

NO. 36598-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOE EDDIE BERLANGA, APPELLANT

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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 06-1-05449-2

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When imposing an exceptional sentence, did the trial court err in allowing such sentence to be served on home detention when the defendant was being sentenced on a drug offense?
2. Did the trial court err in imposing an exceptional sentence?

B. STATEMENT OF THE CASE.

The facts of the case are contained in the State's opening brief and are hereby incorporated by reference.

C. ARGUMENT.

1. EVEN WHEN IMPOSING AN EXCEPTIONAL SENTENCE, THE TRIAL COURT STILL ERRED IN ALLOWING SUCH SENTENCE TO BE SERVED ON HOME DETENTION BECAUSE THE DEFENDANT WAS BEING SENTENCED ON A DRUG OFFENSE.

As stated in the State's opening brief, RCW 9.94A.734(1)(c) specifically excludes people convicted of drug offenses from participating in home detention. RCW 9.94A.734 does provide some exceptions to this prohibition. It states that home detention is available for offenders convicted of possession of a controlled substance under RCW 69.50.4013 or of forged prescription under RCW 69.50.403. In the present case, however, the defendant was convicted of unlawful possession of a

controlled substance with the intent to deliver. This conviction excludes him from consideration for home detention under the language of RCW 9.94A.734.

The defendant received an exceptional sentence in this case of 12 months. RCW 9.94A.680 addresses alternatives to confinement when the offender's sentence is less than one year. RCW 9.94A.680 states:

Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include the following sentence conditions that the court may order as substitutes for total confinement:

(1) One day of partial confinement may be substituted for one day of total confinement;

(2) In addition, for offenders convicted of nonviolent offenses only, eight hours of community restitution may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days. Community restitution hours must be completed within the period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department; and

(3) For offenders convicted of nonviolent and nonsex offenses, the court may authorize county jails to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.607.

For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used.

The respondent has previously asserted that RCW 9.94A.680 controls, and allows for home detention to be served on drug offenses when the sentence is one year or less. Such interpretation is without merit. RCW 9.94A.680 should be read together with RCW 9.94A.734(1)(c). Conflicts in statutes are to be reconciled and effect given to each if it can be achieved and the language of each statute is not distorted. State v. Becker, 59 Wn. App. 848, 852, 801 P.2d 1015 (1990), citing Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). When the statutes cannot be harmonized, the court should look to the legislative treatment of the statutes. Becker, 59, Wn. App. 848 at 852, citing Housing Auth. V. Sunnyside Vly. Irrig. Dist., 112 Wn.2d 262, 267, 772 P.2d 473 (1989). The court in Becker determined that the statutes at conflict in the case could be harmonized if read literally. Becker, 59 Wn. App. 848 at 852. In Hennessey Funeral Homes, Inc. v. Dean, 64 Wn.2d 985, 395 P.2d 493 (1964), the court held that it was the primary rule of statutory construction that all parts of an act that relate to the same subject be read together. Id. at 989, citing Barto v. Stewart, 21 Wash. 605, 615, 59 Pac. 480 (1899).

Similarly, RCW 9.94A.680 and 9.94A.734(1)(c) can be harmonized. While the State agrees that RCW 9.94A.680 allows for alternatives forms of confinement for offenders sentenced to one year or less, RCW 9.94A.734(1)(c) limits such alternative confinement to forms other than home detention. Therefore, while certain forms of alternative

confinement may be available to the defendant in the present case, the particular form of home detention is not, given the nature of the defendant's crime. Such reading does not distort the language of either statute and reconciles any possible conflict.

The limitation of prohibiting home detention for offenders convicted of drug offenses makes sense, particularly in the facts of this case. In this case, the defendant was convicted of unlawful possession of a controlled substance with the intent to deliver. The criminal act is alleged to have taken place in the defendant's home—the same home where he would presumably be serving a sentence on home detention. CP 5. Similarly, RCW 9.94A.734 prohibits offenders convicted of violent offenses or sex offenses from serving those sentences on home detention, even if they are sentenced to one year or less¹. Such a reading is not inconsistent with RCW 9.94A.680. Again, those offenders may have other forms of alternative confinement available to them, but not home detention which has been specifically excluded.

The defendant asserts that “Although RCW 9.94A.734(1) provides that home detention is not available to drug offenders, that statute merely describes the standard sentencing options, just as the standard range is

¹ RCW 9.94A.734 makes certain exceptions for when home detention can be utilized. It allows offenders to serve their sentences on home detention if, for example, they are convicted of possession of a controlled substance or forged prescription. RCW 9.94A.734(1). Such exception does not apply to the defendant, who was convicted of possession of a controlled substance with intent to deliver.

defined by statute.” Brief of Respondent at page 7. Such reading of RCW 9.94A.734(1) is inaccurate and unsupported by any authority. RCW 9.94A.734 does not limit itself to standard range sentences. As argued above, when read in conjunction with RCW 9.94A.680, it is clear that the legislature intended for some forms of partial confinement to be available on sentences of one year or less, but not home detention to offenders convicted of drug offenses.

2. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE.

RCW 9.94A.535(1) supplies an illustrative list of factors the court may consider in imposing an exceptional sentence downward. Those factors include facts that the victim was the aggressor, the defendant was under duress or coercion, and that the defendant had been victim of ongoing physical or sexual abuse. None of the examples provided in 9.94A.535(1) address the defendant’s medical condition as a legitimate basis for an exceptional sentence. In fact, in State v. Fuller, 89 Wn. App. 136, 947 P.2d 1281 (1997), the defendant was sentenced to six months of home detention based on a medical condition. Id. at 138. While the court did not specifically address the propriety of a home detention sentence under RCW 9.94A.680, it did hold that the legislature clearly and unambiguously intended for offenders convicted of certain crimes to be prohibited from serving their sentences on home detention. Id. at 140. In this case, the defendant was convicted of unlawful possession of a

controlled substance with the intent to deliver—a crime the legislature clearly and unambiguously intended to not be served on home detention.

It is clear that the trial court's sole basis in imposing an exceptional sentence was to try to circumvent the prohibitions of RCW 9.94A.734(1)(c). Such basis is erroneous and should not be permitted as a basis for an exceptional sentence. There is already a mechanism in place to address the concerns of the trial court. RCW 9.94A.728(4) allows the secretary of the Department of Corrections to authorize extraordinary medical placement if deemed appropriate. Such extraordinary medical placement includes electronic home monitoring, but that determination is to be made by the DOC secretary, not the trial court. The trial court erred in imposing an exceptional sentence downward based on the defendant's medical condition.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court reverse the trial court below.

DATED: FEBRUARY 27, 2008

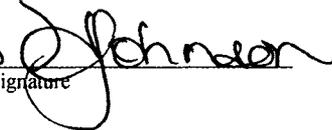
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/27/08 
Date Signature