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No. 52874-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM McGREW,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON  
FOR THE COUNTY OF JEFFERSON

---

BRIEF OF APPELLANT

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## A. INTRODUCTION

A jury convicted William McGrew of trafficking in stolen property for attempting to sell a brooch he received from an acquaintance at an antique shop.

The court sentenced Mr. McGrew to a standard range sentence of five months, determining he was eligible to serve his sentence on electronic home monitoring in lieu of incarceration, but only if he could afford it. If Mr. McGrew was unable to pay for the cost of electronic home monitoring, he would be required to serve his sentence in jail. The court also imposed a \$200 court filing fee despite finding Mr. McGrew was indigent, and a \$100 DNA fee without inquiring into whether Mr. McGrew had already paid this fee. The court stayed imposition of Mr. McGrew's sentence pending appeal.

Mr. McGrew challenges the court's requirement that he must pay for electronic home monitoring in order to benefit from this alternative to confinement, as well as the court's imposition of the non-mandatory fees.

## B. ASSIGNMENTS OF ERROR

1. The Sentencing Reform Act (SRA) does not allow a trial court to condition a sentence of partial confinement on a person's ability to pay for it.

2. The trial court's conditioning of Mr. McGrew's electronic home monitoring (EHM) sentence on his ability to pay violates equal protection.

3. The trial court erred in imposing the \$200 filing fee and \$100 DNA fee on Mr. McGrew, who is indigent and has previously been convicted of a felony.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The SRA allows a defendant to serve his jail sentence on EHM when certain statutory criteria are met. None of these criteria require the defendant pay for EHM as a condition of partial confinement. Did the court err by conditioning Mr. McGrew's sentence on his ability to pay, a factor not provided for by the SRA?

2. There can be no equal justice where the kind of punishment a person receives depends on their wealth. Const. art. I, §12; U.S. Const. amend. XIV. The court determined that Mr. McGrew was eligible to serve his five-month sentence on EHM, rather than in jail, but only if he could pay for it. Does it violate equal protection to allow a defendant to serve his sentence on EHM, rather than in jail, only if he can afford it?

3. It is categorically impermissible to impose any discretionary costs on indigent defendants. This includes the previously mandatory \$200 filing fee. It is also improper to impose the \$100 DNA collection fee if the defendant's DNA has been collected as a result of a prior conviction. Did

the court err in imposing the \$200 criminal filing fee on Mr. McGrew, who is indigent, as well as the \$100 DNA collection fee where Mr. McGrew had already been convicted of a previous felony?

D. STATEMENT OF THE CASE

William McGrew was given an antique brooch by an acquaintance who told him he had gotten it at an estate sale. RP 249. Mr. McGrew took it to a local antique store to sell it. RP 252. Unbeknownst to Mr. McGrew, the brooch had been reported stolen, and the antique store had been notified about it. RP 226. A store employee called police when Mr. McGrew brought it in to sell. RP 228. As soon as police arrived and started to question him about it, Mr. McGrew realized that the brooch was likely stolen. RP 254.

Mr. McGrew was arrested and charged with trafficking in stolen property in the first degree and possession of stolen property in the second degree for trying to sell the brooch. CP 2. Mr. McGrew proceeded to jury trial where he was convicted only of the lesser offense of trafficking in stolen property in the second degree. CP 61-64.

With an offender score of one, Mr. McGrew's standard range sentence was three to eight months. CP 66. At sentencing, Mr. McGrew showed proof his employment at Burgers Landing and asked to serve his sentence on EHM. RP 406; Supp. CP\_\_\_ (Sub. no. 38). The victim of the

theft got her brooch back and did not object to Mr. McGrew serving his sentence on EHM. RP 408. The court imposed a middle range sentence of five months, and allowed Mr. McGrew to serve his sentence on EHM, noting Mr. McGrew's employment, and the fact that "jobs are not easy to get around here." RP 406; CP 67.

However, Mr. McGrew could only benefit from this alternative to incarceration if he could pay for it. RP 408. The court gave Mr. McGrew two days to arrange for payment and set up, or he was required to report to jail for service of his sentence. RP 408; CP 67. Mr. McGrew then moved to stay imposition of his sentence pending appeal, which the court granted. RP 411-12.

E. ARGUMENT

**1. The court's sentence that conditions Mr. McGrew's alternative to incarceration on his ability to pay violates the Sentencing Reform Act and Equal Protection.**

a. The SRA does not authorize a trial court to condition EHM on a defendant's ability to pay.

A trial court's sentence must be authorized by the SRA, which does not allow a trial court to sentence a person to partial confinement only when he can pay for it.

A sentencing court has discretion in sentencing only where the SRA authorizes it. *State v. Murray*, 118 Wn. App. 518, 522, 77 P.3d 1188

(2003) (*citing State v. Shove*, 113 Wn.2d 83, 89, n. 3, 776 P.2d 132 (1989)). Courts do not generally “imply authority where it is not necessary to carry out powers expressly granted.” *State v. DeBello*, 92 Wn. App. 723, 728, 964 P.2d 1192 (1998). The Legislature did, however, intend sentencing courts to exercise some discretion when imposing community supervision sentences. *State v. Hale*, 94 Wn. App. 46, 55, 971 P.2d 88 (1999). Such discretion may include specifying the location of confinement for sentences of less than 12 months and imposing drug treatment as part of an exceptional community supervision sentence. *Id.*

It is reversible error for a trial court to exceed its sentencing authority under the SRA. *Hale*, 94 Wn. App. at 53. Whether a trial court has exceeded its statutory authority is an issue of law that courts review independently. *Id.* at 54.

Partial confinement is an alternative to total confinement for persons sentenced to one year or less. RCW 9.94A.680. “Partial confinement” may include work release, home detention, work crew, electronic monitoring, or any combination thereof. RCW 9.94A.030(36). By contrast, “total confinement” is confinement for 24 hours a day within a state institution imposed for sentences longer than one year. RCW 9.94A.030(52).

RCW 9.94A.734(4)(a)-(c) sets forth the conditions for home detention, which may require the offender to obtain or maintain employment, attend school, or parent full-time, abide by the rules of the home detention program and comply with court-ordered legal financial obligations.

Home detention is available as an alternative to confinement for only a narrow group of criminal defendants convicted of certain non-violent offenses. RCW 9.94A.734(1)-(3). The SRA limits a court from sentencing a defendant to home detention if the offender has previously and knowingly violated the terms of a home detention program and the previous violation is not a technical, minor, or nonsubstantive violation. RCW 9.94A.734(6)(a)(i) and (ii). A court *may* deny home detention when such a violation was merely technical, minor, or nonsubstantive. RCW 9.94A.734(6)(b).

The SRA also provides that the “home detention program must be administered by a monitoring agency that meets the conditions described in RCW 9.94A.736.” RCW 9.94A.734(7). Nowhere does RCW 9.94A.736 or RCW 9.94A.734 require the defendant to pay the cost of home detention in order to benefit from this alternative to confinement.

The court determined that Mr. McGrew's standard range sentence of five months could be served through partial confinement on electronic monitoring. CP 67 (citing RCW 9.94A.030).

However, the court conditioned this sentence on Mr. McGrew's ability to pay for it:

THE COURT: And the only reason I'm doing— normally, you'd just be taken into custody today, but typically it takes at least a few days to do the logistics of actually getting hooked up for EHM if you're able to set that up and able to afford it and able to coordinate it. So either jail or EHM by Friday, the 7th, at 4:00.

RP 407; CP 67.

The SRA sets out a number of requirements for eligibility to serve a sentence through partial confinement on EHM, none of which include the ability to pay for the service. Indeed, conditioning partial confinement on one's ability to pay would be contrary to the SRA's requirement of equal application of the guidelines to every offender in the State, and the SRA's prohibition of "discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340. Moreover, it would be contrary to the stated purpose of the SRA, which is to ensure proportionality in sentencing, and to provide just punishment commensurate with similarly situated defendants. RCW 9.94A.010(1)-(3).

Absent statutory authorization, the court exceeded its authority by sentencing Mr. McGrew to EHM conditioned on his ability to pay for it.

*C.f. Murray*, 118 Wn. App. at 524 (court lacked authority to change form of partial confinement where the SRA lacked express provision permitting it). Mr. McGrew's sentence should be reversed for the court to resentence Mr. McGrew to EHM absent the unauthorized condition that he must pay in order to benefit from this form of partial confinement.

b. Requiring Mr. McGrew to go to jail unless he can pay for EHM violates equal protection, which prohibits poverty from being used as a sentencing factor.

The trial court's sentence allowing Mr. McGrew to serve his five-month term of imprisonment on electronic home monitoring only if he can pay for it impermissibly imposes punishment based on his ability to pay, in violation of equal protection.

Wealth and poverty must have no place in sentencing decisions. *United States v. Flowers*, 946 F. Supp. 2d 1295, 1300 (M.D. Ala. 2013). Any sentence that subjects a criminal defendant "to imprisonment solely because of ... indigency" is constitutionally infirm and cannot stand. *Tate v. Short*, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971).

Equal protection and due process of law work to ensure the central aim of the criminal justice system, which is to provide "equal justice for poor and rich, weak and powerful alike." *Griffin v. Illinois*, 351 U.S. 12, 16-17, 76 S. Ct. 585, 100 L. Ed. 891 (1956). This means that persons similarly situated with respect to the legitimate purpose of the law receive

like treatment.” *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004); *Griffin*, 351 U.S. at 17 (citing *Chambers v. Florida*, 309 U.S. 227, 241, 60 S. Ct. 472, 84 L. Ed. 716 (1940)) (all people charged with a crime must be equal “before the bar of justice in every American court”).

Equal protection analysis generally applies the rational basis test, requiring only that the policy be rationally related to a legitimate state purpose. *Petition of Fogle*, 128 Wn.2d 56, 62, 904 P.2d 722 (1995). However, denial of a liberty interest due to a classification based on wealth is subject to intermediate scrutiny. *Matter of Mota*, 114 Wn.2d 465, 474, 788 P.2d 538 (1990), *superseded by statute*, *Matter of Williams*, 121 Wn.2d 655, 662, 853 P.2d 444 (1993); *State v. Schaaf*, 109 Wn.2d 1, 17-18, 743 P.2d 240 (1987)). Under intermediate scrutiny, the state must prove the law furthers a substantial state interest. *Mota*, 114 Wn.2d at 474.

The United States Supreme Court interprets the Equal Protection Clause to prohibit courts from incarcerating defendants based on their ability to pay. *Tate*, 401 U.S. at 398-99; *see also Williams v. Illinois*, 399 U.S. 235, 242, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) (the statutory ceiling placed on imprisonment for any substantive offense must be the same for all defendants irrespective of their economic status); *Bearden v. Georgia*, 461 U.S. 660, 667-68, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983) (“if the State determines a fine or restitution to be the appropriate and

adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it”).

In *Flowers*, the defendant was eligible to serve her sentence on home monitoring, but this option was only available if she could afford to pay for it herself. 946 F. Supp. 2d at 1298. Because the defendant could not afford this sentencing option, the government refused to recommend it at sentencing, and the court did not impose it. *Id.* at 1299.

Addressing this matter of first impression, the *Flowers* court condemned the practice of allowing only those defendants who “could cough up the money for monitored home confinement” to avoid prison. *Flowers*, 946 F. Supp. 2d at 1300. The *Flowers* court determined that the “the Constitution’s guarantee of equal protection is inhospitable to the Probation Department’s policy of making monitored home confinement available to only those who can pay for it.” *Id.* at 1302.

In Washington, the Supreme Court applied equal protection analysis to ensure all those who served time on electronic home detention received jail time credit equally. *State v. Anderson*, 132 Wn.2d 203, 213, 937 P.2d 581 (1997). In *Anderson*, the Court ruled that “since the Legislature has chosen to grant jail time credit to those who serve pretrial electronic home detention ... equal protection requires the same credit to be granted to those who serve electronic home detention after their

conviction and pending their appeal.” *Id.* *Anderson* noted that where the “condition of each group—being subject to electronic home detention” was identical, and “the reasons for placing a defendant from either group under electronic detention are indistinguishable,” they must be treated equally. *Id.* (emphasis in original).

As in *Anderson*, Mr. McGrew’s eligibility for EHM means that he shares the “condition” of any other person ordered to serve his sentence on home confinement, and the “reason” the court placed him on it is likewise indistinguishable from any other defendant. *Anderson*, 132 Wn.2d at 213. The only difference between Mr. McGrew and another person deemed eligible to serve his sentence on EHM is his ability to pay for it.

As in *Flowers*, this raises “serious constitutional concerns” because the court’s sentence requires Mr. McGrew to pay for the cost of EHM or else serve his sentence in jail, which amounts to sending him to prison because he is poor. *Flowers*, 946 F. Supp. 2d at 1301. This distinction based on poverty does not survive rational basis review, much less intermediate scrutiny, because there can be no substantial state interest in allowing only those with financial means to avoid incarceration. *Mota*, 114 Wn.2d at 474.

In *Flowers* the court noted the particular unfairness of the government making a plea offer with the option of home detention, which

shows the government did not believe incarceration was necessary, but then refused to recommend home confinement at sentencing because the defendant could not pay for it. This result is even more stark in Mr. McGrew's case, where the court explicitly determined jail time was not necessary by allowing EHM, but made this alternative to confinement available only if Mr. McGrew could afford it, which impermissibly made his poverty a sentencing factor. 946 F. Supp. 2d at 1301-02.

The court's sentence that imprisons Mr. McGrew unless he is able to pay for partial confinement violates equal protection, providing a separate ground for reversal and remand for the court to sentence Mr. McGrew to serve his sentence on EHM regardless of his ability to pay.

**2. The trial court's imposition of a \$200 filing fee is not permitted because Mr. McGrew is indigent and the \$100 DNA fee has already been collected.**

RCW 10.01.160(3) prohibits courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. RCW 36.18.020(2)(h) also prohibits a court from charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. The trial court determined that Mr. McGrew was indigent. CP 89. But still the trial court imposed the \$200 filing fee. CP 69.

The DNA Collection Fee may only be imposed if the state has not previously collected DNA as a result of a prior offense. RCW 43.43.7541.

Here, Mr. McGrew had one prior felony offense. CP 66. The trial court imposed the \$100 DNA fee without inquiring whether Mr. McGrew's DNA had already been collected. CP 69.

On remand, this court should strike the criminal filing fee and DNA fee.

F. CONCLUSION

Mr. McGrew is entitled to reversal and remand for the court to sentence him to five months of EHM not conditioned on his ability to pay for it as required by the SRA and equal protection clauses of the state and federal constitutions. On remand, the filing fee and DNA fee should be stricken.

DATED this 2nd day of July, 2019.

Respectfully submitted,

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DIVISION TWO**

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STATE OF WASHINGTON,	)	
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v.	)	NO. 52874-6-II
	)	
WILLIAM MCGREW II,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

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