94439-3

No. 48187-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

ERIK PETTERSON

PETITION FOR REVIEW

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Cases

A Identity of Petitioner

Eric Petterson seeks review of the decision designated in Part B of this Petition

B Court of Appeals Decision

The Court of Appeals filed its decision on March 21, 2017 A timely motion by the State to publish the decision was granted on April 25, 2017 This petition is timely pursuant to RAP 13 4(a) ("If such a motion [to publish] is made, the petition for review must be filed within 30 days after an order is filed determining a timely motion to publish ")

C Issues Presented for Review

1. Whether the trial court has the authority to modify a SSOSA sentence after sentencing is an issue of substantial public interest, as recognized by the Court of Appeals, the Attorney General, and previously by this Court

2 Whether the opinion of the Court of Appeals conflicts with the decisions of this Court insofar as the SSOSA statute specifically and carefully delineates that the trial court may modify community custody conditions, an exception to the general rule set out in *State v Shove, infra*

D Statement of the Case

Erik Petterson, born October 15, 1968, was charged in Kitsap County Superior Court on October 22, 2001 with one count of first degree child molestation for an incident that occurred on October 13, 2001 CP, 1. The legislature had just amended the penalty statute for this offense, effective 43 days earlier on September 1, 2001, to require lifetime community custody for anyone convicted of this offense. See former RCW 9.94A.712 (recodified with minor changes as RCW 9.94A.507)[1]. Therefore, Mr. Petterson represents one of the first individuals charged under the terms of this statute

On February 11, 2002, Mr. Petterson petitioned for and was granted a SSOSA sentence pursuant to RCW 9.94A.670 CP, 6. At the time of sentencing, the Court entered a Judgment and Sentence with all the mandatory and discretionary conditions set out in RCW 9.94A.670. The Court ordered a minimum sentence of 68 months, with 62 months suspended, and a maximum sentence of life CP, 7. Importantly, the Court ordered that the "Defendant shall report to DOC no later than 72 hours after release from custody and shall comply with all conditions stated in this Judgment and Sentence, including those checked in the Supervision

[1] Although the statutes have been renumbered and experienced minor changes, none of the changes impact this appeal. Mr. Petterson will forthwith refer to the current versions of the statutes, including currently numbering.

Schedule, and other conditions imposed by the court or DOC during community custody." CP, 8

On October 4, 2005, Mr Petterson appeared for his treatment termination hearing as contemplated by RCW 9 94A 670(9) CP, 14 At that time, he had completed his three years of treatment and there was a joint request to terminate him from treatment The Court granted the motion and signed an order CP, 15 Inexplicably, the Order terminated him from both treatment and community custody The mistake was discovered in late 2006 and on December 5, 2006, the State filed a motion to amend the Order CP, 17 The motion was eventually granted on March 9, 2007 Mr Petterson appealed that order CP, 24 The Court of Appeals affirmed on March 11, 2008, holding that the October 4, 2005 Order was a scrivener's error correctable pursuant to CrR 7 8(a) See 36048-9-II See, generally, RP, 1-4 (April 18, 2008) No petition for review was filed and the mandate issued on April 21, 2008

On April 28, 2008, the parties held a hearing to discuss what should happen next in light of the Court of Appeals decision Mr Petterson moved to be terminated entirely from community custody RP, 4 (April 18, 2008) The motion was supported by his then Community Corrections Officer (CCO) David Payne RP, 4 (April 18, 2008) Mr Petterson argued that because the SSOSA statute gives judges the

authority to "modify" community custody conditions, it may terminate the conditions entirely or, in the alternative, modify them. RP, 6 (April 18, 2008). The prosecutor objected to the motion. RP, 6 (April 18, 2008) The Court held it lacked the authority to terminate community custody, noting that the statute says "modify, not "terminate." RP, 9 (April 18, 2008) Mr. Petterson then argued that the Court should modify the community custody conditions to delete many of the provisions, including polygraphs, urinalysis, and regular reporting. RP, 10 (April 18, 2008). The Court decided to defer a decision to allow CCO Payne to be present RP, 11-12 (April 18, 2008)

The Court reconvened on May 5, 2008 with DPA Hull and CCO Payne both present. CCO Payne opined that, regardless of what the Court decided to do, short of terminating Mr. Petterson entirely, the Department would continue to actively supervise him, including polygraphs and regular reporting. RP, 4-5 (May 5, 2008) The reason was the Department may be exposed to civil liability if it did not continue to supervise. RP, 4 (May 5, 2008). The parties took note of RCW 9.94A.715(2)(c), which states the Department may not impose conditions which contravene the Court's order. RP, 6 (May 5, 2008). DPA Hull expressly told the Court that the statute gives the court authority to modify the community custody conditions. RP, 8 (May 5, 2008). DPA Hull also expressed a concern that

he does not represent the Department of Corrections and it may be appropriate to have an attorney from the Attorney General's office present. RP, 8-9 (May 5, 2008). CCO Payne agreed that legal representation from the Attorney General's office was appropriate. RP, 10 (May 5, 2008). The Court expressed a concern that the department was essentially saying it would ignore a court order and set another hearing to allow the Attorney General's office to be present. RP, 11-12 (May 5, 2008).

The next hearing occurred on May 30, 2008. At that hearing, although CCO Payne was again present, no one from the Attorney General's office appeared. RP, 1 (May 30, 2008). Mr. Petterson's counsel represented without contradiction by the State that the Attorney General's office had "no position one way or another how the court rules." RP, 3 (May 30, 2008). The prosecutor told the Court that his office had been in contact with both the Department of Corrections and the Indeterminate Sentence Review Board (ISRB) and neither body was taking a position. RP, 4 (May 30, 2008). The State was opposing the motion, however. RP, 4 (May 30, 2008). The Court ruled, after reviewing the statute, it had the authority to modify the community custody conditions. RP, 5 (May 30, 2008). The Court signed an order modifying the community custody conditions to require that Mr. Petterson: (1) obey all laws; and (2) update

the Department of any change in address or phone number. CP, 40. All other community custody conditions were suspended. CP, 40. The Court orally admonished Mr. Petterson that if he were to violate the law, he would be back before the Court and "all the conditions could be put back on you." RP, 5 (May 30, 2008). This Order was not appealed by any party or the Department.

A DOC staff meeting was held on February 13, 2009. CP, 117. At that meeting, Mr. Petterson's situation was discussed. The Department decided to comply with the Court order, but "if at any time, the offender fails to obey all laws (however minor) or information is received the offender is participating in illegal or risk-related behavior that the court be informed immediately and request a hearing for sentence modification." CP, 117.

Since January 1, 2009, Mr. Petterson has maintained strict compliance with his conditions. CP, 98. The Department regularly conducts criminal history checks to ensure compliance. CP, 98. Additionally, although Mr. Petterson has no requirement to report to DOC, he has continued to report when requested by his CCO. CP, 98. The record shows he has reported thirteen times since January 1, 2009, including on January 9, 2009, February 6, 2009, February 13, 2009 (field call), October 12, 2011, June 20, 2012, July 29, 2013, August 6, 2013

(field visit), August 14, 2013, September 4, 2013, September 12, 2013 (field visit), October 1, 2013, May 21, 2014, and July 14, 2015. CP, 104 et seq. Mr. Petterson also requested and was granted permission to travel out of state for routine vacations on August 19, 2014 (Oregon), December 29, 2914 (Hawaii), and June 15, 2015 (Oregon) CP, 104 et seq In each instance, Mr. Petterson promptly contacted DOC to advise them of his return to the state of Washington.

On May 29, 2013, the Department filed a report indicating Mr Petterson was in full compliance with his community custody. CP, 41 The next day, the Kitsap County Superior Court signed an Order removing him from the sex offender registry. CP, 41. This Order was not appealed by any party or the Department.

In July of 2013, an issue arose where Mr Petterson indicated a desire to move to Minnesota. RP, 6 (August 9, 2013). This caused the Department to become concerned because Mr Petterson was living in another state without notifying the state as required by the Interstate Compact RP, 6 (August 9, 2013) The possibility that Mr Petterson would want to move from the State of Washington was not one that was contemplated by the parties at the May 30, 2008 hearing RP, 7 (August 9, 2013). The Department filed a document titled "Notice of Violation," although Mr. Petterson was not actually out of compliance. In response,

Mr Petterson filed a Motion to Clarify Conditions. CP, 47. A hearing was held and the parties entered a stipulation that Mr. Petterson would not leave the State of Washington without permission and would not move from the State of Washington without complying with the Interstate Compact. CP, 52; RP, 7 (August 9, 2013). This Order was not appealed by any party or the Department.

Mr Petterson decided not to petition under the Interstate Compact and move to Minnesota. He continued to remain in compliance with his community custody. On April 29, 2014, Mr Petterson notified the Department he intended to move to Redmond, Washington in King County on May 1, 2014. CP, 108. Over a year later, his case was transferred to a new CCO in King County. CP, 106. This CCO decided to reinstate all community custody conditions as if Mr. Petterson were just starting his SSOSA. CP, 105. A copy of the proposed conditions is in the record. CP, 120. Included among the reimposed conditions are: register with sheriff's officer in the county of residence as required (CP, 124), not possess or peruse pornographic materials unless authorized (CP, 125), enter and successfully participate in a sex offender treatment program (CP, 129), not use computer chat rooms (CP, 133), not possess or control sexual stimulus material for your particular deviancy as defined by your supervisory CCO and therapist except as provided for therapeutic

purposes (CP, 133) Mr Petterson declined to sign the new conditions citing his earlier court orders The Department decided to enlist the aid of the AG, who filed the Motion of DOC to Modify Conditions Mr Petterson responded in writing CP, 95.

The trial court granted the Department's motion in a written memorandum on September 16, 2015 CP, 142 In the Order, the trial court ruled that the Department is free to impose community custody conditions pursuant to RCW 9 94A 715. CP, 145 Mr Petterson appealed from this Order CP, 148 The Court of Appeals affirmed in a published decision Mr Petterson petitions for review.

E. Argument Why Review Should Be Granted

3 The trial court's authority to modify a SSOSA sentence after sentencing is an issue of substantial public interest, as recognized by the Court of Appeals, the Attorney General, and previously by this Court.

The issues presented by Petterson's petition are significant issues of public interest and should be reviewed by this Court RAP, 13 4(b) The State, represented by the Attorney General's Office, agrees that the issues are significant and recurring In its motion to publish the Court of Appeals decision, the Attorney General wrote, "Petterson's arguments

regarding the Superior Court's authority to modify conditions are the same arguments frequently raised in superior courts by other SSOSA offenders. No published case law currently exists interpreting the specific section of the SSOSA statute regarding the superior court's authority following the treatment termination hearing and community custody conditions... Therefore, unless publication is granted, these are expected to be frequent issues litigated before superior courts." Respondent's Motion to Modify, 2.

The importance of providing for judicial review of Department imposed conditions is amply demonstrated by the colloquy at Oral Argument in the Court of Appeals. Mr. Petterson pointed out that some of the department imposed conditions were potentially unconstitutional, such as the prohibitions on pornography. See *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). In response to a question from the Court, the Attorney General suggested that there is a difference between court-imposed conditions and Department-imposed conditions, suggesting that *State v. Bahl* is inapplicable to the latter situation. See Oral Argument, 48187-1-II, starting at approximately 28:00.

This Court in 2015 granted review in a case involving an issue substantially similar to Mr. Petterson's issues. See *In re the PRP of Steven Montgomery*, cause no. 89730-1. In *Montgomery*, the Department imposed a prohibition on the petitioner's right to contact his biological

children, arguably in violation of his rights under *State v. LeToureau*, 100 Wn.App. 424, 997 P.2d 436 (2000), and contravening the order of the trial court. This Court granted review and held oral argument. But prior to issuing its decision, Mr. Montgomery completed his community custody and this Court dismissed Mr. Montgomery' petition as moot. In contrast, Petterson's community custody will never expire. Undoubtedly, the need for judicial review of Department-imposed community custody conditions contributed to this Court's decision to grant review in *Montgomery*. The issues deemed important enough by this Court to grant review in 2015 continue to plague Mr. Petterson and other similarly situated probationers and should be reviewed by this Court.

It is nearly impossible to overstate the importance of the issues presented by this petition. 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. Many offenders subject to lifetime community custody committed their offenses when in their late teens or twenties. It is not unforeseeable that early in the twenty-second century we will read about someone who has spent a century on

community custody for a mistake they made while still in high school 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. See *State v LeTourneau*, 100 Wn App. 424, 997 P.2d 436 (2000) (authorizing post-sentencing judicial oversight of community custody conditions involving contact with biological children). In those situations, it is important to have access to a neutral magistrate to determine whether, and under what conditions, contact should occur.

It should be noted that Mr. Petterson is not requesting any specific community custody conditions be modified at this time The 2008 Order was working well until 2013, when a change in circumstances caused the parties to jointly request an amendment to the Order. In turn, the 2013 Order was working well until 2014, when he moved from Kitsap County to King County This move, along with the resultant change of

community custody officer, resulted in his being put back to square one on his SSOSA. His current Department-imposed conditions require he undergo treatment (even though he has completed treatment), not possess pornography or sexually stimulating material (arguably in violation of *State v. Bahl*), not use computer chat rooms (arguably in violation of *State v. O'Cain*, 144 Wn.App. 772, 184 P.3d 1262 (2008)[2]), and register as a sex offender (even though he has a court order relieving him of sex offender registration). These conditions were reimposed on him seven years after they were removed by the court even though he had no intervening violations and had completed treatment. It may be that some of the conditions desired by the Department should be reimposed, but the Department should not be able to impose them unilaterally in contravention of the court order.

2. The opinion of the Court of Appeals conflicts with the decisions of this Court insofar as the SSOSA statute specifically and carefully delineates that the trial court may modify community custody conditions, an exception to the general rule set out in *State v. Shove*.

[2] There is no allegation the internet was used during the commission of his offense.

The Court of Appeals held that the trial court did not have the authority to modify the community custody conditions because Mr Petterson had his termination hearing in 2005 and the Court modified the conditions in 2008 It reached this conclusion despite the fact that the statute twice states trial courts are required to hold hearings and "modify conditions of community custody " See RCW 9 94A 670(8)(b) and (9) The statute also states that "the Department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-ordered conditions " RCW 9 94A 704(6). When imposing community custody conditions, the department is deemed to be performing a "quasi-judicial function." RCW 9 94A 704(11).

The conclusion reached by the Court of Appeals is erroneous both factually and legally It is factually erroneous because of Mr Petterson's unique procedural history between 2005 and 2008 The termination hearing began on October 4, 2005 where, due to a scrivener's error, the Court erroneously removed Mr Petterson from community custody entirely The error was only discovered a year later, at which time the Court reimposed community custody and Mr Petterson appealed. The Order was affirmed by the Court of Appeals and remanded back to the trial court Having erroneously eliminated all of the community custody conditions, the trial court reconvened to determine what community

custody conditions should be imposed going forward. Because the trial court wanted to get input from the Department of Corrections before making this decision, the hearing was rescheduled twice. Therefore, the termination "hearing" was in fact six hearings over three years on October 4, 2005, December 5, 2006, March 9, 2006, April 28, 2008, May 5, 2008, and May 30, 2008

More importantly, the Court of Appeals is wrong legally. SSOSA sentences are unique under the SRA because they are the only felony suspended sentences and the trial court retains jurisdiction for as long as the SSOSA candidate remains on community custody Only the trial court has the discretion to revoke a SSOSA sentence. RCW 9.94A.670(11). The trial court may revoke the sentence at any time prior to the completion of community custody. *State v Miller*, 159 Wn App. 911, 247 P.3d 457 (2011) (trial court properly held hearing nine years into ten year suspended sentence and revoked SSOSA). When a SSOSA candidate violates community custody, the trial court has the authority either to impose a local sanction of up to 60 days or to revoke the SSOSA. *State v Partee*, 141 Wn App. 355, 170 P.3d 60 (2007)

Mr. Petterson, who is on lifetime community custody, is subject to revocation at any time for the rest of his life should he violate his SSOSA But such action may only be done by the trial court, not by the

Department. Under the analysis of the Court of Appeals, were Mr. Petterson to violate his community custody conditions, the trial court could convene a hearing and either sanction him to local jail or revoke his SSOSA, but could not modify his conditions. For instance, were Mr. Petterson to get arrested for DUI, the court could send him to jail or prison, but not alcohol treatment. This is clearly not the intent of the statute. The statute does not allow a "quasi-judicial" officer to be able to impose community custody conditions that contravene, replace, or ignore conditions imposed by a full judicial officer.

The Court of Appeals avoided this conclusion by citing *State v Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989) and *State v Harkness*, 145 Wn App. 678, 186 P.3d 1182 (2008). But *Shove* and *Harkness* are easily distinguishable. In *Shove*, this Court reversed an early SRA sentence for two reasons. First, the Court held that a jail sentence, once imposed, may not be modified at a later date by the trial court except in "specific, carefully delineated circumstances." *Shove* at 86. Second, this Court held the trial court erred by imposing a suspended sentence, saying that suspended sentences are not authorized by the SRA except for "one exception not applicable here," i.e. the SSOSA statute. *Shove* at 90. The *Shove* case is, therefore, inapplicable to Mr. Petterson's case because the

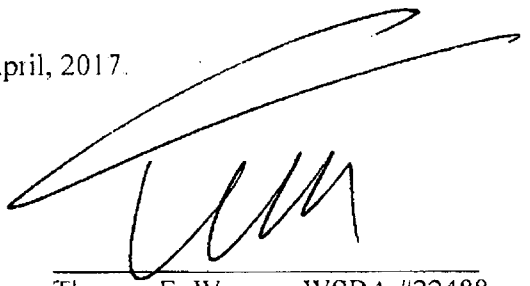
SSOSA statute specifically and carefully authorizes sentence modifications and suspended sentences

Similarly, in *Harkness*, the trial court granted a DOSA sentence two years after sentencing without "specific and carefully delineated" statutory authority to modify the original sentence *Harkness* at 685 Because Mr Petterson relies on RCW 9.94A 670(8)(b), (9) and (11) as his specific and carefully delineated statutory authority, *Harkness* is also inapplicable

F Conclusion

This Court should grant review, reverse the Court of Appeals, and remand for the trial court to review and modify as necessary Mr Petterson's community custody conditions

DATED this 28th day of April, 2017.



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March 21, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ERIK G. PETTERSON	No. 48187-1-II UNPUBLISHED OPINION

SUTTON, J. — Erik Petterson appeals the superior court's order granting the Department of Corrections's (Department) motion to modify the conditions of Petterson's sentence under the Special Sex Offender Sentencing Alternative (SSOSA) and reinstating the condition that Petterson comply with conditions imposed by the Department.[1] Here, Petterson's community custody conditions were erroneously modified in 2008 because the superior court did not have the authority to modify Petterson's community custody conditions; therefore, the superior court properly remedied the error by reinstating the condition at issue in 2015. The condition at issue is a mandatory condition of all community custody; therefore, it was appropriate for the superior court to reinstate it. Accordingly, we affirm.

[1] Former RCW 9.94A.670 (2001). Petterson committed his crime in 2001 and was sentenced under the SSOSA sentencing scheme codified in former RCW 9.94A.670. Accordingly, former RCW 9.94A.670 is the applicable law in this case. Since 2001, there have not been substantive changes to the provisions at issue here, although other changes to SSOSA have resulted in changes to the sections and sub-sections. Here, we cite to the applicable law from 2001 but include citations to the corresponding sections and subsections under the current law.

FACTS

In 2002, Petterson pleaded guilty to child molestation in the first degree and was sentenced under SSOSA. Petterson was sentenced to 68 months confinement with 62 months suspended for the maximum term of life. As a condition of his suspended sentence, Petterson was placed on community custody and, among other conditions, required to comply with all conditions imposed by the Department. Petterson's treatment termination hearing was set for February 7, 2005.

On October 4, 2005, the superior court entered an order at the treatment termination hearing. The order terminated Petterson's SSOSA sentence and community custody. On December 5, 2006, the State filed a motion to amend the order to reinstate community custody and the Department's supervision in accordance with the requirements of SSOSA. The superior court granted the State's motion and entered an amended order reinstating lifetime community custody.

Petterson appealed the superior court's amended order. In 2008, in an unpublished opinion, we determined that the order terminating community custody was a scrivener's error and affirmed the superior court's order correcting the error and reinstating lifetime community custody.

Petterson then filed a motion to terminate community custody. The superior court did not terminate community custody, but entered an order (2008 order)[2] modifying Petterson's community custody conditions to only impose two conditions: (1) the defendant shall obey all laws and (2) the defendant shall update the Department of any change in address or phone number.

In August 2015, the Department filed a motion to reinstate the SSOSA condition requiring an offender to comply with any conditions imposed by the Department. Prior to the 2015 motion, the Department had declined to take any position on the superior court's authority to modify

[2] Order Modifying Community Custody Conditions, filed May 30, 2008. Clerk's Papers at 40.

community custody provisions; however, Petterson's community custody officer supported Petterson's motion to terminate community custody.

On September 16, 2015, the superior court entered its order (2015 order)[3] granting the Department's motion. The superior court concluded that the court did not have the authority to modify the community custody conditions in the 2008 order. The superior court also concluded that compliance with conditions imposed by the Department was a mandatory condition and the superior court did not have the authority to remove that specific condition. Therefore, the superior court granted the Department's motion and reinstated the requirement that Petterson comply with additional community custody conditions imposed by the Department. Petterson appeals the superior court's 2015 order.

ANALYSIS

The issue before this court is whether the superior court erred by granting the Department's motion to modify Petterson's community custody provisions.[4] Here, the superior court properly remedied the 2008 order in which the superior court modified the conditions of community custody

[3] Order on Motion to Modify Conditions of Community Custody, filed Sept. 16, 2015. CP at 142.

[4] Petterson also argues that equitable estoppel bars the Department from making a motion to modify. Here, equitable estoppel does not apply because Petterson has not established that he suffered injury as a result of complying with the 2008 order limiting the community custody conditions. *Kramarevcky v. Dep't of Soc. & Health Serv.*, 122 Wn.2d 738, 750-51, 863 P.2d 535 (1993) (An equitable estoppel claim requires establishing five elements including injury.). Petterson argues that he relied on the Department's action by complying with the superior court's 2008 order. However, Petterson cannot show how being required to comply with the Department's imposed community custody provisions, in order to prevent revocation of his suspended SSOSA sentence, was detrimental. *See In re Personal Restraint of Lopez*, 126 Wn. App. 891, 895, 110 P.3d 764 (2005) ("The only injury [petitioner] asserts he suffered was that he was led to improve his behavior in prison to avoid receiving any more disciplinary infractions. This cannot be said to have been reliance to his detriment.").

without the authority to do so and reimposed a mandatory community custody condition. Accordingly, we affirm the 2015 order.

I. STANDARD OF REVIEW

Conditions of community custody are reviewed for an abuse of discretion. *State v. Valencia*, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006). The superior court abuses its discretion if it reaches its decision by applying the wrong legal standard. *Dixon*, 159 Wn.2d at 76. "When we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case." *State v. Corona*, 164 Wn. App. 76, 79, 261 P.3d 680 (2011).

Statutory interpretation is a question of law that this court reviews de novo. *State v. Rice*, 180 Wn. App. 308, 313, 320 P.3d 723 (2014) (citing *State v. Franklin*, 172 Wn.2d 831, 835, 263 P.3d 585 (2011)). Our objective is to determine and give effect to the legislature's intent. *Rice*, 320 P.3d at 726. We give effect to the statute's plain language when it can be determined from the text. *Rice*, 320 P.3d at 726 (citing *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011)). Statutes are interpreted to give effect to all language in them and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

II. STATUTORY SCHEME

To determine whether the superior court erred by entering the 2015 order we must examine the statute governing SOSSA, former RCW 9.94.670 (2001), and the statute governing community custody generally, former RCW 9.94A.715 and .720 (2001). Under SSOSA, if an offender charged with a sex offense qualifies for a sentencing alternative, the superior court may suspend

the offender's sentence for the offender to engage in treatment. Former RCW 9.94A.670(2)-(3). Former RCW 9.94A.670(4)(a)[5] states that when the superior court suspends a sentence under SSOSA:

> The court shall place the offender on community custody for the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.712, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

Prior to an offender completing treatment imposed as a condition of the SSOSA sentence, the superior court must hold a treatment termination hearing. Former RCW 9.94A.670(6)-(8) (2001). Former RCW 9.94A.670(8) (2001)[6] provides, in relevant part,

> At the treatment termination hearing the court may: (a) Modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment for up to the remaining period of community custody.

Because offenders sentenced under SOSSA are placed on community custody, we also consider the statutes governing community custody. Former RCW 9.94A.715[7] provides, in relevant part,

> (2)(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

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[5] Currently codified at RCW 9.94A.670(5)(b).

[6] Currently codified at RCW 9.94A.670(9).

[7] Currently codified at RCW 9.94A.703.

> (c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

And former RCW 9.94A.720(1)[8] states,

> (a) All offenders sentenced to terms involving community supervision, community service, community placement, community custody, or legal financial obligations shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed.
>
> . . . .
>
> (d) For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the department may impose conditions as specified in RCW 9.94A.715.

III. SUPERIOR COURT'S STATUTORY AUTHORITY TO MODIFY COMMUNITY CUSTODY CONDITIONS

As an initial consideration, we hold that the superior court did not abuse its discretion by issuing the 2015 order because the 2015 order was necessary to correct the 2008 order which exceeded the superior court's authority. "After final judgment and sentencing, the court loses jurisdiction to the [Department of Corrections]." *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008). Sentences imposed under the Sentencing Reform Act of 1981 (SRA)[9] "may be modified only if they meet the requirements of the SRA provisions relating directly to the modification of sentences." *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989). Absent explicit authorization, the superior court lacks jurisdiction to modify an offender's sentence. *Harkness*, 145 Wn. App. at 685-86; *Shove*, 113 Wn.2d at 88-89.

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[8] Currently codified at RCW 9.94A.704.

[9] Ch. 9.94A RCW.

SSOSA only includes one provision explicitly authorizing the superior court to modify the offender's sentence: "At a treatment termination hearing the court may . . . [m]odify conditions of community custody." Former RCW 9.94A.670(8). Here, the superior court's 2005 order was entered following Petterson's treatment termination hearing and that order did not modify the conditions of Petterson's community custody. The 2008 order, which did modify Petterson's community custody conditions, was entered following a motion to terminate community custody. Nothing in SSOSA provides explicit authority for the superior court to modify the conditions of community custody after the treatment termination hearing. Therefore, the superior court entered the 2008 order without the authority to do so. The superior court properly remedied this error by entering the 2015 order reinstating a condition that was improperly removed by the 2008 order.

Petterson argues that the provision allowing the superior court to modify community custody conditions at a treatment termination hearing implicitly provides the superior court the authority to modify community custody conditions at any time. However, our Supreme Court has clearly stated that if the superior court's power to set a sentence carried with it the power to modify the sentence, it would undermine the finality in rendered judgments. *Shove*, 113 Wn.2d at 88. "Final judgments in both criminal and civil cases may be vacated or altered only in those limited circumstances where the interests of justice most urgently require." *Shove*, 113 Wn.2d at 88. Here, Petterson does not allege that the interests of justice "most urgently require" modifying his community custody conditions. *Shove*, 113 Wn.2d at 88. Because this is the only circumstance under which the superior court has the inherent authority to modify a sentence, we reject Petterson's argument that the superior court's explicit authority to modify community custody

conditions at the treatment termination hearing carries with it the authority to modify community custody conditions at any time.

IV. Superior Court's Authority To Modify Mandatory Community Custody Conditions

Even if we accept that the superior court had the authority to modify community custody conditions after an offender's treatment termination hearing, the superior court does not have the authority to modify mandatory community custody conditions. *See State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). Because the statutes governing imposition of community custody require the superior court to order an offender to comply with conditions imposed by the Department, the condition is mandatory and the superior court did not have the authority to remove the condition in the 2008 order. *See Lundy*, 176 Wn. App. at 102-03. Accordingly, the superior court did not abuse its discretion by reinstating a condition required in all community custody sentences.

The language in former RCW 9.94A.715(2)(b) is explicit. The superior court "shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720" as a condition of community custody. Generally, the term "shall" is presumptively imperative and creates a duty rather than granting a superior court discretion. *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196, 196 (1985). Therefore, the superior court did not have the discretion to remove this mandatory condition in the 2008 order.

Petterson argues that the provision prohibiting the Department from contravening a court order somehow grants the superior court continuing authority to modify community custody conditions. Although the Department's authority is limited by the terms of a court order, it does not follow that the superior court retains the authority to modify community custody conditions.

A reasonable reading of the plain language of the statute, taking into account all the provisions governing community custody, demonstrates that the superior court's final court order is what effectively limits the Department's authority to act. Moreover, nothing in the statutory language Petterson cites indicates the superior court has the authority to modify explicitly mandatory conditions.

The superior court did not abuse its discretion by entering the 2015 order because the superior court lacked the authority to modify community custody conditions in the 2008 order. Moreover, even if the superior court retained some discretion to modify community custody conditions throughout the term of an offender's community custody, it does not have the authority to modify mandatory conditions explicitly required by statute. Accordingly, we affirm the superior court's 2015 order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, P.J.

Lee, J.
LEE, J.