

No. 49029-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

WAYLON JAMES HUBBARD,

Respondent.

Appeal from the Superior Court of Washington for Pacific County

Appellant's Reply Brief

MARK McCLAIN
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By:



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I. **STATE'S RESPONSE**

A. **THE BACKDATED CERTIFICATE AND ORDER OF DISCHARGE WAS NOT PROPER.**

1. **Standard of Review.**

While the State asserts the trial court's backdated order is an improper *nunc pro tunc* order, reviewed for abuse of discretion, an interpretation of a statutory provision, as suggested by Hubbard, is a question of law reviewed *de novo*. *State v. Haddock*, 141 Wn.2d 103, 3 P.3d 733 (2000).

2. **Hubbard incorrectly asserts he is entitled to a backdated certificate of discharge as a matter of law.**

Hubbard asserts the effective date of the certificate of discharge is the date of completion of the conditions of sentence rather than the date certified by the trial court by suggesting it was the Legislature's intent to do so, and that *State v. Johnson*, 148 Wn.App. 33, 197 P.3d 1221 (2008), which rejected this position, was wrongly decided.

Hubbard's argument turns on the notion that *Johnson* failed to comply with the terms of his sentence, and that *Johnson* was under

DOC supervision.¹ Further, that the RCW 9.94A.637 is ambiguous.²

The fundamental objective of statutory construction is to ascertain and carry out the Legislature's intent. *Rozner v. Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). If the statute is plain and unambiguous, its meaning must be derived from the statute's words alone. *Rozner*, 116 Wn.2d at 347, 804 P.2d 24. In judicial interpretation of statutes, the first rule is the court should assume that the legislature means exactly what it says; plain words do not require construction. *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995). When construing an unambiguous statute courts are to look to the wording of the statute, not to outside sources such as legislative intent. *Multicare Med. Ctr. v. Department of Soc. & Health Servs.*, 114 Wn.2d 572, 582, 790 P.2d 124 (1990).

RCW 9.94A.637(1)(c) is clear on its face, does not require construction, and is not subject to different interpretations. Offenders subject to sentence conditions, who do not complete the sentence requirements while under supervision, are required to provide verification of completion of the sentence conditions in order to receive a certificate of discharge. Next, when the court receives both

¹ Brief of Respondent at 7

² Brief of Respondent at 8

notification from the clerk and adequate verification from the offender that the sentence requirements have been completed, the court shall discharge the offender and provide the offender with a certificate of discharge. The use of the word 'shall' creates an imperative obligation unless a different legislative intent can be discerned.” *Johnson*, 148 Wn.App. at 38-39, quoting *State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984). Hubbard asserts the difficulty of navigating the legal process creates ambiguity intended by the Legislature, thereby creating an “absurd or strained” result.³

Because the Legislature limited Department of Corrections (DOC) supervision to a number of cases, and required DOC to assess the risk of certain offenders placed on supervision, they understood that some offenders placed on supervision would not meet the risk criteria for continued supervision. See RCW 9.94A.704. As a result, the Legislature intended to create a process for obtaining a certificate of discharge. This is evident in the structure of RCW 9.94A.637, and in particular the section that relates to Hubbard.

Hubbard asserts that the court is required to backdate its order to the date he completed his conditions of sentence because to do

³ Brief of Respondent at 9, 10

otherwise penalizes Hubbard.⁴ This equitable argument fails to take into consideration the requirements that the trial court actually make a factual determination of completion. Such a determination is made upon petition. *State v. Donaghe*, 172 Wn.2d 253, 256 P.3d 1171 (2011); *State v. Rosenbaum*, 56 Wn.App. 407, 784 P.2d 166 (1989)(a retroactive entry is not proper to rectify the record as to acts which did not, but should have, occurred.).

B. VERBATIM REPORT OF PROCEEDINGS IS NOT NECESSARY AND NOT A BAR TO CHALLENGING A TRIAL COURT'S FINDINGS

Respondent asserts the State should be barred from challenging any findings of fact for want of a verbatim report of proceeding.⁵ The trial court resolved this matter entirely on the records produced by Hubbard without any additional testimony. Respondent fails to demonstrate why a verbatim report of proceedings would assist review in light of the entirety of the record below consisting of documents without testimony.⁶

No testimony was taken at any hearing in this matter and the trial

⁴ Brief of Respondent at 9.

⁵ Brief of Respondent at 15.

⁶ Pursuant to GR 14.1, see unpublished opinion of *Immelt v. Bonneville*, 182 Wn.App. 1005 (2014)(Respondents have not persuasively explained why a verbatim report of proceedings is necessary for this court to review this question)

court's decision was based entirely on the moving documents. As a result a verbatim report of the proceedings would merely provide argument of counsel, which is not evidence. *Standberg v. Northern Pac. Ry.Co.*, 59 Wn.2d 259, 265, 367 P.2d 137 (1961). While RAP 9.2 (b) provides for a verbatim report of proceedings, it suggests on those portion "necessary to present the issues raised on review" need be produced. Here, this matter was resolved without testimony, but instead documents presented here for review. Therefore, a verbatim report of proceedings would not aid review and should not be a bar to appellate review.

II. CONCLUSION

The trial court lacked the authority to issue a backdated certificate of discharge. Such an order is an inappropriate *nunc pro tunc* order. It was Hubbard's burden to demonstrate completion of the sentence requirements at the time he petitioned the court. Thus, the effective date is when the Court made the factual determination, rather than an asserted date of completion.

RESPECTFULLY submitted this 17th day of December, 2016.



MARK MCCLAIN, WSBA 30909
Pacific County Prosecutor
Attorney for Appellant

PACIFIC COUNTY PROSECUTOR

December 19, 2016 - 9:38 AM

Transmittal Letter

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
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STATE OF WASHINGTON,)
)
 Respondent,)
)
 WAYLON JAMES HUBBARD,)
)
 Appellant.)

No. 49029-3-II

CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
) ss.
 County of Pacific)

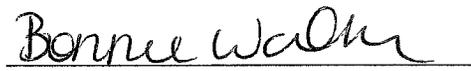
The undersigned being first duly sworn on oath deposes and states: That on the 19th day of December, 2016, affiant delivered by electronic mail a true and correct copy of Appellant's Reply Brief to:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Dated this 19th day of December, 2016, in South Bend, Washington.



Bonnie Walker
Paralegal

PACIFIC COUNTY PROSECUTOR

December 19, 2016 - 9:39 AM

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