

NO. 40044-8-II

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

STATE OF WASHINGTON,
Petitioner,

v.

SHANNON JEAN CASERI,
Respondent.

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STATE OF WASHINGTON
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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR CLARK COUNTY

The Honorable John P. Wulle, Judge

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

The court below sentenced respondent to 181 days confinement but ordered her furloughed from jail for substance abuse treatment. The State sought to have respondent committed to jail after completing just the inpatient portion of her treatment, but the court allowed her to remain furloughed as she completed the outpatient portion of her program. The court subsequently entered an order clarifying that the original sentence contemplated time spent in inpatient as well as outpatient treatment to serve in lieu of confinement.

1. Where there is substantial evidence in the record to support the court's finding that it intended outpatient as well as inpatient treatment as an alternative to confinement, must this Court defer to the lower court's finding?

2. Where the court's order did not modify the original sentence but only clarified the court's intent at the time of sentencing, has the State failed to show error?

3. RCW 9.94A.680(3) authorizes alternatives to confinement, including participation in a county supervised drug treatment program, for sentences of less than one year. Where respondent was furloughed from jail to participate in drug treatment while supervised under the Clark

County District Court Substance Abuse Court program, was the sentence authorized by the SRA?

B. STATEMENT OF THE CASE

On August 20, 2008, respondent Shannon Caseri pleaded guilty to a charge of possession of methamphetamine. CP 2. She acknowledged a standard range for this offense of 6+ to 18 months confinement. CP 3. Under the terms of the plea agreement, the State would recommend 181 days in jail, and Caseri was free to argue for day for day credit for 28 days of inpatient treatment. CP 5. The Honorable John P. Wulle accepted Caseri's plea. RP¹ 4.

The case proceeded to sentencing, and the State made the agreed recommendation. RP 4. Defense counsel then asked to court to consider that Caseri was participating in the Substance Abuse Court Program with Clark County District Court, which included substance abuse treatment. He asked the court to allow Caseri to serve her last 28 days of confinement in inpatient treatment. RP 4-5.

The court responded that it would permit Caseri to be furloughed for treatment, but it would not give her credit for that time until she completed treatment successfully. RP 6. The court rejected defense

¹ The Verbatim Report of Proceedings from the hearings on 8/20/08, 11/4/08, 2/20/09, 3/3/09, and 10/21/09 is contained in a single volume, designated RP.

counsel's proposal that she be furloughed for the last 28 days of her sentence, stating that treatment was a higher priority than confinement. RP 6. Instead, the court ordered her to be furloughed as soon as there was a bed date available, stating that if there was any time left on her sentence after she completed her treatment program, she could be returned to jail to finish the sentence. RP 6-7. The court reminded Caseri that she needed to work with the Substance Abuse Court. RP 7.

The court entered a Judgment and Sentence indicating that Caseri was sentenced to 181 days confinement in the county jail, with 33 days credit for time served prior to sentencing and the remaining 148 days to be served in total confinement. CP 17. In the memorandum of disposition, the court authorized Caseri to be furloughed from the jail for treatment. CP 11.

With the court's authorization, Caseri was furloughed from Clark County Jail on September 4, 2008, and entered inpatient treatment. She completed that program on October 1, 2008. CP 49. After inpatient treatment, Caseri continued in the Substance Abuse Court Program. CP 28. In that program, Caseri was required to attend three outpatient treatment groups a week, submit to random UAs, and attend community support groups weekly. Her progress was reviewed in court weekly. CP

28. Caseri chose to reside at Oxford House while completing this program. CP 28.

Following Caseri's completion of inpatient treatment, the State sought review of her sentence. CP 27. The State argued that Caseri should be given credit for time spent in inpatient treatment and committed to jail to serve the remaining 103 days of her sentence. RP 9. Defense counsel proposed instead that the court allow Caseri to serve the remainder of her sentence by completing intensive outpatient treatment under the supervision of the Substance Abuse Court, while residing at Oxford House. RP 11. The court responded that it would make the final decision as to whether Caseri received credit for outpatient treatment against her sentence when she completed treatment. RP 11.

On November 13, 2008, Caseri completed an intake with the Department of Corrections for supervision during her outpatient treatment. CP 31. Caseri completed intensive outpatient treatment on January 28, 2009. CP 41, 46.

The court again reviewed Caseri's sentence at a hearing on February 20, 2009. At that hearing, the State argued that the court did not have the authority to modify the sentence after it was imposed, thus it could only give Caseri credit for her time in inpatient treatment, and she should be required to serve the remainder of the sentence in jail. RP 14.

Defense counsel argued, however, that the court's intent at the time of sentencing was to give Caseri credit for her entire treatment program against the confinement portion of her sentence. Thus, she had fully served her sentence. RP 15; CP 33-37.

The court noted that, generally, when allowing treatment as an alternative to confinement, it considers the entire treatment program, including inpatient, outpatient, Oxford House, and after care. The court's goal is to create an environment which will motivate the defendant to complete every phase of treatment. RP 16. The court acknowledged that it was bound by what was said on the record at the time of sentencing, however, and it ordered transcription of those proceedings. RP 16-18.

At the next hearing on March 3, 2009, the State objected to Caseri receiving credit for time spent in outpatient treatment or in residence at Oxford House. The prosecutor argued that those programs did not constitute confinement, and the court did not contemplate partial confinement at the time it imposed the sentence. RP 21-22.

After reviewing the transcript from the plea and sentencing hearing, however, the court disagreed. It noted that it had said at sentencing that Caseri should be furloughed as soon as a bed date was available, and if the program was less than the sentence she would return to jail to complete the sentence. RP 22. The court explained that when it

made that decision, it contemplated successful completion of every phase of Caseri's treatment program. RP 23. As long as she was successfully completing the program—whether inpatient, outpatient, or Oxford House—she was serving her sentence. RP 24.

On October 21, 2009, the court entered an order clarifying its intent as to Caseri's sentence, stating that Caseri's 28 days of inpatient treatment and more than 105 days in outpatient treatment while residing at Oxford House satisfied the sentence in lieu of total confinement. CP 49-52. The State moved for discretionary review of this order, which the Court of Appeals Commissioner converted to a notice of appeal.

C. ARGUMENT

1. THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND MUST BE GIVEN DEFERENCE.

The State assigns error to the trial court's Finding of Fact 5, which states as follows:

At a hearing on November 4, 2008, the State asked the Court to order Defendant to complete the remainder of the sentence previously imposed. The State indicated that it had no objection to the Defendant being given credit for 30 days spent in the in-patient treatment program, but asked the Court to impose the unserved portion of the sentence, a total of 103 days. Defendant asked the court to clarify her sentence by giving her credit for 30 days in the Life Line in-patient treatment program, and giving her [credit] for 103 additional [days] spent in outpatient treatment and residence at an Oxford House residence. The State objected to the

proposed clarification of sentence. The Court indicated that it was considering the Defendant's request and scheduled further hearing.

CP 50. The State also challenges the court's Conclusion of Law 2, which provides as follows:

The Court has authority to clarify the Defendant's sentence of total confinement entered herein on August 28, 2008 (sic), by giving Defendant credit for time served in in-patient treatment and an outpatient treatment program at Oxford House in lieu of 133 days of total confinement as ordered in the Judgment and Sentence.

CP 51.

A trial court's findings of fact are entitled to great deference, and they are binding on appeal if supported by substantial evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004); State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). This is in recognition of the fact-finder's superior opportunity to assess credibility and resolve disputed facts. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Here, the State disputes the court's finding that it intended, at the time of the original sentencing, to credit Caseri for time spent in outpatient treatment in lieu of total confinement. Because that finding is supported by substantial evidence in the record, it is binding on appeal.

After sentencing, the State was under the impression that the sentence imposed by the court permitted Caseri to serve only 30 days of her sentence in inpatient treatment and required the rest to be served in

confinement. When it sought clarification of the sentence, the court explained that its normal practice when ordering treatment as an alternative to confinement is to include every phase of treatment. RP 16-17. After reading the transcript of the sentencing proceeding, the court confirmed that the sentence imposed in this case was in accordance with its general practice. By allowing Caseri to be furloughed from jail as soon as a bed date was available and returned to jail only if she finished her treatment program before her sentence expired, the court contemplated that every phase of Caseri's treatment would serve as an alternative to confinement. RP 22-24. The court's explanation of its general practice, together with its confirmation after reviewing the record that the sentence in this case conformed to that practice, supports the finding disputed by the State on appeal.

The State points out in its brief that at the sentencing hearing defense counsel requested only credit for time spent in inpatient treatment. Br. of App. at 8-9. While defense counsel made that recommendation, as permitted by the plea agreement, the court was not bound by that recommendation. See RCW 9.94A.431(2); State v. Harrison, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003) (The trial court is not bound by any recommendations contained in the plea agreement.); State v. Wakefield, 130 Wn.2d 464, 474, 925 P.2d 183 (1996) (sentencing court not bound by

recommendations in plea agreement). Here, the court rejected defense counsel's recommendation that Caseri be furloughed for the last 28 days of her sentence in order to enter inpatient treatment. Instead, the court ordered her furlough to begin as soon as a bed date was available and end when she had completed every phase of treatment, specifically stating that treatment was a higher priority than confinement. RP 6.

The finding of fact challenged by the State involves the court's intent when allowing Caseri to be furloughed for drug treatment. The trial court was in the unique position of knowing its general practice when ordering treatment as an alternative to confinement, and it was able to analyze the statements it made at sentencing in light of that general practice. This Court must defer to the trial court's supported finding of fact.

2. THE TRIAL COURT DID NOT MODIFY CASERI'S SENTENCE.

The State argues in its brief that the trial court had no authority to modify Caseri's sentence after a portion of it had been served, citing State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1980); and State v. Murray, 118 Wn. App. 518, 77 P.3d 1188 (2003). There is no question that the SRA does not authorize a trial court to change the original sentence. The court below did not modify Caseri's sentence, however. In its findings and

conclusions, the court made it abundantly clear that it was not modifying the sentence but rather clarifying it to reflect its intent at the time the sentence was imposed: it struck the State's use of the words modify, modification, and modified, substituting the words clarify, clarification, and clarified. CP 49-52.

Clarification is authorized under CrR 7.8(a), which permits clerical errors on the face of a Judgment and Sentence to be corrected. "A court has jurisdiction to amend a judgment to correct an erroneous sentence, where justice requires, under CrR 7.8." State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996). This rule provides, in relevant part:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

CrR 7.8(a).

To determine whether a clerical error exists under CrR 7.8, the appellate court uses the same test used to determine clerical error under CR 60(a), the civil rule governing amendment of judgments. State v. Rooth, 129 Wn. App. 761, 770, 121 P.3d 755 (2005). The court looks at "whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial[.]" Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If the

corrected judgment embodies the court's intentions, the error may be considered "clerical" because "the amended judgment merely corrects language that did not correctly convey the intention of the court[.]" Presidential, 129 Wn.2d at 326.

Such is the case here. The Judgment and Sentence erroneously indicated that Caseri was sentenced to 181 days confinement, with 33 days credit for time served and 148 days to be served in total confinement. CP 17. The court's intent, as indicated in the memorandum of disposition and explained by the court at the March 3, 2009, hearing, was that Caseri be furloughed from jail to serve her sentence in treatment—including inpatient, outpatient, and after care. CP 11; RP 23-24. The court's findings, conclusions and order clarified the Judgment and Sentence so that this intent was clearly expressed. CP 49-52.

The State contends that this case is almost identical to the facts in Murray, in which the Court of Appeals reversed an order modifying the defendant's sentence. Br. of App. at 12; Murray, 118 Wn. App. at 519. In that case, the defendant was sentenced to 365 days in jail. The sentencing court rejected her request to serve the sentence on home detention, but it allowed her to serve her time in a work release facility. After she had served five months of her sentence, the defendant filed a motion to serve the remainder of her sentence on home detention. The court granted the

motion over the State's objection. Murray, 118 Wn. App. at 520. The Court of Appeals reversed, holding that the lower court lacked authority to modify the sentence. Murray, 118 Wn. App. at 524.

Murray is distinguishable from this case in a significant respect. In Murray, the Court of Appeals noted that the court's order allowing home detention was a sentence modification, because the original sentence did not provide for a change in the form of partial confinement during the sentence. Murray, 118 Wn. App. at 522. Here, on the other hand, the original sentence clearly contemplated that Caseri be furloughed from jail for treatment. CP 11, 17; RP 6-7, 23-24. The court never modified that sentence. Rather, the court's later findings, conclusions and order merely clarified that by "treatment" the court intended to include all phases of Caseri's treatment program. CP 51; RP 24. The State's reliance on Murray is thus misplaced. The court did not exceed its authority in clarifying Caseri's sentence.

3. THE ALTERNATIVE TO CONFINEMENT ORDERED
IN THIS CASE WAS AUTHORIZED BY STATUTE.

The Sentencing Reform Act authorizes courts to impose alternatives to total confinement for sentences of one year or less. RCW 9.94A.680². In fact, when sentencing a nonviolent offender to one year or

² RCW 9.94A.680 provides as follows:

less, the statute requires the court to consider and give priority to available alternatives to total confinement and explain in writing if such alternatives are not employed. Id.

For offenders such as Caseri who are convicted of nonviolent and nonsex offenses, the statute permits the court to “authorize county jails to convert jail confinement to an available county supervised community option,” and require the offender to participate in drug treatment. RCW 9.94A.680(3); RCW 9.94A.607. The statute places no limitations on permissible county supervised community options, and the options differ

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 of community supervision or a time 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 credit time served by the offender before the sentencing in an available county supervised community option and may authorize county jails to convert jail confinement to an available county supervised community option, may authorize the time spent in the community option to be reduced by earned release credit consistent with local correctional facility standards, 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.

from county to county. 13B Wash. Prac. § 3703.50. “Options available in some counties include drug and alcohol treatment, educational programs, and counseling programs.” *Id.* For example, in Pierce County, Breaking the Cycle, a community-based drug treatment program, is a sentencing alternative to total confinement under RCW 9.94A.680(3). State v. Breshon, 115 Wn. App. 874, 876, 63 P.3d 871 (2003).

In this case, the court ordered as an alternative to total confinement that Caseri be furloughed from jail to complete drug treatment under the supervision of the Clark County District Court Substance Abuse Court Program. RP 6-7. The Substance Abuse Court Program is designed to treat clients in the community while holding them accountable for their past actions. CP 28. Under that program, once Caseri completed inpatient treatment, she was required to attend three outpatient substance abuse groups per week, submit to weekly random drug/alcohol screens, and attend several community support groups each week. Her progress was reviewed in court weekly. CP 28. Caseri was also supervised by the Department of Corrections while she participated in outpatient treatment. CP 31. The alternative to confinement imposed by the court satisfies the requirements of RCW 9.94A.680(3).

Nonetheless, the State argues that the trial court lacked the authority to give Caseri credit for drug treatment as an alternative to

confinement, relying on State v. Hale, 94 Wn. App. 46, 971 P.2d 88 (1999). Br. of App. at 14. Hale was a consolidated case involving two defendants. The first was sentenced to 30 months confinement, but the court delayed her jail report date for 21 days to allow her to complete drug treatment, then credited the treatment days toward her sentence of confinement. Hale, 94 Wn. App. at 49. The second defendant was sentenced to five months of confinement, 30 days of which were converted to 240 hours of community service. The court then allowed credit against the community service sentence for each day spent in drug treatment. Hale, 94 Wn. App. at 51.

This Court held that the sentencing courts did not have authority to credit drug treatment against the first defendant's confinement time or the second defendant's community service. Hale, 94 Wn. App. at 55. The Court noted that a sentencing court has only the discretion authorized by the SRA. Hale, 94 Wn. App. at 55. Because the SRA does not authorize drug treatment as an alternative to confinement where the sentence is greater than one year, nor does it authorize credit for drug treatment against community service, the sentences were erroneous. Hale, 94 Wn. App. at 55-56.

In this case, however, because Caseri's sentence was less than one year, the SRA specifically authorized her jail confinement to be converted

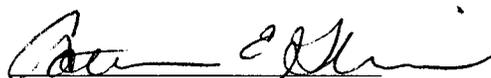
to drug treatment as an alternative to confinement. RCW 9.94A.680(3).
The court acted within its authority in ordering treatment in lieu of
confinement, and this Court should uphold the sentence.

D. CONCLUSION

The lower court's findings in support of its order clarifying the
sentence are supported by substantial evidence and thus entitled to
deference on appeal; the court did not modify the terms of the original
sentence but merely corrected the language to express the court's original
intent; and the order allowing Caseri's jail confinement to be converted to
participation in drug treatment was authorized by statute. This Court
should affirm the sentence and order of clarification.

DATED this 20th day of May, 2010.

Respectfully submitted,



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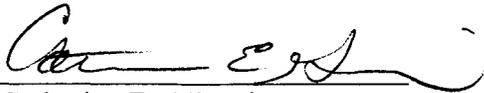
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Respondent in *State v. Shannon Jean Caseri*, Cause No. 40044-8-II directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
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