NO. 48187-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIK G. PETTERSON,

Appellant.

BRIEF OF RESPONDENT
WASHINGTON STATE DEPARTMENT OF CORRECTIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Petterson was sentenced under the Special Sex Offender Sentencing Alternative (SSOSA) for his conviction of child molestation. Under the SSOSA statute, the superior court must require Mr. Petterson to comply with conditions of supervision imposed by the Department of Corrections during his term of community custody. The superior court had previously incorrectly omitted this requirement. On September 16, 2015, the superior court corrected this error and issued an order imposing the requirement that Mr. Peterson comply with conditions imposed by the Department. Mr. Petterson now appeals from this order, contending that the requirement is not mandatory and is precluded under the doctrine of equitable estoppel.

Mr. Petterson's arguments are without merit. The statute expressly provides that as part of a SSOSA sentence, the superior court must impose a term of community custody and "require the offender to comply with any conditions imposed by the department…." RCW 9.94A.670(5)(b). This is a mandatory statutory requirement. The doctrine of equitable estoppel does not obviate this mandatory requirement because the Department did not take positions inconsistent with the statutory requirement, Mr. Petterson was not prejudiced by the Department's

alleged representations, and elimination of the statutory requirement is incompatible with state law.

II. COUNTER STATEMENTS OF THE ISSUES

1. Where RCW 9.94A.670(5)(b) expressly provides that the superior court must require Mr. Petterson to comply with conditions imposed by the Department of Corrections, did the superior court have discretion not to impose the statutory requirement?

2. Does the doctrine of equitable estoppel preclude the statutory requirement to comply with conditions imposed by the Department where the Department has not taken inconsistent positions, there is no injury or prejudice, and the requirement of sentence is mandatory under the statute?

III. STATEMENT OF THE CASE

A. Factual History

In 2001, when Mr. Petterson was 32, he molested his 10-year-old step-daughter. CP 6-13; CP 4. After Mr. Petterson pleaded guilty to first degree child molestation (domestic violence), the superior court imposed a determinate plus sentence consisting of a minimum term of 68 months of confinement and a maximum term of life, with community custody for any period Mr. Petterson is released prior to the maximum term. CP 7. The Court then suspended the confinement term and imposed a SSOSA

sentence of six months of confinement plus community custody for the length of the maximum term (*i.e.*, life). CP 7-8.

As part of the SSOSA sentence, and in accordance with statutory requirements, the superior court imposed the mandatory requirement that Mr. Petterson comply with conditions imposed by the Department during the term of community custody. CP 8; *see also* RCW 9.94A.670(5)(b) (former RCW 9.94A.670(4) (2001)).

Mr. Petterson began supervision on February 11, 2002. CR 83. On October 5, 2005, the Court found that Mr. Petterson had successfully completed sex offender treatment and terminated his treatment condition, pursuant to RCW 9.94A.670(9)(b). CP 14-16. At the same time, the Court entered an order terminating both the SSOSA and the term of community custody. CP 14-16. The order terminating Mr. Petterson's SSOSA was in error and on March 9, 2007, the Court entered an order reinstating community custody for life in accordance with RCW 9.94A.712. CP 22-23. Mr. Petterson appealed from the March 9, 2007 order, and this Court affirmed. CP 24 and 35-39.

On May 30, 2008, the superior court entered an order in which it "suspended" all conditions of community custody except for the conditions that Mr. Petterson obey all laws and inform the Department of his change of address or phone number. CP 40. On August 9, 2013, the

Court entered an order adding conditions prohibiting Mr. Petterson from leaving the state without permission of the Department, and from moving to another state without going through the application process required by the Interstate Compact for Adult Offender Supervision. CP 52-53. Both the 2008 and 2013 orders state that any party or the Department may move at any time to modify the conditions.

On July 30, 2015, the Department filed an Amicus Motion to Modify Conditions of Community Custody. CP 57-93. The superior court heard oral argument on August 14, 2015. RP (August 14, 2015). On September 16, 2015, the Court entered an order imposing the condition of community custody that required Mr. Petterson to comply with conditions imposed by the Department. CP 142-146. The Court's September 16, 2015 order is the basis of Mr. Petterson's current appeal.

IV. STANDARD OF REVIEW

Conditions of a sentence are reviewed for abuse of discretion. *State v. Deskins*, 180 Wn.2d 68, 77, 322 P.3d 780 (2014) (citing *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010)). An abuse of discretion occurs "when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Deskins*, 180 Wn.2d at 77.

V. ARGUMENT

A. The Superior Court Correctly Concluded that the Statute Requires Mr. Petterson to Comply with Conditions Imposed by the Department During the Term of Community Custody

The superior court correctly determined that RCW 9.94A.670(5)(b) mandates that Mr. Peterson comply with conditions imposed by the Department of Corrections during the term of community custody. In light of express statutory language, the court had no discretion not to impose the statutory requirement.

The SSOSA statute expressly provides,

> (5) As conditions of the suspended sentence, the court *must* impose the following:
>
> . . .
>
> (b) A term of community custody equal to . . . the length of the maximum term imposed pursuant to RCW 9.94A.507, . . . and *require the offender to comply with any conditions imposed by the department* under RCW 9.94A.703.

RCW 9.94A.670(5)(b) (emphasis added).

The same requirement existed in the SSOSA statute at the time Mr. Petterson committed his crime:

> The court *shall* place the offender on community custody for . . . the length of the maximum term imposed pursuant to RCW 9.94A.712, . . . and *require the offender to comply with any conditions imposed by the department* under RCW 9.94A.720.

Former RCW 9.94A.670(4)(a) (2001) (emphasis added).

The SSOSA statute, both the prior and current versions, requires the sentencing court to order the offender to abide by conditions imposed by the Department during community custody. This is a mandatory statutory requirement.

The statute uses the term "must." The word "must" is a synonym of "shall" which imposes a mandatory requirement. *See State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) (quoting *Crown Cascade Inc. v. O'Neal*, 100 Wn.2d 256, 668 P.3d 585 (1983)) (The general rule is that the word "shall" is presumptively imperative and operates to create a duty rather than conferring discretion.). The superior court was not authorized to remove this requirement. This is in contrast to the discretionary conditions listed in RCW 9.94A.670(6), which provides, "As conditions of the suspended sentence, the court *may* impose one or more of the following . . . ." (emphasis added). Use of the word "may" in a statute along with must or shall "indicates that the Legislature intended the two words to have different meanings: "may" being directory while "shall" being mandatory. *Bartholomew,* 104 Wn.2d. at 848. The statute allows the court not to impose the discretionary conditions, but requires the court to impose the mandatory conditions. As a result of this express statutory language, the superior court could not remove the requirement

that Mr. Petterson comply with Department imposed conditions during his term of community custody.

Mr. Petterson argues that the court had authority to eliminate any and all conditions of community custody, including the requirement that Mr. Petterson comply with conditions imposed by the Department. But this argument ignores the plain statutory language that mandates the requirement to comply with conditions imposed by the Department. Moreover, an order eliminating all but two conditions, and prohibiting the Department from imposing any other conditions during community custody, effectively terminated community custody. The superior court recognized it did not intend to terminate community custody after the court terminated treatment. CP 22-23; CP 142-146. The court intended Mr. Petterson to remain on community custody.

Mr. Petterson also argues that the SSOSA statute allows the superior court to modify community custody conditions at any time, even after the court has terminated treatment. Brief of Appellant, at 18-19. But the provisions cited by Mr. Petterson do not support his argument because they apply only before and up to termination of treatment. The statute does not authorize the court to remove community custody conditions after treatment has ended. After treatment has ended, a court only has the authority to revoke the SSOSA sentence. Petterson's treatment ended in

2006. Therefore, the orders that the court entered in 2008 and 2013, which eliminated the Department's ability to impose any conditions, were without authority.

The SSOSA statute provides that the sentencing court may modify conditions during the treatment progress or termination hearings:

> (8)(b) The court shall conduct a hearing on the offender's progress *in treatment* at least once a year. . . . *At the hearing, the court may modify conditions* of community custody including, but not limited to, crime-related prohibitions and affirmative conditions relating to activities and behaviors identified as part of, or relating to precursor activities and behaviors in, the offender's offense cycle or revoke the suspended sentence.
>
> (9) . . . Prior to the *treatment termination hearing*, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, *and recommendations regarding termination from treatment, including proposed community custody conditions. . . . At the treatment termination hearing* the court may: (a) *Modify conditions* of community custody, and either (b) terminate treatment, or (c) extend treatment in two-year increments for up to the remaining period of community custody.

RCW 9.94A.670 (emphasis added).

Subsections (8) and (9) expressly refer to modification of conditions during treatment and at the treatment termination hearing. These statutes govern the court's authority to modify conditions prior to termination of treatment. Nothing in the SSOSA statute allows the court to modify or remove community custody conditions after treatment has

ended. The SSOSA statute authorizes the court only to revoke the SSOSA sentence once treatment has ended: "The court may revoke the suspended sentence *at any time* during the period of community custody." RCW 9.94A.670(11) (emphasis added).

In *State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012), the Supreme Court reiterated the longstanding constitutional principle that fixing penalties and punishments for criminal offenses is a legislative function. *Nunez*, 174 Wn.2d at 711; *see also In re Pers. Restraint of Coats*, 173 Wn.2d 123, 136, 267 P.3d 324 (2011); *State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985). "The 'trial court's sentencing authority is limited to that expressly found in the statutes.'" *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993) (quoting *State v. Theroff*, 33 Wn. App. 741, 744, 657 P.2d 800, *review denied*, 99 Wn.2d 1015 (1983)). "In Washington, the authority to sentence in felony cases is prescribed by the Sentencing Reform Act (SRA), RCW 9.94A." *State v. Skillman*, 60 Wn. App. 837, 839, 809 P.2d 756 (1991).

Under the SRA, the court generally loses jurisdiction to the Department of Corrections after entry of final judgment. *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008). A court has no inherent authority and only limited statutory authority to modify a sentence post-judgment. *Harkness*, 145 Wn. App. at 685; *see e.g., State v.*

Murray, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003) (court was without authority to modify form of partial confinement from work release to home detention). The superior court has no power to modify the criminal judgment absent specific statutory authority. *State v. Hardesty*, 78 Wn. App. 593, 597, 897 P.2d 1282 (1995), *reversed on other grounds by* 129 Wn.2d 303, 915 P.2d 1080 (1996); *State v. Sampson*, 82 Wn.2d 663, 666, 513 P.2d 60 (1973). Modification of a judgment is not appropriate merely because it appears in retrospect that a different decision might have been preferable. *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989).

In *State v. Shove*, the Supreme Court determined that a court may modify an SRA sentence only if the sentence meets the statutory requirements relating directly to the modification of sentences. "The SRA only allows modification in certain specific and carefully delineated circumstances." *Harkness*, 145 Wn. App. at 685 (citing *Shove*, 113 Wn.2d at 86). The SRA defines the circumstances in which a person sentenced and committed to the supervision of the Department may be released from supervision prior to the expiration of the community custody term. *See* RCW 9.94A.501(3), (4). The SRA explicitly bars offenders such as Mr. Petterson who are sentenced under RCW 9.94A.670 from receiving early termination of their community custody. RCW 9.94A.501(4)(e).

Petterson cites to *State v. Miller*, 159 Wn. App 911, 247 P.3d 457 (2011) and *State v. Letourneau*, 100 Wn. App. 424, 997 P.2d 436 (2000) in support of his position. But even Petterson acknowledges he is relying on dicta. *See* Brief of Appellant, at 15-16. The superior court's September 16, 2015 order acknowledged the statutory requirement that the defendant is "required to follow any conditions imposed by the DOC under former RCW 9.94A.720." CP 144. The 2015 order corrected prior orders that had improperly removed this statutory requirement.

The plain reading of the statute supports the trial court's 2015 order. The order was not manifestly unreasonable or based on untenable reasons.

B. Equitable Estoppel Does Not Bar the Department's Request for Modification of Mr. Petterson's Sentencing Conditions

Mr. Petterson argues that equitable estoppel precludes application of the statutory requirement that he comply with conditions imposed by the Department. In support, Mr. Petterson states the Attorney General's Office "did not have a position" and the Department "failed to take a position." Brief of Appellant, at 12. The absence of an earlier position, even if accurate, does not support the claim of equitable estoppel.

The elements of equitable estoppel are (1) a party's admission, statement or act is inconsistent with its later claim; (2) action by another

party in reliance on the first party's act, statement or admission and (3) injury would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission. *Kramarevcky v. Department of Social and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Equitable estoppel against the government is not favored. *Kramarevcky*, 122 Wn.2d at 743 (quoting *Finch v. Matthews*, 74 Wn.2d 161, 169, 443 P.2d 833 (1968). Therefore, when equitable estoppel is asserted against the government, the party asserting the doctrine must also show estoppel is (1) necessary to prevent a manifest injustice and (2) the exercise of the governmental functions must not be impaired as a result of the estoppel. *Kramarevcky*, 122 Wn.2d at 743 (quoting *Shafer v. State*, 83 Wn.2d 618, 622, 521 P.2d 736 (1974)); *Finch*, 74 Wn.2d at 175.

First, Mr. Petterson cannot meet the first element necessary to assert equitable estoppel because, as he candidly admits, the Department did not take an earlier position. Brief of Appellant, at 12. Thus, the Department's current action cannot be inconsistent with an earlier position, where there is no earlier position. *See Cedars-Sinai Medical Center, et al. v. Shalala*, 177 F.3d 1126, 1130 (9th Cir. 1999) (For equitable estoppel to apply against the government, the government must have engaged in "affirmative misconduct going beyond mere negligence."); *Federal Way Disposal Co. v. City of Tacoma*, 11 Wn. App.

894, 897, 527 P.2d 1387 (1974) (Inaction is not an affirmative act for purposes of equitable estoppel).

And examining the record here shows that the Department's earlier position, to the extent it was communicated by CCO Payne, is not inconsistent with its current position.

In April 2008, Community Corrections Officer, Dave Payne, wrote a letter to defense counsel. CP 34. CCO Payne did state he recommended the Court terminate Mr. Petterson's supervision with the court. CP 34. But CCO Payne stated in that sentence, "[i]f it is within the authority of the Court." CP 35. CCO Payne was present at a hearing on May 5, 2008. RP, May 5, 2008. At this hearing, defense counsel argued the Court had the ability under the statute to set conditions of community custody at "whatever the court wants." RP, May 5, 2008, at 4. The Court inquired of CCO Payne who relayed his understanding that "whether you (the Court) modify those conditions or not, we are going to impose them because we have to." RP, May 5, 2008, at 4. The Court would have to terminate further supervision for the Department to be "out of the loop." RP, May 5, 2008, at 5. The Court questioned CCO Payne asking for clarification of his position to which CCO Payne stated that, "because of the offense that had been committed and because of the liability, we would impose those conditions. I am mandated." RP May 5, 2008. Defense counsel argued,

correctly, to the Court that the Department cannot impose conditions that contravene or decrease court-imposed conditions. RP May 5, 2008, at 6. In response, CCO Payne stated the statute "just says decrease. It doesn't say that we can't increase." RP May 5, 2008, at 6. And the Court clearly stated the Department's request was for termination of community custody, which the court was without authority to do, and the issue the Court was considering was modification. RP May 5, 2008, at 12. If anything, the statements of CCO Payne support the Department's current position that it is required to impose its own conditions as long as it is supervising Mr. Petterson.

Nor can Mr. Petterson meet the second element of the equitable estoppel test because he did not rely on the Department's prior actions. Rather, he merely complied with court orders

Finally, there is no injury to Mr. Petterson. Mr. Petterson argues that putting him back on community custody as if he were starting probation all over would "cause him great prejudice" and would be a manifest injustice. Brief of Appellant, at 12-13. To establish an injury, a party must establish he or she "justifiably relied to his or her detriment on the words or conduct of another." *Kramarevcky*, 122 Wn.2d at 747 (quoting *Safeco Ins. Co. of Am. V. Butler*, 118 Wn.2d 383, 405, 823 P.2d 499 (1992)). As noted by the court, the Department's position pertained to

termination of community custody. RP, May 5, 2008, at 12. As to the modification of Mr. Petterson's community custody, defense counsel represented to the court the Attorney General's Office had "no position on it one way or the other how the Court rules." RP May 30, 2008, at 2-3. In making the order, the Court stated, "I understand the Department's chosen not to appear or make any written – provide any written input for the Court, and I am satisfied based on my research of the law . . . ." RP May 30, 2008, at 5.

Mr. Petterson cannot establish he "justifiably relied" on any position of the Department to his "detriment." The Court made it clear that any party and the Department of Corrections could seek modification of its order *at any time*. CP 40. The Department did not take a position on modification of Mr. Petterson's conditions and compliance with the court's order regarding conditions of community custody is both required and a benefit to Mr. Petterson. Doing so allows him to remain in the community.

Finally, it is not manifestly unjust for the Department to request a court order that Mr. Petterson comply with conditions imposed by the Department when that condition is statutorily mandated. To the contrary, it would be manifestly unjust to allow Mr. Petterson an exception to that statutory requirement that is not granted to other SSOSA offenders.

Mr. Petterson cannot use equitable estoppel against the government to avoid compliance with statute. *See Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998) (Where the representations allegedly relied upon are matters of law, rather than fact, equitable estoppel will not be applied); *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 20, 43 P.3d 4 (2002) (Equitable estoppel does not apply against the government when the meaning of a statutory provision is at issue); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61-62, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984) (A private party cannot show reliance to his detriment when asserting equitable estoppel against the government when his detriment is the inability to retain money he never should have received in the first place.).

Mr. Petterson does not demonstrate a basis for equitable estoppel against the Department.

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VI. CONCLUSION

The superior court correctly concluded that the statute requires Mr. Petterson comply with conditions imposed by the Department of Corrections during community custody. Mr. Petterson does not show an error. The Court should affirm.

RESPECTFULLY SUBMITTED this 11th day of April, 2016.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the BRIEF OF RESPONDENT WASHINGTON DEPARTMENT OF CORRECTIONS with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

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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.

EXECUTED this 11th day of April, 2016 at Olympia, Washington.

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