NO. 49413-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ELLISON,

Appellant.

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

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in assigning appellant one point in his offender score for being on community placement.

Issue Pertaining to Assignment of Error

Under RCW 9A.76.110, a person must be "in custody" in order to be convicted of first-degree escape. RCW 9.94A.525(19) authorizes addition of an extra point to the offender score when a person is serving a term of community placement at the time of the offense. Appellant was convicted of first-degree escape for failing to comply with a county-run alternative to confinement program. Did the Court err in adding a point to appellant's offender score for being on community placement at the time of the escape?

B. STATEMENT OF THE CASE

The Pierce County prosecutor charged appellant Joseph Ellison with first-degree escape after he failed to check in for the Alternatives to Confinement (ATC) program on July 6 and 7, 2015. CP 1. Ellison had been convicted of a violation of the uniform controlled substances act on June 29 and had been sentenced to the ATC program. Ex. 2. He appeared for orientation on July 1, participated in an intake interview on July 2, and checked in as required on Friday July 3. RP 42-43. The rules of the program required him to check in between 8:30 and noon or call to explain

his absence every weekday. RP 29; Ex. 1. He was warned that, if he failed to comply with the check-in requirements, he could be charged with escape. Ex. 1.

According to the testimony at trial, ATC is a program operated jointly by the Pierce County Jail and the Pierce County Sheriff's Office. RP 40. During the course of the program, the offender is housed in the community instead of the jail and is supervised by a deputy. RP 40. The program is for felony offenders only. RP 40.

Ellison testified he has severe memory problems. RP 54. He could not recall that the program requirements were explained to him and was unaware of any requirement to check in. RP 55-57.

The jury found Ellison guilty as charged, and the court imposed a residential drug offender sentencing alternative under RCW 9.94A.664. CP 54, 67-68. He was sentenced to serve 24 months on community custody, during which time he would participate in a minimum of three and a maximum of six months of residential drug treatment. CP 67-68. His offender score was calculated as four, based on three prior felonies and an additional point because he was believed to have been serving community placement at the time of his escape from ATC. CP 62-63.

C. ARGUMENT

THE COURT ERRED IN ADDING A POINT TO ELLISON'S OFFENDER SCORE FOR BEING ON COMMUNITY PLACEMENT AT THE TIME OF THE OFFENSE.

In calculating an offender score, used to determine an offender's standard sentencing range, prior felonies generally count as one point. RCW 9.94A.505; RCW 9.94A.530; RCW 9.94A.525(15). An additional point is added if the person was serving a term of community custody, community placement, or post-release supervision at the time of the offense. RCW 9.94A.525(19). Ellison's offender score is incorrect because he was not serving community placement at the time of his escape. On the contrary, he was "in custody" in a community program that is a substitute for total confinement. State v. Breshon, 115 Wn. App. 874, 880-81, 63 P.3d 871 (2003) (discussing "Breaking the Cycle," the precursor program to ATC).[1] He cannot be both convicted of first-degree escape based on his "in custody" status and have a point added to his offender score for being on community placement.

[1] Both Breaking the Cycle and ATC are alternatives to confinement programs under the aegis of RCW 9.94A.680(3). Breshon, 115 Wn. App. at 876; Ex. 2 at 6. According to the testimony in State v. Varnell, 176 Wn. App. 1016, 2013 WL 4774138 at *1 n. 3 (2013), an unpublished decision, Breaking the Cycle was later renamed Alternative to Confinement. Under GR 14.1, the unpublished decision in Varnell has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

a. The ATC Program, from which Ellison Was Convicted of Escaping, Qualifies as Being in Custody, Not on Community Placement.

Ellison was convicted of first-degree escape for failing to report to the ATC program. This alternative to confinement under RCW 9.94A.680(3) qualifies as custody for purposes of the first-degree escape statute. It does not, however, qualify as community placement under the scoring provision adding a point for being on community custody at the time of the offense.

Statutory interpretation is a question of law reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A court's primary goal in construing the meaning of a statute is to determine and give effect to the Legislature's intent and purpose. State v. Sullivan, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). The meaning of a clear and unambiguous statute is derived from its plain language alone. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Courts assume the Legislature means exactly what it says. State v. Delgado, 148 Wn.2d 723, 727, 63 P. 3d 792 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

When the Legislature chooses different statutory terms, courts recognize that a different meaning was intended by each term. State v. Roggenkamp, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005). An

unambiguous statute is not subject to construction, and the court may not add language to a clear statute even if it believes the Legislature intended something else but failed to express it adequately. Vita Food Products, Inc. v. State, 91 Wn.2d 132, 587 P.2d 535 (1978). Provisions of a statute must be read in relation to other statutory provisions in order to "'achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes.'" State v. W.S., 176 Wn. App. 231, 237, 309 P.3d 589 (2013) (quoting State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (2000)).

First-degree escape is committed when a person escapes from custody or a detention facility pursuant to a felony conviction. RCW 9A.76.110.[2] With exceptions not relevant here, custody is defined as "restraint pursuant to a lawful arrest or an order of a court, or any period of service on a work crew." RCW 9A.76.010. The ATC program qualifies as being in custody for purposes of first-degree escape. Breshon, 115 Wn. App. at 880-81.

ATC does not, however, meet the statutory requirements for community placement under RCW 9.94A.525(19). Moreover, comparison of these two statutory provisions shows a person cannot be both in custody

[2] RCW 9A.76.110 provides in relevant part, "(1) A person is guilty of escape in the first degree if he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense."

and on community placement at the same time. The law distinguishes "in custody" status from community custody or community placement status. The ATC program is a substitute for full "custody;" the mere fact that it occurs in the community does not reduce it to mere community placement for purposes of the offender score.

RCW 9.94A.525(19) adds one point to the offender score when a person is "under community custody" at the time of the offense. Community custody, as used in this provision, is defined to include community placement or post-release supervision, as defined in chapter 9.94B RCW. RCW 9.94A.525(19). Chapter 9.94B RCW defines community placement as the "period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release." RCW 9.94B.020(1). Post-release supervision is defined as "that portion of an offender's community placement that is not community custody." RCW 9.94B.020(3). Thus, post-release supervision and community custody are both subsets of community placement.

The ATC program is not community placement. First, community placement requires that the person be "subject to the conditions of community custody or post-release supervision." RCW 9.94B.020(1).

Community custody occurs only when a person is sentenced to follow court-imposed conditions under the supervision of the Department of Corrections. RCW 9.94A.704 ("Every person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department."). The ATC program is not under the supervision of the Department of Corrections. It is a program jointly operated by the Pierce County Jail and the Pierce County Sheriff's Office. RP 40; RCW 9.94A.680(3). Therefore, persons in the ATC program are not subject to "conditions of community custody."

The second requirement is that community placement begins either "upon completion of the term of confinement (post-release supervision)" or when the person is "transferred to community custody in lieu of earned release." RCW 9.94B.020. ATC does not occur upon completion of a term of confinement; it is a substitute for that term of confinement. RCW 9.94A.680(3) (authorizing jails to "convert jail confinement to an available county supervised community option"); Breshon, 115 Wn. App. at 880-81 ("[T]he BTC program was a substitute for total jail confinement."). Nor does it involve transfer to community custody in lieu of earned early release because community custody would involve supervision by the Department of Corrections. RCW 9.94A.704.

Under the plain language of the relevant statutes, the ATC program is "custody" not "community placement." Therefore, the court erred in adding a point to Ellison's offender score for being on community placement at the time of his failure to report to ATC.

b. The Legislature Did Not Intend Dual Punishment By Conviction for First-Degree Escape and an Additional Point for Being on Community Placement.

Even if the statute could be construed as ambiguous, this Court should find that ATC does not qualify as community placement for three main reasons. First, by establishing the separate crime of escape from community custody, the legislature showed its intent not to charge first-degree escape and also add a point for being on community custody for the same act. Second, the statutes should be construed to avoid the unlikely result that escapes by more serious offenders would have a higher offender score and be punished more harshly. Finally, under the rule of lenity, sentencing statutes must be strictly construed in favor of the accused.

A statute is ambiguous if it is susceptible to two or more reasonable interpretations. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998). If a statute is ambiguous, courts look to other sources of legislative intent to discern the statute's meaning. Id. (citing State v. Rhodes, 58 Wn. App. 913, 915-16, 795 P.2d 724 (1990)).

Escape in the first degree was established with the revision of the criminal code in 1975. Laws of 1975, ch. 260 §9A.76.110. More than 10 years later, the Legislature created the new crime of escape from community custody. Laws of 1988, ch. 153, § 6; RCW 72.09.310. That same year, the Legislature also added the scoring provision adding one point for offenders on community placement. Laws of 1988, ch. 153, § 12. This later became the community custody scoring provision at issue in this case, RCW 9.94A.525(19).

Escape from community custody is a separate crime, lesser in degree than first-degree escape. RCW 72.09.310[3] (escape from community custody is a class C felony); RCW 9A.76.110 (first-degree escape is a class B felony). A specific statute prevails over a general statute when the statutes conflict. State v. Baker, 194 Wn. App. 678, 683, 378 P.3d 243 (2016) (citing O.S.T. v. BlueShield, 181 Wn.2d 691, 701, 335 P.3d 416 (2014)). Therefore, the specific escape from community custody statute applies, to the exclusion of first-degree escape, when the person is on community

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[3] RCW 72.09.310 provides, in relevant part:

> An inmate in community custody who willfully discontinues making himself or herself available to the department for supervision by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony.

The statute is limited to inmates in community custody under the supervision of the Department of Corrections. RCW 72.09.310. It therefore cannot be applied to someone in a county supervised alternative to confinement under RCW 9.94A.680(3).

custody at the time of the escape. This framework indicates that the legislature intended that a person is either on community custody (and chargeable with escape from community custody) or "in custody" (and chargeable with first-degree escape), but not both at the same time.

It also indicates that escape from community custody, a class C felony punishable by up to five years in prison, is a less serious offense in the eyes of the legislature, than first-degree escape, a class B felony punishable by up to 10 years in prison. RCW 9A.20.020; RCW 9A.76.110; RCW 72.09.310. Thus, the legislature also likely did not intend the unlikely and absurd results that would occur if a person could be both "in custody" for purposes of first-degree escape and on community placement for purposes of adding a point to the offender score at the same time. Statutes are interpreted to avoid "an unlikely, absurd, or strained result." W.S., 176 Wn. App. at 236 (citing State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010)). Adding a point to the offender score for being on community placement at the time of a first-degree escape leads to the unlikely and absurd result of increasing the punishment for escape for less serious offenses.

Anyone convicted of any felony, who escapes, may be convicted of first-degree escape. RCW 9.76.110. That includes those serving decades of prison time for serious violent felonies. By contrast, ATC, as a county-supervised alternative, is only available to those convicted of non-violent,

non-sex offenses with sentences less than one year. RCW 9.94A.680. Assuming the same criminal history, someone like Ellison, who failed to check in to an alternative program for a non-violent drug offense would have one more point in his offender score than a violent felon who escapes from a maximum security prison. Thus, the standard sentencing range would be longer for the less serious offender. RCW 9.94A.510. The legislature could not have intended to sentence more harshly escapes committed by less serious offenders.

The legislative history and unlikely results show that the legislature did not intend that a person convicted of first-degree escape would also have a point added to the offender score for committing the offense while on community placement. Even if this Court does not find the contrary legislative intent to be clear, the rule of lenity requires the ambiguity be resolved in favor of the accused. Van Woerden, 93 Wn. App. at 116 (citing In re Personal Restraint Petition of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994)). Under the rule of lenity, the statute should be construed against adding a point to Ellison's offender score when he is convicted of first-degree escape from ATC, an alternative to full custody.

Ellison was not on community custody or community placement when he escaped, and his offender score should not so reflect. His offender score should be corrected to reflect only his three prior felonies.

D. CONCLUSION

For the foregoing reasons, Ellison's offender score should be corrected and the community placement point removed.

DATED this 21st day of February, 2017.

Respectfully submitted,

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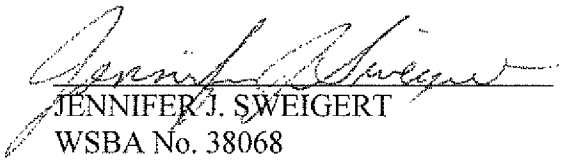

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