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| **SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY** | |
| **STATE OF WASHINGTON**_____, Plaintiff<br><br>vs.<br>XXXXXXXXX_____, Defendant. | NO. **XXXXXXX**<br><br>**DISPOSITION MEMO UPON RE-SENTENCE (BLAKE)** |

The defendant, XXXXXXXXX, is asking that this court upon re-sentencing, impose a sentence that provides for credit for time served for the prison time thus far served on this matter with no additional incarceration to be imposed, nor any (additional) community custody to be served .

This is a *Blake*-based re-sentencing on a charge of Possession with Intent to Deliver Heroin. At the original disposition it was alleged that Mr. XXXXXXXXX had five (5) points for his offender score, and therefore had a sentencing range of 20 to 60 months incarceration t be followed by twelve (12) months of community custody.

Based on that offender score, Mr XXXXXXXXX was sentenced to a 60-month sentence to be followed by 12 months of community custody. That community custody was to commence consecutively to the community custody that had been imposed on Mr XXXXXXXXX's 2014 *Blake* subject sentence. (See discussion below for summary of the charges and sentences that that led to this (incorrect) offender score).

Mr. XXXXXXXXX has served his 60 month sentence. Counsel believes Mr. XXXXXXXXX was released on approximately January 26, 2019, at which time his community custody under his 2014 *Blake* subject sentence resumed.

On August 19, 2021, Mr XXXXXXXXX's 2014 *Blake*-subject sentence and the resultant community custody obligations were vacated and the community custody obligations imposed on the original sentence under this cause commenced.

At the original sentencing the basis for the finding of an offender score of five (5) was purported to derive from three possession of controlled substance charge cases from Grant county under which Mr XXXXXXXXX served concurrent sentences of forty-five (45) days incarceration and twelve (12) months of community custody. The other points purported to drive from a 2014 Clallam County conviction for possession of a controlled substance for which Mr XXXXXXXXX was sentenced to and served 1one hundred-eighty (180)days of incarceration (some of which may have been converted to ehm and or community service work) and twelve (12) months of community custody, for which at least eight (8) months is believed to have been successfully completed prior to vacating of the sentence. The final point that was the purported basis for the offender score of five in the original disposition in this matter, purported to derive from Mr XXXXXXXXX being under community custody from the 2014 judgment and sentence.

As noted previously, the 2014 conviction was vacated on August 19, 2021, and defense understands that the prosecution does not dispute that the Grant County cases reference previously are also subject to *Blake*-vacating as well as that the offender point added for the community custody that has since been vacated is also inapplicable.

All told, Mr XXXXXXXXX has served  at least two hundred and twenty five (225) days and between twelve (12) and twenty-four (24) months on community custody for Constitutionally void charges.  Therefore, the parties agree that the defendants offenders score is zero (0).

Under an offender score of zero (0), Mr XXXXXXXXX standard range sentence is 12 + to 20 months to be followed by 12 months of community custody. The state does not dispute that as a matter of law, Mr XXXXXXXXX has already served 40 to 48 months longer, or two to four times the maximum length of his appropriate standard range.

Likewise, defense believes that the prosecution does not dispute that it is ill-positioned to restore to Mr XXXXXXXXX the 40 to 48 months of surplus prison time that he has served, much less the time he has served incarcerated and community custody on his *Blake* voided charges.

Instead, the State's position is that Mr. XXXXXXXXX's sentence on the proper (post-*Blake*)  offender score be corrected on paper but not in reality e.g. that he get credit for his 60 months served against the 12+ to 20 months to be imposed, and that he still have the requirement of twelve (12) months community custody to serve. Defense expects the State to rely upon *State v. Jones*, 172 Wash.2d 236 (2011) as authority for this position.

While *Jones* may support the State's position as to what can be done by way of re-sentencing, it is silent, with especial regard to the undisputed facts at bar, with what should be done by way of re-disposition of Mr. XXXXXXXXX.

Given the undisputed history set forth above, there can be no question that the relief Mr. XXXXXXXXX requests by way of re-sentencing is the right and just way to proceed. Legally and procedurally, there are multiple paths available to this court should it choose to impose a (re)sentence consistent with Mr. XXXXXXXXX's request.

There are at least five (5) paths by which this court can circumvent the draconian (re) sentence the State seeks. Briefly, they are:

- exceptional sentence under RCW 9.94A.535(1) and 9.94A.010(1), (2), (3), and (6); or
- award Mr. XXXXXXXXX community custody credit on this cause for the community custody he has completed under the recently *Blake* vacated and other *Blake* susceptible cases; or
- order that any sanction time for any alleged community custody violations that may arise in the future in this matter be assessed against the time served in excess of the sentence imposed at re-sentencing; or
- hold that equitable estoppel principals of *Pers. Restraint of Roach,* 150 Wn.2d 29, and *State v. Dalseg*, 132 Wn.App. 854 (2006)apply in this case so as precludes the applicability of *Jones;* or
- hold that *Jones* is not controlling due to its reliance upon a statute (then-RCW 9.94A. 170(3), now RCW 9.94A.171) that is Constitutionally defective due to the relied upon but over-broad language that purports to punish (by tolling and thereby extending community custody) for any time spent while incarcerated "for any reason", (emphasis added), including innocence.

Presented by:

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