2011)	2
<u>State v. Hawkins</u> , 164 Wn.App. 705, 265 P.3d 185 (2011).....	3
Statutes	
RCW 9.94A.701(9).....	1, 2

I. STATEMENT OF CASE

The State agrees with the procedural history as set forth by the appellant.

II. ISSUES PRESENTED

1. Should the Trial Court Have Reduced the Appellant's Term of Community Custody under RCW 9.94A.701(9)?
2. Is the Appellant's Firearm Operability Argument Barred by Res Judicata?

III. SHORT ANSWERS

1. No.
2. Yes.

IV. ARGUMENT

A. **The Trial Court Does Not Have the Authority to Reduce the Appellant's Term of Community Custody.**

The appellant argues that the trial court should have eliminated the 18 month term of community custody for each count of assault in the second degree, as he was also sentenced to 120 months of incarceration for these counts. He argues that RCW 9.94A.701(9) requires the trial court to eliminate the term of community custody, as the appellant has also been sentenced to serve 120 months, the statutory maximum for the offense, in actual custody. The appellant argues his case should be remanded for resentencing without the community custody term. However, the

Washington Supreme Court has held that in this circumstance it is the Department of Corrections rather than the trial court that must reduce the term of community custody.

In State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011), the Supreme Court considered how the trial court was to apply RCW 9.94A.701(9) to sentences that had been imposed prior to the statute's enactment in 2009. The Supreme Court noted that the Brooks notation previously allowed under In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), was no longer proper. Franklin, 172 Wn.2d at 839. However, the court further held that where the sentence had been imposed by the trial court prior to the statute's enactment in 2009, it was the responsibility of the Department of Corrections to reduce the term of community custody to comply with the statutory maximum. Id. at 839-841. Only when the trial court imposes sentence *after* the enactment of RCW 9.94A.701(9), does the responsibility for reducing the term of community custody lie with the trial court. See State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012).

Here, the trial court imposed its sentence on December 18, 2007. CP 70-81. RCW 9.94A.701(9) was not yet enacted at that time. Thus, the responsibility for adjusting the term of community custody lies with the Department of Corrections. This Court should deny the appellant's

requested relief, as it is contrary to the rulings of the Washington Supreme Court.

B. The Appellant's Operability Argument Has Already Been Rejected by This Court and the Supreme Court.

The appellant claims his firearm enhancements should be vacated, alleging there was insufficient proof that the weapon at issue was an operable firearm. However, this exact argument has already been addressed and rejected by this Court in a prior personal restraint provision (PRP). The appellant filed a PRP with this Court, In re the Personal Restraint of Clinton Prather, No. 41475-9-II, raising the very same operability argument he advances now. This Court entered an order denying the PRP and rejecting this argument. The appellant then litigated the matter further, and a Commissioner of the Supreme Court upheld the decision on this issue. In the Matter of Prather, 86316-4. The Supreme Court ultimately remanded on the Brooks issue, but did not disturb this Court's holding on the operability argument. Thus, the appellant's current argument regarding operability is simply an attempt to re-litigate an issue the Court has already resolved. As such, res judicata bars him from raising this issue yet again. State v. Hawkins, 164 Wn.App. 705, 265 P.3d 185 (2011).

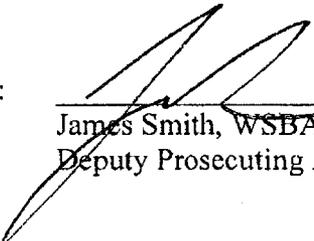
V. CONCLUSION

Based on the preceding argument, respondent requests the Court deny the instant appeal, as the issues presented are without legal merit or have been previously decided by this Court.

Respectfully submitted this 19th day of February, 2013.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By:


James Smith, WSBA #35537
Deputy Prosecuting Attorney

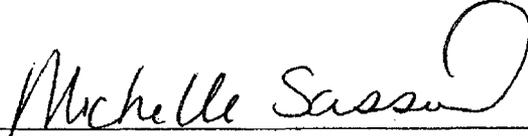
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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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.

Signed at Kelso, Washington on February 19th, 2013.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

February 19, 2013 - 2:33 PM

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