

original

No. 36048-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
COURT OF APPEALS
BY: [Signature]
[Signature]

STATE OF WASHINGTON

v.

ERIK PETTERSON

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

Assignments of Error

Did the trial court err by vacating the order of October 4, 2005 after the expiration of the one year statute of limitations?

Issues Pertaining to Assignments of Error

On October 4, 2005, the trial court mistakenly entered an order terminating Mr. Petterson from community custody. Fourteen months later, the State moved to vacate the order. Did the trial court err by concluding that the order was void and, therefore, not subject to the one year statute of limitations?

B. Statement of Facts

Eric Petterson was charged by information with child molestation in the first degree. CP, 1. He eventually pled guilty and petitioned for a SSOSA. The Court imposed a SSOSA on February 11, 2002. CP, 6. The Court imposed, pursuant to RCW 9.94A.712, a minimum sentence of 68 months with all but 6 months suspended, and a maximum sentence of life. CP, 6.

Mr. Petterson did well in treatment and graduated in the fall of 2005. On October 4, 2005, the Court heard a motion to terminate SSOSA. CP, 44. At the hearing, the Community Corrections Officer (CCO) Debra

Walsh requested that he be terminated as successfully completing treatment and that he continue on supervision with the Department of Corrections. CP, 47. The Court granted the motion. CP, 48. The order signed by Judge Olson found that Mr. Petterson had satisfactorily completed treatment and terminated SSOSA. The order further states that “community custody is hereby ~~imposed for the remainder of the defendant’s life in accordance with RCW 9.94A.712~~ terminated.” CP, 14. Above the crossed-out portion the word “terminated” is handwritten. CP, 14. It was never determined conclusively who crossed-out the sentence fragment and wrote “terminated.” RP, 5-6 (March 9, 2007). There has never been any allegation that Mr. Petterson was involved in any way with the change.

On December 5, 2006, CCO Walsh arrested Mr. Petterson for alleged community custody violations. CP, 22. On that same day, the State filed a Motion to Amend Order Terminating SSOSA. CP, 16. The purpose of the Motion to Amend was to reinstate community custody. The State’s motion cites no authority except that an error was made on October 4, 2005. At a court hearing that afternoon, the Court set bail at \$10,000. CP, 68-69. The record does not show that the Court made a probable cause finding. CP, 61-70.

At a hearing on December 5, 2006, the State represented that the October 4, 2005 order was a "scrivener's error" and asked that the order amending be signed. CP, 63. Mr. Petterson through substitute counsel objected to the order being considered until Mr. Petterson's attorney of record had an opportunity to consider it. CP, 64. The Court scheduled a bail hearing for December 6, 2006. On December 7, inexplicitly, the Court signed a proposed order to amend the October 4, 2005 order reinstating community custody. Mr. Petterson was not given an opportunity to object to the order. CP, 76-79.

On December 21, 2006, Mr. Petterson appeared. Mr. Petterson first moved to be released without bail because the community custody violations were not supported by probable cause, RP, 4 (Dec. 21, 2006). Mr. Petterson argued that it is legally impossible to violate community custody while not on community custody. RP, 4-5 (Dec. 21, 2006). The Court agreed and released Mr. Petterson without conditions except that he appear for future court hearings. CP, 12 (Dec. 21, 2006).

Second, Mr. Petterson moved to vacate the December 7, 2006 order amending the October 4, 2005 order. The Court found that the December 7 order had been signed without input from the defense and the court suspended application of the order pending further order of the court. RP, 10-13 (Dec. 21, 2006). The Court specifically ordered DOC not to

supervise Mr. Petterson without further order of the court. RP, 13 (Dec. 21, 2006).

The issue of whether to vacate the October 4, 2005 order was briefed, with both parties submitting multiple briefs. CP, 56, 80, 151, 155. On March 9, 2007, the Court concluded that the October 4, 2005 order was void and vacated the order. RP, 7-8 (March 9, 2007). Mr. Petterson appeals from this order.

C. Argument

A motion to vacate an order in a criminal case must be brought pursuant to CrR 7.8, regardless of whether the moving party is the defendant or the State. State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996). CrR 7.8(b) details five grounds for vacating an existing order. The first is mistake, inadvertence, surprise, excusable neglect or irregularity. The second is newly discovered evidence. The third is fraud. The fourth is that the order is void. The fifth is any other reason justifying relief. There is a one year statute of limitations for motions brought for mistake or newly discovered evidence. The last three grounds must be brought within a “reasonable time.”

Mr. Petterson’s appeal is resolved by answering one question: Was the October 4, 2005 order entered as a result of a mistake or was the order

void? Although the transcript from October 4, 2005 makes clear that no one intended for Mr. Petterson to be released from community custody, the issue is whether the error is one for which the law affords a remedy. If the order was a mistake, then the motion to correct the mistake must be brought within one year. Because the motion to vacate the order was brought on December 5, 2006, 14 months after the October 4, 2005 order, the motion was not timely. On the other hand, if the order was void, then the motion must be brought within a reasonable period of time. The trial court concluded that 14 months was reasonable. RP, 8 (March 9, 2007).

The State argued in the trial Court, and the Court agreed, that the October 4, 2005 order was void. A void judgment is one entered by a court "which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved" State v. Zavala-Reynoso, 127 Wn. App. 119; 110 P.3d 827 (2005), citing Dike v. Dike, 75 Wn.2d 1, 448 P.2d 490 (1968). In Zavala-Reynoso the defendant argued that his judgment and sentence was void because it reflected the wrong offender score and standard range. The Court of Appeals disagreed because the trial court clearly had the inherent authority to sentence the defendant. Instead, the mistaken offender score was a mistake under CrR 7.8(b)(1). Because more than one year had passed, the statute of limitations for bringing the motion was expired.

Relying on the Zavala-Reynoso definition of void, the trial court concluded that “the termination of community custody is not within the modifications to community custody that the Court is authorized by RCW 9.94A.670(7) to make.” RP, 8 (March 9, 2007). This conclusion, if correct, has far reaching implications, not just for Mr. Petterson, but for the thousands of people subject to the rules of RCW 9.94A.712. RCW 9.94A.712 went into effect on September 1, 2001. It provides that persons convicted of certain sex offenses shall be sentenced to a maximum and minimum term. The maximum term is equal to the maximum sentence for the offense, in most cases life imprisonment. The minimum term is equal to a sentence within the standard range for the offense (unless the court imposes an exceptional sentence). The Court may also suspend a portion of the sentence under the SSOSA statute, RCW 9.94A.670. The defendant remains on community custody until the completion of the maximum sentence. The upshot is that most people receiving sentences pursuant to this statute, including Mr. Petterson, are subject to community custody for the remainder of their life. Since September 1, 2001, more and more defendants have completed their minimum sentences. Over time, RCW 9.94A.712 will leave thousands of defendants on active probation despite not having reoffended in decades.

It belies logic to say that a Court has *no* authority to terminate a defendant from community custody prematurely. As Mr. Petterson argued in the trial court, it is not going to take long before the Department of Corrections is going to seek to terminate a defendant from community custody for any of a variety of reasons, such as severe health problems. RP, 4 (March 9, 2007). It is also highly likely that the department will at some point assess some individuals as a low risk to reoffend and seek to terminate them prematurely in order to more properly manage fiscal and time resources. Under the trial court's interpretation of the applicable statutes, the department would be required to continue monitoring all defendants sentenced pursuant to RCW 9.94A.712 regardless of the need for continued supervision.

Despite the fact that RCW 9.94A.712 does not contain a provision explicitly giving trial courts the authority to terminate community custody, such authority is implicit in the statute. RCW 9.94A.713(2), which sets forth the permissible community custody conditions for defendants subject to RCW 9.94A.712, says, "The department may not recommend and the board may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions. The board shall notify the offender in writing of any such conditions or

modifications.” Under this provision, the court retains oversight authority over an offender sentenced under RCW 9.94A.712-.713.

RCW 9.94A.670 also gives the trial court broad authority to act.

It reads, in part:

(7)(a) The sex offender treatment provider shall submit quarterly reports on the offender's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, offender's compliance with requirements, treatment activities, the offender's relative progress in treatment, and any other material specified by the court at sentencing.

(b) The court shall conduct a hearing on the offender's progress in treatment at least once a year. At least fourteen days prior to the hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. 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.

(8) At least fourteen days prior to the treatment termination hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. 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. The court may order an evaluation regarding the advisability of termination from treatment by a sex offender treatment provider who may not be the same person who treated the offender under subsection (4)

of this section or any person who employs, is employed by, or shares profits with the person who treated the offender under subsection (4) of this section unless the court has entered written findings that such evaluation is in the best interest of the victim and that a successful evaluation of the offender would otherwise be impractical. The offender shall pay the cost of the evaluation. 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.

The statute specifically gives the court authority to modify the conditions of community custody. If it has authority to modify the conditions of community custody, logic would dictate that it has authority to terminate community custody.

Trial courts have always had the inherent authority to terminate supervision early. RCW 9.95.230 reads, "The court shall have authority at any time prior to the entry of an order terminating probation to (1) revoke, modify, or change its order of suspension of imposition or execution of sentence; (2) it may at any time, when the ends of justice will be served thereby, and when the reformation of the probationer shall warrant it, terminate the period of probation, and discharge the person so held." See In re Belsher, 102 Wn.2d 844, 689 P.2d 1078 (1976) (petitioner's probation was terminated 3 years early by court order). In State v. J.A., 105 Wn. App. 879; 20 P.3d 487 (2001) the Court recognized the inherent

authority of a juvenile court to terminate an offender early from a deferred disposition sentence.

In Mr. Petterson's case, the Court modified the community custody by both terminating treatment and terminating community custody. Mr. Petterson does not dispute that this was probably an unintended mistake by the Court, but the Court clearly had the authority, both inherent and statutory, to do so. The State's remedy for a mistake of this sort was to file a motion pursuant to CrR 7.8(b)(1) to correct a mistake. But such a motion had to be filed within 12 months of the order. The order was not void and the statute of limitations for correcting the mistake had expired prior to the State bringing a motion to vacate the order.

D. Conclusion

This Court should remand to the trial court with instructions to reinstate the October 4, 2005 order to full force and effect.

DATED this 11th day of May, 2007.

A handwritten signature in black ink, consisting of a large, sweeping horizontal stroke followed by several smaller, vertical strokes.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

DEPOSITED
STATE OF WASHINGTON
BANK OF AMERICA
MAY 11 2007

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

10	STATE OF WASHINGTON,)	Case No.: 01-1-01509-3
11)	Court of Appeals No.: 36048-9-II
12	Respondent,)	
13	vs.)	AFFIDAVIT OF SERVICE
14	ERIK PETTERSON,)	
15	Defendant.)	

16 STATE OF WASHINGTON)
 17 COUNTY OF KITSAP)

18 THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

19 I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,
20 and competent to be a witness.

21 On May 11, 2007, I sent an original and a copy, postage prepaid, of the BRIEF OF
22 APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite
23 300, Tacoma, WA 98402.

24 On May 11, 2007, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to the
25 Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-4683.

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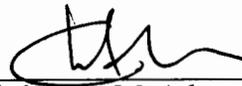
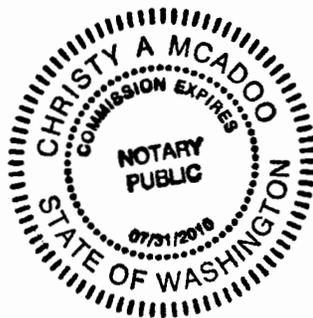
1 On May 11, 2007, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to Mr.
2 Erik Petterson, 27470 Anchor Place N.W., Poulsbo, WA 98370.

3 Dated this 11th day of May, 2007.



4
5 Thomas E. Weaver
6 WSBA #22488
7 Attorney for Defendant

8 SUBSCRIBED AND SWORN to before me this 11th day of May, 2007.



9
10 Christy A. McAdoo
11 NOTARY PUBLIC in and for
12 the State of Washington.
13 My commission expires: 07/31/2010