

NO. 40044-8-II

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

STATE OF WASHINGTON, Appellant

v.

SHANNON JEAN CASERI, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER A. BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01196-8

BRIEF OF APPELLANT

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I. INTRODUCTION

The Defendant Shannon Caseri pled guilty to a charge of Possession of a Controlled Substance-Methamphetamine in Clark County Superior Court. She was sentenced to a term of 181 days in Total Confinement, with credit for time served before sentencing. The Court authorized her release from confinement on a furlough prior to completion of the sentence to enable her to attend an in-patient substance abuse treatment program. Upon completion of the in-patient portion of the program, the State asked the trial Court to order the Defendant to report to jail to complete the remainder of the total confinement sentence. The State appeals from an order of the trial Court allowing the Defendant credit for time spent in out-patient treatment and in a “recovery house” in lieu of serving the sentence of total confinement.

II. ASSIGNMENTS OF ERROR

- 1. The trial court erred in entering Finding of Fact No. 5, and Conclusion of Law No. 2, stating that by its order giving Defendant credit for time served in out patient treatment and residence in a “recovery house” it was “clarifying” its original sentence, in that said Finding of Fact is not supported by substantial evidence in the record.**

2. **The trial court erred by modifying the Defendant's original sentence of total confinement after a portion of the sentence had been served, without legal authority.**

3. **The trial court erred by giving the Defendant credit for time spent in an outpatient substance abuse treatment program and residence in a "recovery house", since neither the treatment program nor the residence were "confinement" under RCW 9.94A.030(11) and the court lacked authority to sentence Defendant to such treatment or residence in lieu of "confinement".**

III. STATEMENT OF THE CASE

Shannon Jean Caseri was arrested and booked into the Clark county Jail on July 18, 2008 on a charge of possession of a controlled substance. She was formally charged by Information filed July 22, 2008 in Clark County Superior Court with the crime of Possession of a Controlled Substance (Methamphetamine), committed on July 18, 2008. CP-1 Caseri rejected an Offer of referral to the Clark County Superior Court Drug Court program. CP 49.

On August 20, 2008, while still in custody in the Clark County Jail, Caseri appeared with her attorney in Superior Court and entered a plea of guilty to the charge. In the Statement of Defendant on Plea of Guilty Defendant acknowledged an Offender Score of 3 and that her Standard Range was 6+ to 18 months. CP 3, RP 2 Defendant further

acknowledged the sentence recommendation would be 181 days total confinement, credit for time served in pretrial confinement since July 18, 2008, and that “def. is free to argue for day for day credit while def. is in Lifeline inpatient treatment facility in Van., WA, not a lockdown facility, *up to 28 days.* [emphasis added] CP 5.

The trial court proceeded to sentence Defendant on August 20, 2008 following her guilty plea. Consistent with the plea agreement, the deputy prosecutor recommended 181 days total confinement. Defense counsel asked that the court impose no additional or consecutive sentence on the pending probation violation. As to the sentence on the possession charge, defense counsel told the court in part:

NC: We’re asking the court to consider allowing her to do her last twenty-eight days of confinement in the Life Line Treatment Facility in Vancouver. The bad news is that is not a lock down facility but she does have to –

JUDGE: Is that part of the SAC Court¹ treatment?

NC: - yes sir. And they have a bed waiting for her as soon as she can tell them she’s ready to go. . .

-(RP 5)

¹ The judge was referring to the Clark County District Court Substance Abuse Court program.

The trial court imposed a sentence of 181 days Total Confinement, and gave the Defendant 33 days credit for time spent in jail prior to the plea and sentencing. The trial court told Defendant:

JUDGE: First off I am going to accept the recommendation of the State. However I am going to make it concurrent as to the PV. I will permit her to be furloughed to a treatment program but I will not give credit until I know she's successfully completed it.

...

JUDGE: So if she can – successfully completes I will strongly consider giving you credit for the time you do in that program.

-(RP 5-6).

Defense counsel then addressed the timing of the proposed furlough:

NC: Thanks, your honor. When does she appeal – or apply the furlough time – the last twenty-eight days? Can it be done that way?

JUDGE: Well the problem with treatment programs is that in fact – I assume it's in-patient, right?

SC: Yes sir.

JUDGE: I – my outlo – my suggestion Mr. Cane is that if she gets a treatment bed date, I will furlough her immediately because that's the higher priority for me. And I will evaluate her performance when she gets back for purposes of credit for time.

NC: Okay.

JUDGE: But if you – she completes her time and gets earlier to the bed –

SC: Um-hum.

JUDGE: - and the program is less than the sentence, they return you to jail.

SC: Right. That's fine.

JUDGE: So you get to complete the sentence.

-([Emphasis added] RP 5-7).

The Judgment and Sentence reflected imposition of a sentence of 181 days total confinement, with credit for 33 days and the balance of 148 days to be served in total confinement. CP 17.

Without notice to the State, Defendant was released from jail on September 4, 2008 to commence treatment. On October 1, 2008 she successfully completed an in-patient substance abuse treatment program at Lifeline in Vancouver. Upon discharge she began residence in an Oxford House “recovery house” where she continued to reside. She also continued to participate in out-patient treatment. She did not return to jail. Findings of Fact Nos. 3, 4; CP 50 From July 18, 2008 to release on September 4, 2008 Defendant served a total of 48 days total confinement.

The State moved for an Order directing the Defendant to return to jail to serve the remainder of the sentence. At a hearing on November 4,

2008 Defendant for the first time asked the trial court to give her credit for the time she was spending in outpatient treatment in lieu of making her serve the remaining jail sentence.

NC: Your Honor, we have a different proposal. On August 20th the court sentenced my client to a hundred eighty-one days. The court allowed my client to do thirty days in-patient treatment at – where?

SC: [inaudible]

NC: Which is not an in – which is not a lock-down facility. The court still allowed her to do that. She finished that and apparently can provide informa – documentation that she completed it. She's now at Oxford House. We're asking the court to consider allowing her to do that next hundred and three days at Oxford House in out-patient, intensive treatment because that is – while it is not - also is not a lock down facility, she's already shown that she can do the thirty days that she did in a not lock down facility. She wants a hundred and three days more plus she's in SAC Court."

-([Emphasis added.] RP 9-10).

The State objected and advised the trial court that the State believed the court lacked authority to modify the sentence in that manner. The trial court scheduled another hearing to review the matter, which was held on March 3, 2009.

On that date the State again noted its objection to the modification of the sentence as proposed by Defendant. At this hearing defense counsel

suggested for the first time that the court was not modifying the sentence, but only clarifying it, because the court had intended from the very beginning to consider conversion of the remainder of the sentence to “partial confinement” if Defendant successfully completed a program. The trial court reviewed the transcript and concluded that at the time of sentencing the court:

. . .was thinking of a program and programs come in various phases. And as long as she was completing the program – whether it be in –patient – out-patient – Oxford House – whatever it may be, that that would all be contemplated. . .”

-(RP 21-24)

The State argued that if it had indeed been the trial court’s original intent to consider allowing credit for outpatient treatment and residence at Oxford House, the court nevertheless lacked authority to credit the Defendant with either participation in an outpatient treatment program or residence at a “recovery house” because neither “program” fell within the definition of confinement. RP 24. The trial court later entered Findings of Fact and Conclusions of Law which reflected the court’s ruling that it was merely “clarifying” its original intent.

The State sought review, initially by filing a Petition for Discretionary Review. Following argument on the Petition, the

Commissioner ruled that the trial court's order was properly the subject of direct appeal and directed the State to proceed by appeal procedure.

IV. AUTHORITIES AND ARGUMENT

A. Argument in Support of Assignment of Error No.1

The State assigns error to the trial court's Finding of Fact No. 5. Finding of Fact No. 5 is not supported by substantial evidence in the record and therefore should not be treated as a verity on appeal. State v. Gatewood, 163 Wn.2d 534; 182 P.3d 426; 2008.

The record reflects that at the original sentencing defense counsel asked the court to give the Defendant credit for time spent in an in-patient treatment program of approximately 28 days. Neither the parties nor the court ever mentioned outpatient treatment or post treatment residence as an alternative to confinement. Defense counsel at one point asked the court whether Defendant would be required to wait until the last 28 days of her term of confinement before being furloughed to inpatient treatment. Although the court replied that it would furlough the Defendant as soon as a bed was available, if she was released *before* the end of her jail sentence, she would be required to return to jail to complete the sentence. RP 4-6. The defense request was consistent with the plea agreement, which made

no mention of a request for credit other than for in-patient treatment. The prosecutor's stated recommendation was for 181 days total confinement.

The trial court stated that it was accepting that recommendation, and the Judgment and Sentence reflected that the remainder of the sentence, after credit for time served, would be served in *total confinement*. And it was not until the hearing on November 4, 2008 that defense counsel told the court "*we have a different proposal.*" RP 10.

Based on the record of proceedings the State submits that when defense counsel first argued, at the hearing on March 3, 2009, that the trial court *originally intended* to give Defendant credit for outpatient treatment and recovery house residence, defense counsel misinterpreted the record of the prior hearings. The record of those prior proceedings simply does not support such an interpretation, and the trial court's Finding of Fact No. 5, and Conclusion of Law No. 2 based on that Finding, are in error.

B. Argument in support of Assignment of Error No. 2

In State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989) the court held that under the Sentencing Reform Act (SRA), once a determinate sentence had been imposed the Superior Court was without authority to modify the sentence except in "specific, carefully delineated circumstances" provided by the statute. The defendant in Shove was

originally sentenced to a term of 365 days in partial confinement. After she had served five months of the sentence she asked the court to reduce her sentence to allow her immediate release. The trial court amended the original sentence by granting her immediate release, declaring an exceptional sentence and suspending the unserved balance. The Supreme Court held that the trial court had no authority to amend the original sentence.

In Shove, *supra*, the Superior Court attempted to modify a determinate sentence by shortening the original sentence and granting the Defendant an early release. Subsequent decisions based on the holding in Shove have confirmed that except as specifically provided in the SRA, a trial court also lacks authority to modify a determinate sentence by changing the form of confinement as the trial court attempted to do in the present case.

In State v. Murray, 118 Wn.App. 518; 77 P.3d 1188; (2003), the Court of Appeals held that a trial court had neither statutory nor inherent authority to modify an offender's sentence to allow her to serve the remainder of her sentence in home detention. In Murray, the defendant pled guilty to several counts of felony theft. The court sentenced her to 365 days confinement. The court rejected the defendant's request for home detention but authorized the sentence to be served in work release.

The sentence order did not authorize alternative forms of partial confinement, nor did it provide for any movement from work release to home detention. After the defendant had served approximately five months of the sentence, she filed a motion asking the court to allow her to finish the remainder of the sentence on home detention. The trial court granted the motion over the State's objection, holding that it had "inherent authority" to modify the sentence to allow the defendant to serve the remainder of the sentence in home detention instead of work release. The Court of Appeals ruled that the Supreme Court's holding in State v. Shove leaves no room for the sentencing court to exercise "inherent authority". The Court noted that Shove involved the reduction of a sentence, while Murray involved a change in the form of partial confinement. Nevertheless, the Court said, the SRA contains no express provision allowing a change in the form of partial confinement except in the limited circumstances provided by [former] RCW 9.94A.150 [now RCW 9.94A.728].

None of the circumstances specified in RCW 9.94A.728 are applicable here. Defendant did not argue that any of those limited circumstances applied when she requested the trial court to convert her sentence. She offered no authority to the trial court for the proposed

modification. This case is almost identical to the facts in State v. Murray, *supra*.

The trial court's order granting Defendant credit for the time spent in outpatient substance abuse treatment and residence in a recovery house is a modification of the court's original sentence, and as such is precluded by the Sentencing Reform Act and State v. Shove, *supra*.

C. Argument in support of Assignment of Error No. 3

A sentencing court has discretion in sentencing only to the extent authorized by the Sentencing Reform Act (SRA). Authority is not implied where it is not necessary to carry out powers expressly granted, especially where the general structure and purposes of the SRA limit the trial court's sentencing discretion and require determinate sentences. State v. Shove, *supra*; State v. Murray, *supra*. When sentencing a defendant upon conviction of the crime of Possession of a Controlled Substance under RCW 69.50.4013, with an Offender Score of 3, the SRA requires a sentencing court to impose a sentence within the standard range of confinement of between 6+ and 18 months of confinement, or to utilize one of the available sentencing options such as the Drug Offender Sentencing Alternative (DOSA) under RCW 9.94A.660. RCW 9.94A.505(1),(2)(a)(i) and RCW 9.94A.517.

The SRA defines “confinement” as “total or partial confinement”.

RCW 9.94A.030(11).

“Total confinement” means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

-(RCW 9.94A.030(51))

“Partial Confinement” means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

-(RCW 9.94A.030 (35)).

In the present case, the trial court did not utilize any alternative form of sentence such as DOSA, did not impose an exceptional sentence or find grounds to do so. There is no question that the outpatient treatment program and the Oxford House residence did not satisfy the definition of partial or total confinement, although at one point defense counsel attempted to characterize them as such.

In State v. Hale, 94 Wn.App. 46, 971 P.2d 88, (1999), the Court of Appeals held that a trial court lacked authority to give a defendant credit for drug treatment against confinement time. Likewise in the present case, the trial court lacked authority to order that Defendant could satisfy a mandatory sentence of total or partial confinement of at least 6 months by participating in outpatient substance abuse treatment and living in a facility which was not operated by or under contract with a government unit.

The trial court's order therefore should be reversed and this matter remanded to the trial court with instructions to reinstate the sentence of confinement and compel the Defendant to complete the sentence.

V. CONCLUSION

The trial court exceeded its sentencing authority under the SRA by giving Defendant credit against the sentence of total confinement for time spent in out-patient drug treatment and residence at a recovery house, thereby modifying the sentence after Defendant had commenced service of the sentence contrary to the SRA and State v. Shove, *supra*. The order of the trial court should be reversed, and the Cause remanded to the

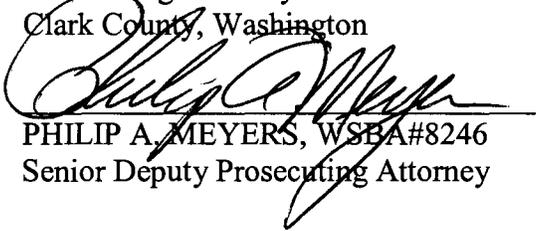
Superior Court for entry of an Order requiring Defendant to complete the original sentence of total confinement.

DATED this 29 day of April, 2010.

Respectfully submitted:

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