71701-4

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NO. 71701-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SALLYEA McCLINTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The Sentencing Reform Act in effect at the time of the defendant's crimes granted authority to the Department of Corrections (DOC) to issue instructions to a supervised offender in order to monitor compliance with the conditions of his sentence, and required the offender to follow such instructions. DOC instructed the defendant to wear a GPS monitoring device, to allow monitoring of his compliance with sentence conditions requiring him to avoid certain locations. Was DOC's instruction lawful, such that the trial court could lawfully sanction the defendant for failing to comply?

2. A claim is moot, and should not be addressed, if the court cannot provide effective relief. The defendant claims that the trial court erred in finding that he had failed to provide his current address to DOC, but he has already served the entire sanction imposed by the trial court. Should this Court decline to review the defendant's claim on the grounds that it is moot?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

In 1997, the defendant, Sallyea McClinton, was charged by amended Information with (i) rape in the first degree of J.A. while armed with a deadly weapon, (ii) attempted rape in the first degree of T.S., (iii) burglary in the first degree of T.S. and her daughters, and (iv) burglary in the first degree of L.D. and M.N. while armed with a deadly weapon, all alleged to have occurred during the fall of 1995. CP 9-11, 23. A jury found McClinton not guilty of count four, but found him guilty of the other counts. CP 12, 23.

McClinton received standard range sentences of 134 months on the rape charge (which included the 24-month deadly weapon enhancement), 68 months on the attempted rape charge (consecutive to the rape sentence), and 42 months on the burglary charge (concurrent to the rape and attempted rape sentences), for a total sentence of 202 months. CP 14. He was also sentenced to community placement for two years or up to the period of earned early release, whichever was longer. CP 17. The convictions were upheld on appeal. CP 23-24.

McClinton was released from prison to begin his term of community placement in June of 2013. CP 39. In September of 2013, McClinton was ordered to serve 120 days of confinement for two violations of his conditions of community placement. CP 35-36. He appealed, but later moved to dismiss his appeal as moot. CP 43, 58.

A second sentence modification hearing occurred on February 12, 2014. RP[1] 3; CP 55-56. The trial court found that McClinton had willfully committed four violations of his conditions of community placement, and imposed 240 days of confinement. CP 55-56. McClinton timely appealed the trial court's February 12th order. CP 59.

2. SUBSTANTIVE FACTS.

a. Facts Of The Crimes.

On September 18, 1995, McClinton followed J.A. into her apartment building and raped her at knifepoint in an elevator. CP 28. On October 17, 1995, McClinton followed T.S. and T.S.'s five-year-old daughter into their apartment, dragged T.S. into a

[1] The report of proceedings consists of a single volume from February 12, 2014, and will be referred to as "RP."

bedroom, and demanded that T.S. remove her clothes. CP 23, 31. T.S.'s thirteen-year-old daughter was already in the bedroom and called 911. CP 31. When McClinton began to remove his pants, the thirteen-year-old screamed and broke a window, and McClinton fled. CP 31.

b. Community Placement Violations And February 12, 2014, Sentence Modification Hearing.

On November 12, 2013, McClinton met with his Community Corrections Officer (CCO), Jeffrey Brown, after being released from custody for prior violations of his community placement. RP 13-14, 19. At that time, Brown introduced McClinton to Kathy Casey, McClinton's new CCO going forward. RP 20, 34. McClinton notified Brown and Casey that he was staying at the Union Gospel Mission, but that information could not be verified. RP 25; CP 49-50. Brown instructed McClinton to report to the Sheriff's Office that same day to update his sex offender registration as required by law.[2] RP 20-21. Brown also instructed McClinton to

[2] November 12th was the final day of McClinton's three-day window for registering following release from confinement. RP 21-22.

report back to Brown the following day for re-installation of GPS monitoring. RP 20.

McClinton failed to register as a sex offender with the Sheriff's office at any point after his meeting with Brown, and failed to report back to Brown or Casey on November 13th or at any point thereafter. RP 11, 20. Casey, acting as McClinton's new CCO, promptly filed a notice of violation alleging five violations of McClinton's conditions of supervision: (1) Failure to report to CCO on November 13, 2013; (2) Failure to enroll in GPS monitoring on November 13, 2013; (3) Failure to register as a sex offender on November 12, 2013; (4) Failure to be available for urinalysis after November 12, 2013; and (5) Failure to provide a current address to DOC as of November 13, 2013. CP 48.

The notice of violation warned that McClinton was a clear risk to the community based on his downward spiral since being released from the Special Commitment Center in June of 2013. CP 50. The trial court issued a warrant for McClinton's arrest on November 15, 2013. CP 54.

The trial court addressed the allegations at a sentence modification hearing on February 12, 2014. CP 55-56; RP 3. The State withdrew allegation (4) during the hearing after testimony revealed that McClinton had not been told on November 12th that urinalysis would be required on November 13th. RP 52. After testimony from Brown, Casey, a records custodian for the Sheriff's Office, and McClinton himself, the trial court found that McClinton had willfully committed the remaining four violations. RP 58-59; CP 55.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY SANCTIONED McCLINTON FOR NONCOMPLIANCE WITH DOC'S LAWFUL USE OF GPS TECHNOLOGY TO MONITOR COMPLIANCE WITH GEOGRAPHIC SENTENCE CONDITIONS.

McClinton contends that DOC lacks statutory authority to impose GPS monitoring on him, and that the trial court therefore lacked authority to sanction him for failure to comply with GPS monitoring. This claim should be rejected. The requirement that McClinton submit to GPS monitoring was a lawful exercise of

DOC's statutory authority to monitor compliance with sentence conditions that restricted McClinton's movements.[3]

a. Relevant Facts.

When McClinton committed his crimes in September and October of 1995, the Sentencing Reform Act (SRA) stated, in relevant part:

> (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 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. . . . 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;

[3] Because McClinton has already served his sanction in full, this Court can no longer provide effective relief. The State is not arguing that this claim is moot, however, because the issue is likely to recur and an authoritative determination is needed to guide DOC in the future. See infra, § C.2.b.

(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.

Former RCW 9.94A.120(9) (1995).[4] At sentencing in 1997, the trial court imposed all the mandatory conditions, as well as additional non-mandatory conditions, including: obtain a sexual deviancy

[4] McClinton asserts that these provision were contained in RCW 9.94A.120(8) at the time of his crimes. Brief of Appellant at 4-5. However, the amendment that moved them to subsection (9) took effect on April 19, 1995. Laws 1995, ch. 108, § 3. In any event, the parties agree on the substance of the relevant provisions.

evaluation and follow all treatment recommendations; do not attend X-rated movies, peep shows, or adult book stores without the approval of the sexual deviancy treatment specialist or CCO; do not have contact with the victims; do not purchase, possess, or use alcohol; and do not enter any business where alcohol is the primary commodity for sale. CP 17, 19.

At the time of McClinton's crimes in the fall of 1995, the SRA also stated:

> 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 fee 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.

Former RCW 9.94A.120(13) (1995).

b. The Use Of GPS Monitoring Lay Within DOC's Statutory Authority To Monitor Compliance With Conditions Of Community Placement, And Did Not Constitute A New Condition Of Supervision.

A defendant's sentence is governed by the version of the SRA in effect when the crime was committed. RCW 9.94A.345; State v. Medina, 180 Wn.2d 282, 287, 324 P.3d 682 (2014). When interpreting the SRA, or any other statute, a court's principal objective is "to ascertain and carry out the intent of the Legislature." State v. Riles, 135 Wn.2d 326, 340, 957 P.2d 655 (1998), overruled in part on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). Interpretation of a statute is a question of law that the appellate courts review de novo. In re Post-Sentencing Review of Charles, 135 Wn.2d 239, 245, 955 P.2d 798 (1998).

The purpose of the SRA in 1995 included, and continues to include today, promoting respect for the law by providing just punishment, protecting the public, providing the offender an opportunity for self-improvement, and making frugal use of the state's resources. RCW 9.94A.010 (1981). The SRA's requirement of mandatory community placement for sex offenders like McClinton, and the associated mandatory and optional conditions, were intended to further those purposes. Riles, 135

Wn.2d at 341. Yet, if there were no way to monitor an offender's compliance with the conditions of his supervision, the imposition of such conditions would be meaningless. See id.

The SRA places responsibility for monitoring an offender's compliance with sentence conditions on the offender's CCO. Former RCW 9.94A.030(3) (1995). It requires offenders on community placement to "follow explicitly the instructions of [DOC,] 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 fee assessment." Former RCW 9.94A.120(13) (1995). This is a non-exclusive list. See Queets Band of Indians v. State, 102 Wn.2d 1, 4, 682 P.2d 909 (1984) ("[I]n interpreting statutory definitions, 'includes' is construed as a term of enlargement . . . .").

The SRA's examples of the kinds of instructions an offender must follow all relate to allowing a CCO to monitor the offender's behavior and ensure compliance with sentence conditions, and include instructions that require the offender to do things he otherwise would not have to do, such as participating in a particular reporting program, or avoiding certain places. See Former RCW

9.94A.120(13) (1995). Similar to requiring an offender to stay in or out of a certain geographic area or follow a particular reporting schedule, an instruction to wear an electronic monitoring device assists a CCO in monitoring an offender's compliance with geography-related conditions of his sentence, and is thus the type of instruction contemplated by former RCW 9.94A.120(13) (1995).

The legislature's intent to allow DOC to instruct offenders to comply with electronic monitoring is confirmed by the sentence that immediately follows the illustrative list of permissible instructions in former RCW 9.94A.120(13) (1995). That sentence states, "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." Former RCW 9.94A.120(13) (1995). The inclusion of electronic monitoring with day reporting and telephone reporting, in a section that solely addresses DOC's ability to issue instructions to offenders, indicates that the legislature intended for DOC to be able to instruct an offender to wear an electronic monitoring device where appropriate.

Here, the trial court imposed several community placement conditions that restrict McClinton's movements, including prohibitions on visiting the victims' residences, X-rated movie theaters, peep shows, adult book stores, bars, and liquor stores. CP 19. As this Court has recognized, it is virtually impossible to effectively monitor an offender's compliance with sentence conditions like these without the use of a monitoring tool. State v. Eaton, 82 Wn. App. 723, 733-34, 919 P.2d 116 (1996) (discussing use of polygraph testing to monitor compliance with an order to stay away from places where children congregate), abrogated in part on other grounds by State v. Frohs, 83 Wn. App. 803, 811 n.2, 924 P.2d 384 (1996).

With the advent of technological improvements, GPS monitoring has joined the list of useful monitoring tools such as urinalysis and polygraph examinations. Indeed, GPS monitoring is likely a more accurate, and therefore more effective, monitoring tool than any other alternative for conditions excluding offenders from certain locations. See Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 606 n.4, 260 P.3d 857 (2011) (noting reliability of polygraph testing is disputed); State v. Jackson, 150 Wn.2d 251, 257, 76 P.3d 217 (2003) (noting GPS device allows location to be

tracked precisely). The CCO's instruction to McClinton to wear a GPS device was thus within the CCO's authority to issue instructions to an offender in order to effectively monitor his compliance with sentence conditions.

McClinton relies on In re Pers. Restraint of Capello, 106 Wn. App. 576, 584, 24 P.3d 1074 (2001), for his contention that DOC lacks authority to instruct him to wear a GPS device. Brief of Appellant at 17-19. McClinton is correct that Capello holds that DOC lacked statutory authority prior to 1996 to impose additional conditions of community placement beyond those imposed by the sentencing court. 106 Wn. App. at 584.

However, McClinton's argument ignores the critical distinction between conditions of community placement and the tools used by DOC to monitor compliance with those conditions. Riles, 135 Wn.2d at 339-43 (polygraph and penile plethysmograph testing allowed under the pre-1996 SRA because they are not sentencing conditions, but merely tools to monitor compliance with sentencing conditions); State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000) (polygraph testing and urinalysis are monitoring tools rather than actual conditions of community placement); State v. Eaton, 82 Wn. App. 723, 733, 919 P.2d 116 (1996) (same),

abrogated in part on other grounds by State v. Frohs, 83 Wn. App. 803, 811 n. 2, 924 P.2d 384 (1996). Like polygraph testing, urinalysis, and plethysmograph testing, GPS monitoring is a tool for monitoring compliance with court-imposed conditions of supervision, rather than an additional condition of supervision.

Capello dealt with DOC's imposition of a condition requiring DOC approval of Capello's living arrangements before he could be transferred to community custody in lieu of early release, in a case where the sentencing judge had explicitly chosen not to impose such a condition at sentencing. 106 Wn. App. at 578. That requirement was a true condition of community supervision, restricting what Capello could and could not do while supervised by DOC. In contrast, instructions to submit to polygraph testing, urinalysis, or GPS monitoring do not further restrict where an offender can go or what he can do, but merely give DOC more information about the offender's activities, making them monitoring tools rather than conditions of sentence. Cf. Julian, 102 Wn. App. at 305; Eaton, 82 Wn. App. at 733. Capello is thus inapplicable to McClinton's case.

McClinton's claim that a 2008 amendment to the SRA to explicitly acknowledge DOC's authority to impose electronic monitoring on sex offenders indicates that DOC lacked such authority prior to that amendment is also unfounded. In Riles, the Washington Supreme Court considered the effect of a 1997 SRA amendment stating that a trial court could impose a condition requiring a defendant to submit to affirmative acts necessary to monitor compliance with the court's orders. 135 Wn.2d at 342-43. The court held that the addition of the new language did not indicate that the trial court had lacked such authority prior to the amendment. Id.

Instead, the court held, the amendment indicated the legislature's intent to confirm the existence of such authority. Riles, 135 Wn.2d at 343 ("Where there has been doubt or ambiguity surrounding a statute, amendment by the Legislature is interpreted as some indication of legislative intent to clarify, rather than to change, existing law."). Similarly, the fact that a 1994 statute specifically allowed DOC to require prisoners to participate in stress and anger management classes in order to earn early release credits did not indicate that DOC previously lacked the

authority to require such classes. In re Pers. Restraint of Forbis, 150 Wn.2d 91, 100-01, 74 P.3d 1189 (2003).

Just as was the case in Riles and Forbis, the legislature's decision to make DOC's authority to impose electronic monitoring for sex offenders explicit in 2008 does not indicate that DOC lacked such authority previously, particularly in light of the language addressing payment for electronic monitoring in the context of DOC instructions to offenders in former RCW 9.94A.120(13) (1995) and the purposes of the SRA.

At the time of McClinton's crimes, DOC's statutory authority to issue instructions to offenders in order to monitor their compliance with court conditions already included authority to use monitoring tools such as electronic monitoring. DOC's instruction to McClinton to comply with GPS monitoring was therefore lawful, and the trial court properly sanctioned McClinton for failure to comply.[5]

[5] Although the trial court's ruling on the source of DOC's authority to impose GPS monitoring relied in part on a statute that did not yet exist at the time of McClinton's crimes, this Court may uphold the trial court's ruling on any grounds supported by the law and the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).

2. McCLINTON'S CLAIM THAT THE TRIAL COURT ERRED IN SANCTIONING HIM FOR FAILING TO PROVIDE HIS CURRENT ADDRESS IS MOOT AND SHOULD NOT BE REVIEWED.

McClinton contends that there was insufficient evidence to support the trial court's finding that he had failed to provide DOC with his current address. This Court should not address this claim because it is moot and does not involve matters of continuing and substantial public interest.

a. Relevant Facts.

At the February 12, 2014, sentencing modification hearing, the trial court found that the State had proved by a preponderance of the evidence that McClinton failed to provide a current address to DOC as of November 13, 2014, the date when he failed to report to his CCO as instructed. RP 59; CP 48-50. The trial court ordered McClinton to serve 60 days for that violation, as part of his total 240-day sanction, with credit for time served since McClinton was booked on November 19, 2013. CP 56, 62. McClinton served his time, and was released in April of 2014. CP 66.

b. This Court Should Not Review This Claim Because It Is Moot And Does Not Involve Matters Of Continuing And Substantial Public Interest.

A claim is moot if a court can no longer provide effective relief. In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141 (2009). An appellate court may nevertheless choose to decide a moot claim if it involves "matters of continuing and substantial public interest." Id. (quoting Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). In assessing whether the requisite public interest is involved, the courts consider (1) "the public or private nature of the question presented," (2) "the desirability of an authoritative determination" to guide public officers in the future, and (3) the likelihood that the question will recur. Id.

McClinton's claim is moot because he has already served the entire sanction imposed by the trial court, and thus this Court cannot provide effective relief. Furthermore, because the claim relates solely to the sufficiency of the evidence presented at the February 12, 2014, sentence modification hearing, the question is highly unlikely to recur and there is no need for an authoritative

determination to guide public officers in the future. Therefore, this Court should not address McClinton's claim.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to find that the challenge to the trial court's sanction for failure to provide a current address is moot, and to affirm the trial court's sanction for failure to enroll in GPS monitoring.

DATED this 11th day of September, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the BRIEF OF RESPONDENT, in State v. Sallyea Mcclinton, Cause No. 71701-4, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 11th day of September, 2014.

Name
Done in Seattle, Washington