72190-9

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COURT OF APPEALS NO. 72190-9-I

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

STATE OF WASHINGTON,

Respondent,

V.

SALLYEA McCLINTON,

Appellant.

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

The Honorable Palmer Robinson, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court acted outside its authority in sanctioning appellant for failing to be fitted for global positioning system (GPS) monitoring, as it was not a condition of appellant's judgment and sentence.

Issue Pertaining to Assignment of Error

Appellant was convicted of offenses allegedly occurring in 1995. At that time, the department of corrections ("DOC" or the "department") did not have authority to modify or add conditions of community placement. Did the court err in sanctioning appellant for failing to be fitted for GPS tracking, where it was not a condition imposed by the court, but rather, by DOC?[1]

B. STATEMENT OF THE CASE

Following a jury trial in July 1997, appellant Sallyea McClinton was convicted of first degree rape while armed with a deadly weapon, attempted rape in the first degree and first degree burglary. CP 12-19. Count one allegedly occurred on September

[1] This same issue is pending before this Court in State v. McClinton, COA No. 71701-4-I, an appeal of a previous modification of McClinton's judgment and sentence, entered on February 12, 2014. This Court can take judicial notice of its own files. State v. Perkins, 32 Wn.2d 810, 872, 204 P.2d 207 (1949); ER 201(b)(2); Tegland, 5 Wash. Pract. Evidence, § 201.17 (4th ed. 1999).

18, 1995; counts two and three allegedly occurred on October 17, 1995. CP 12.

Sentencing occurred on August 15, 1997. CP 14. The court imposed 134 months on count one, 68 months on count two and 42 months on count three. The sentences imposed for counts one and two were ordered to run consecutively, and the 24-month deadly weapon enhancement was ordered to run consecutively to that, for a total sentence of 226 months (approximately 19 years). CP 14.

The court imposed community placement for the maximum period of time authorized by law. CP 14. In 1995, the date of McClinton's offenses, the applicable community placement provision provided:

> (b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or a serious violent offense committed on or after July 1, 1990, the court shall in addition to other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer. The community placement shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150(1) and (2). When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist

entirely of the community custody to which the offender may become eligible, in accordance with RCW 9.94A.150(1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence. Unless a condition is waived by the court, the terms of community placement for offenders sentenced pursuant to this section shall include the following conditions:

(i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(ii) The offender shall work at department of corrections-approved education, employment, and/or community service;

(iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

(iv) An offender in community custody shall not unlawfully possess controlled substances;

(v) The offender shall pay supervision fees as determined by the department of corrections; and

(vi) The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

(c) The court may also order any of the following special conditions:

(i) The offender shall remain within, or outside of, a specified geographical boundary;

(ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(iii) The offender shall participate in crime-related treatment or counseling services;

(iv) The offender shall not consume alcohol; or

(v) The offender shall comply with any crime-related prohibitions.

(d) Prior to transfer to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

RCW 9.94A.120(8); Laws 1995, ch. 108, § 3, eff. April 19, 1995.

The judgment and sentence incorrectly cites to former RCW 9.94A.120(9).[2] CP 14. By the time of sentencing, RCW 9.94A.120 had been amended and the applicable community placement provision was contained in subsection nine. Laws 1996, ch. 199, §1; Laws 1996, ch. 215, § 5; Laws 1996, ch. 275, § 2. The

[2] In 1995, that statute provided:

> If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits.

RCW 9.94A.120(1995).

substance of that provision did not change, however. RCW 9.94A.120(9)(b)(1996).

The court imposed the mandatory conditions authorized by statute. CP 17. As additional conditions, the court ordered inter alia that McClinton: have no contact with the alleged victims; complete a sexual deviancy evaluation within 30 days of release; not possess or use controlled substances or alcohol and submit to testing to monitor compliance; not peruse or possess pornography, as defined by his community corrections officer (CCO) or therapist; and not change residences without his CCO's prior approval. CP 19.

McClinton was also ordered to register as a sex offender. CP 14, 18. The court did not impose any geographic restrictions, however. CP 17, 19.

On June 25, 2013, McClinton was released from custody to serve his period of community placement. RP 25.

On May 29, 2014, the court held the modification hearing at issue in this appeal. RP (5/29/14). The state alleged the following five violations: (1) failing to report to the Department of Corrections (DOC or the department) as directed since April 28, 2014; (2) failing to get enrolled in GPS monitoring on April 30, 2014, as directed; (3)

failing to provide verification of registering as a sex offender on April 30, 2014, as directed; (4) failing to be available for urinalysis testing since April 28, 2014; and (5) failing to provide a current address to DOC since April 28, 2014. RP 5. McClinton denied the allegations. RP 5.

At the hearing, the state called Community Corrections officer (CCO) John Chinn. RP 7. Chinn testified McClinton reported to him on April 28, 2014, following his release from a previous modification. RP 8, 15; see also RP 24. McClinton reported he was homeless and submitted to a urinalysis test, which was negative for alcohol and controlled substances. RP 10, 16.

Because Chinn needed time to take care of some administrative matters, he directed McClinton to return Wednesday morning, April 30, to allow Chinn to collect an additional urine sample, install a GPS unit,[3] and update McClinton's supervision plan. RP 8, 18. Chinn testified he also directed McClinton to bring verification he registered with the King County Sheriff's department. RP 8.

According to Chin, McClinton did not return for the April 30th appointment. RP 9. He was arrested for the current alleged

violations on May 18, 2014. RP 13. At some point, Chinn checked and learned McClinton "had been down there" to the King County Sheriff's Office to register. RP 17.

In closing, defense counsel argued the state unfairly turned one violation – failure to report – into five. RP 20. Moreover, McClinton did in fact register with the sheriff's office and was unable to prove a current address to DOC, as he was homeless. RP 20-21. McClinton also provided a urine sample when he first reported. RP 21.

Additionally, counsel argued DOC had no authority to impose the GPS requirement:

> Mr. McClinton continues to object to the imposition of GPS monitoring and he does not – that actually is not in his Judgment and Sentence, truly, it really isn't in his Judgment and Sentence. And he continues to believe that DOC has no authority to impose that as a condition of his sentence, and so he denied that, but he also is of the position that that is not a lawfully imposed condition by DOC.

RP 20.

The court found the violations proven and imposed a 60-day sanction for each to run concurrently for a total of 300 days. RP 22-23, 27. Regarding the GPS requirement, the court noted that

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[3] Chinn testified he was required by DOC policy to install GPS monitoring, due to McClinton's classification and homelessness. RP 16.

"until the Court of Appeals says you're right[,]" you're "going to be back here and back here and back here[.]" RP 26. This appeal follows. CP 49-51.

B. ARGUMENT

THE COURT WAS WITHOUT AUTHORITY TO SANCTION McCLINTON FOR FAILING TO SUBMIT TO GPS MONITORING AS DOC WAS WITHOUT AUTHORITY TO ORDER IT.

Interpretation of the Sentencing Reform Act is a question of law this Court reviews de novo. In re Post Sentencing Review of Charles, 135 Wn.2d 239, 245, 955 P.2d 798 (1998). Courts review sentencing issues under the law in effect at the time of the offense. State v. Bader, 125 Wn. App. 501, 105 P.3d 439 (2005) (applying community custody statute in effect at time of the offense to determine when period of community custody began); State v. Jones, 118 Wn. App. 199, 203, 76 P.3d 258 (2003) (the validity of the conditions of community custody are determined according to the law in effect at the time of the offense).

McClinton's offenses occurred in 1995. In 1995, the applicable community placement statute provided:

> Unless a condition is waived by the court, the terms of community placement for offenders sentenced pursuant to this section shall include the following conditions:

(i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(ii) The offender shall work at department of corrections-approved education, employment, and/or community service;

(iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

(iv) An offender in community custody shall not unlawfully possess controlled substances;

(v) The offender shall pay supervision fees as determined by the department of corrections; and

(vi) The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

(c) The court may also order any of the following special conditions:

(i) The offender shall remain within, or outside of, a specified geographical boundary;

(ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(iii) The offender shall participate in crime-related treatment or counseling services;

(iv) The offender shall not consume alcohol; or

(v) The offender shall comply with any crime-related prohibitions.

> (d) Prior to transfer to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

RCW 9.94A.120(8); Laws 1995, ch. 108, § 3, eff. April 19, 1995.

In 1996, the legislature amended Former RCW 9.94A.120 to grant DOC the authority to modify or impose additional conditions of community placement, for crimes committed *after* June 6, 1996:

> (14) All offenders sentenced to terms involving community supervision, community service, community placement, or legal financial obligations shall be under the supervision of the department of corrections and shall follow explicitly the instructions and conditions of the department of corrections.
>
> (a) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.
>
> (b) For sex offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include, in addition to the instructions in (a) of this subsection, any appropriate conditions of supervision, including but not limited to, prohibiting the offender from having contact with any other specified individuals or specific class of individuals. The conditions authorized under this subsection (14)(b) may be imposed by the department prior to or during a sex offender's community custody term. If a violation of conditions

> imposed by the court or the department pursuant to subsection (10)[4] of this section occurs during community custody, it shall be deemed a violation of community placement for the purposes of RCW 9.94A.207 and shall authorize the department to transfer an offender to a more restrictive confinement status as provided in RCW 9.94A.205. At any time prior to the completion of a sex offender's term of community custody, the department may recommend to the court that any or all of the conditions imposed by the court or the department pursuant to subsection (10) of this section be continued beyond the expiration of the offender's term of community custody as authorized in subsection (10)(c) of this section.
>
> . . .

Laws 1996, ch. 199, §; Laws 1996, ch. 215, § 5; Laws 1996, ch. 275, § 2; RCW 9.94A.120(1996).

The amendment amounted to a significant change in the law. As this Court explained:

> The final legislative report for Substitute Senate Bill 6274 states that "[u]nder current law, all conditions of supervision must be imposed at the time of sentencing by the court and may not be altered later except to make them less restrictive. The department does not have the statutory authority to impose additional supervision conditions based on information it may learn about an individual's history or deviancy cycle during incarceration." Substitute Senate Bill 6274 amended RCW 9.94A.120 by authorizing DOC to "impose any appropriate conditions on sex offenders during their community custody terms[.]" But DOC's new authority to impose

[4] For offenses committed after June 6, 1996, the Legislature also increased the minimum period of community supervision to three years. RCW 9.94A.120(10)(1996).

> conditions under this act is specifically limited to those offenders sentenced after the effective date of the 1996 amendment. DOC had no authority to impose additional, more restrictive terms of community placement until the Legislature amended the SRA in 1996.

In re Capello, 106 Wn. App. 576, 584-85, 24 P.3d 1074 (2001), superseded by statute, as stated in In re Stewart, 115 Wn. App. 319, 341-42, 75 P.3d 521 (2003).

Thus, the statutory framework of former RCW 9.94A.120(8) – as it existed at the time of McClinton's offenses – evinced legislative intent that the trial court, not DOC, had exclusive discretion regarding community custody conditions. Capello, 106 Wn. App. at 583-84. The circumstances of Capello are analogous to those here.

At the time of Capello's offenses in 1991, the requirement that an offender submit to a preapproved residence and living arrangement was a condition of community placement the court had discretion to impose. The trial court did not impose this condition on Capello, despite the department's urging. Capello, 106 Wn. App. at 579.

Nonetheless, the department subsequently informed Capello it would not allow his transfer to community custody in lieu of

earned early release time without a preapproved residence. When Capello complained administratively, DOC initially relied on the 1992 amended version of Former RCW 9.94A.120, which made the preapproved residence requirement a standard condition unless waived by the court. Capello, 106 Wn. App. at 580. In response to Capello's personal restraint petition, however, the department asserted its authority to require a preapproved residence location was inherently authorized as part of its overall community custody policy. Capello, 106 Wn. App. at 580.

This Court rejected the existence of such inherent authority:

> DOC cannot avoid RCW 9.94A.120 by attempting to redefine the preapproved residence requirement as part of its program rather than a condition of community placement. It is a fundamental tenet of statutory construction that every provision of a statute must be read in conjunction with its related provisions to determine legislative intent and to achieve a harmonious and unified statutory scheme. There is no meaningful distinction between a preapproved residence requirement imposed as a condition of community placement by the trial court under RCW 9.94A.120, and the same requirement imposed by DOC as part of its policy for administering the community custody program under RCW 9.94A.150.

Capello, 106 Wn. App. at 584.

Just as the court did not impose the residence location requirement in Capello, the court did not impose the GPS

tracking requirement here. Just as the law in Capello's instance did not authorize the department to impose additional conditions of community placement, the law in McClinton's instance likewise did not authorize the department to impose additional conditions.

In response, the state may argue that GPS monitoring is somehow inherent in DOC's authority to issue instructions regarding reporting requirements, etc. Under the 1995 version of former RCW 9.94A.120(12), the department had authority to issue *instructions* regarding reporting, remaining within geographical boundaries, notifying DOC of changes of address and payment of supervision fees:

> All offenders sentenced to terms involving community supervision, community service, community placement, or legal financial obligation shall be under the supervision of the secretary of the department of corrections or such person as the secretary may designate and shall follow explicitly the instructions of the secretary including reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision assessment. The department may require offenders to pay for special services rendered on or after July 25, 1993, including electronic monitoring, day reporting, and telephone reporting, dependent upon the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

RCW 9.94A.120(12)(1995) (emphasis added).

But this statute simply says the offender must follow the instructions of the CCO regarding requirements that have already been imposed. It does not give DOC any authority to impose new requirements. In other words, if the CCO instructs an offender to report on a particular day, the offender must report on that particular day. And while the statute may allow the department to require offenders to *pay for* electronic monitoring, it does not allow the department to *impose* electronic monitoring.

Moreover, the authority to *instruct* offenders regarding reporting requirements, etc., cannot be said to carry with it an inherent authority to require GPS monitoring anymore than a community custody policy carries with it inherent authority to require a preapproved residence. See Capello, 106 Wn. App. at 584. Accordingly, any argument that this statue provided DOC with authority to impose GPS tracking on McClinton should be rejected.

In response, the state may also argue the department has authority to require GPS tracking to monitor McClinton's compliance with supervision conditions. But this argument should also be rejected, because the sentencing court did not

impose any geographic limitations. CP 17, 19. Accordingly, there is no relevant condition a GPS tracking device could monitor.

Alternatively, the state may argue requirements that McClinton have no contact with the victims and not frequent "X-rated movies, peep shows or adult book stores" provides DOC with authority to require GPS tracking to monitor his compliance. But GPS tracking would not inform the CCO of the nature of the business located at a particular address, or who was present there. Thus, GPS tracking would not effectively monitor these conditions.

In any event, monitoring tools under the pre-1996 SRA were ordered by the court, not DOC. See State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998) ("a trial court has authority to impose monitoring conditions such as polygraph testing[.]").

It should also be noted GPS tracking is highly intrusive. See e.g. State v. Morrow, 200 N.C. App. 123, 683 S.E.2d 754, 765 (2009) (Elmore, J., concurring in part, dissenting in part) (likening GPS tracking to "public shaming"); see also State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) ("the intrusion into private affairs made possible with a GPS device is quite extensive[.]"). Accordingly, it stands to reason this is a requirement that – at least

according to the law in effect at the time of McClinton's offenses – could only be imposed by the court.

Indeed, if DOC's authority to require GPS tracking was inherent in its overarching supervisory authority or as a monitoring tool, there would have been no need for the legislature in 2008, to enact RCW 9.94A.704,[5] which specifically provides for GPS tracking of sex offenders:

> 5) If the offender was sentenced pursuant to a conviction for a sex offense, the department may:
> . . . (b) Impose electronic monitoring. Within the resources made available by the department for this purpose, the department shall carry out any electronic monitoring using the most appropriate technology given the individual circumstances of the offender. As used in this section, "electronic monitoring" means the monitoring of an offender using an electronic offender tracking system including, but not limited to, a system using radio frequency or active or passive global positioning system technology.

In response, the state may argue this provision indicates the Legislature's intent to confirm the existence of such authority. Such may be the case where there has been doubt or ambiguity surrounding a statute and the legislature amends it. See e.g. State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998). But RCW 9.94A.704 is not an amendment to a pre-existing statute. Rather, it is a completely new law, enacted in 2008. Accordingly, its

enactment indicates DOC had no authority to impose GPS tracking previously.

In short, it was the court's sole authority to impose community custody provisions. The court did not order GPS tracking. The department therefore did not have authority to require McClinton to submit to GPS tracking. The court therefore erred in sanctioning him for failing to do so. State v. Angulo, 77 Wn. App. 657, 893 P.2d 662 (1995) (defendant did not violate condition or requirement of his sentence to authorize modification). DOC should be directed to discontinue this requirement in the future. Capello, 106 Wn. App. at 585 (directing DOC to transfer Capello to community custody when he is otherwise eligible, without the need for a preapproved residence location and living arrangement).

[5] Laws 2008, Ch. 231, § 10.

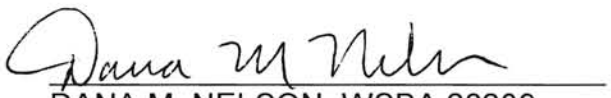
D. CONCLUSION

For the reasons stated above, this Court should vacate the sanction for violating an unlawful condition and direct DOC to discontinue any further GPS monitoring requirement.

Dated this 4th day of November, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72190-9-I
	)	
SALLYEA McCLINTON,	)	
	)	
Appellant.	)	

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 26TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SALLYEA McCLINTON
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500 5TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF NOVEMBER 2014.

x Patrick Mayovsky