No. 48187-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

ERIK PETTERSON

REPLY BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P O Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

A. Arguments in Reply 1

1. The Department's Position is Inconsistent with the Statutory Scheme and Leads to Absurd Results 4

2. The Modifications at Issue in this Case were Entered in a Timely Manner 6

B. Conclusion 9

TABLE OF AUTHORITIES

Cases

State v Shove, 113 Wn.2d 83, 776 P.2d 132 (1989) 5

A. Arguments in Reply

The Department's Position is Inconsistent with the Statutory Scheme and Leads to Absurd Results

After Mr. Petterson completed the sex offender treatment pursuant to his SSOSA statute, the sentencing court held a hearing to determine what his community custody conditions should be going forward. The Court modified the community custody conditions to suspend most of the conditions, but required him to continue to be on community custody subject to the modified conditions. The Department raised no objection to the modifications. Over seven years later, the Department moved to reconsider the court order to reinstate the ability of the Department to "comply with any conditions imposed by the department," apparently without any limitations or court input. The Department takes the position that the court has no ability to set or modify the community custody conditions once sentence has been imposed. This conclusion fundamentally misreads the statutory framework of the SSOSA statute and should be rejected. RCW 9.94A.670.

It is important to start with an issue not at issue in this appeal. Former RCW 9.94A.670(4)(a) required the court, at the time of the sentencing hearing, to order Mr. Petterson to "comply with any

conditions imposed by the department." The trial court complied with this requirement by including this requirement in the Judgment and Sentence. CP, 8. But that does not settle the issues presented by this case.

Normally, once a sentence is imposed, it may not be modified by the trial court. *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989). But this restriction does not apply when the sentencing court has express authority to make the modification. RCW 9.94A.670 twice authorizes the sentencing court to make such modifications. See RCW 9.94A.670(8) and (9). In fact, the sentencing court is required to hold annual hearings to determine what, if any, conditions should be modified. The Department's position would essentially read these provisions out of the statute.

Nor does the Department make any effort to explain former RCW 9.94A.715(2)(c), which reads, "The department may not impose any conditions that are contrary to those imposed by the court and may not contravene or decrease court imposed conditions." This provision, which is not mentioned a single time in the State's brief, expressly contemplates that there may be situations where the court and department disagree on appropriate conditions, and when they do, the court's order trumps.

The Modifications at Issue in this Case were Entered in a Timely Manner

The Department's secondary argument is that the court's order modifying the community custody conditions was not timely because it did not take place during the final treatment termination hearing, as contemplated by RCW 9.94A.670(9). This argument fails for two reasons. First, the trial court retains jurisdiction over SSOSA cases until the completion of the community custody term. As pointed out by the State, RCW 9.94A.670(11) authorizes the sentencing court to revoke the suspended sentence at any time during the period of community custody. See Brief of Respondent, 9. It makes no sense that the sentencing court should have jurisdiction to revoke the suspended sentence at any time, but may only modify the conditions at the time of the treatment termination hearing.

A simple hypothetical illustrates this point. Assume a young adult commits a sex offense subject to lifetime community custody. The offender completes treatment as required and is terminated from treatment. Many years later, the offender gets arrested for DUI and evidence is presented of alcohol abuse, a condition that did not exist at the time of the underlying sex offense. Under the department's interpretation of the statute, the sentencing court at a probation violation

hearing would have discretion to revoke the suspended, or impose a 60 day sentence, but not have discretion to order alcohol treatment. This is an absurd reading of the statute

The second reason the Department's argument fails is the unusual procedural history of this case. The treatment termination hearing in this case proceeded in three stages. At the first stage, the sentencing court terminated Mr. Petterson from both treatment and community custody. At the second stage, the error was discovered and the court reimposed community custody, an order that was affirmed on appeal by this court. The third stage occurred on remand after the appeal for the parties to further address the conditions of community custody. Given the unusual procedural history of this case, the sentencing court's order modifying the community custody conditions was timely even under the Department's absurd reading of the statute

It is nearly impossible to overstate the importance of the issues presented by this appeal. For offenders such as Mr. Petterson who are on lifetime community custody, it is imperative that the court retain jurisdiction to modify community custody conditions as necessary. Mr. Petterson was 33 years old at the time of his initial sentencing hearing. Assuming a normal lifespan, he will spend approximately 50 years on

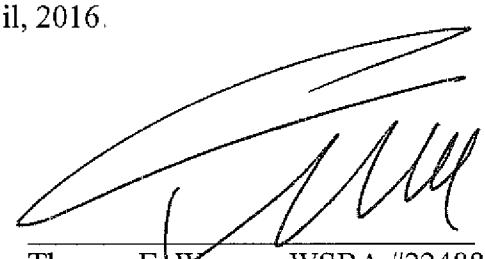
community custody over the course of his lifetime. During that time, it is inevitable that important life changes will occur. Children and grandchildren will be born. Parents and grandparents will die. Graduations and marriages will occur. Victims will want to reconcile with their perpetrators. It is important that the sentencing court retain jurisdiction to address these life changes as they occur. The Department, whose primary mission is community safety, is not always the best entity to address these issues. For instance, many Community Corrections Officers (CCO) have blanket policies of prohibiting all contact with minors or always denying victim requests for family reconciliation. In those situations, it is important to have access to a neutral magistrate to determine whether, and under what conditions, contact should occur.

It is worth noting as well that the opportunity for court oversight of community custody conditions is often a selling point for SSOSA candidates. Offenders subject to lifetime community custody pursuant to RCW 9.94A.507 (former .712) who receive prison sentences receive oversight by the Indeterminate Sentencing Review Board (ISRB). If this Court reverses this case, this incentive for defendants to plead guilty and enter treatment will be reduced.

B. Conclusion

This Court should reverse and reinstate the Order of August 9, 2013.

DATED this 27th day of April, 2016.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. ERIK PETTERSON, Defendant/Appellant.	Court of Appeals No.: 48187-1-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On April 28, 2016, I e-filed the Reply Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to the Kitsap County Prosecuting Attorney's Office via email to: kcpa@co.kitsap.wa.us through the Court of Appeals transmittal system.

On April 28, 2016, I deposited into the U S Mail, first class, postage prepaid, a true and correct copy of the Reply Brief of Appellant to the defendant:

Erik Petterson
PO Box 3053
Renton, WA 98056

////

The Law Office of Thomas E. Weaver
P O. Box 1056
Bremerton, WA 98337
(360) 792-9345

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: April 28, 2016, at Bremerton, Washington

Alisha Freeman

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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