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Court of Appeals
Division II
State of Washington
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No. 52874-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM McGREW,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The court sentenced Mr. McGrew to a mid-range, five month sentence for the crime of attempting to sell a stolen brooch to an antique store. The court allowed this sentence to be served on electronic home monitoring (EHM), rather than in jail, but only if Mr. McGrew could afford it. The court's conditioning of Mr. McGrew's sentence on his ability to pay violates the Sentencing Reform Act (SRA) and the Equal Protection Clause, requiring reversal for remand and sentencing on EHM regardless of his ability to pay.

B. ARGUMENT IN REPLY

1. The Sentencing Reform Act does not authorize the court to condition Mr. McGrew's sentence on his ability to pay.

The SRA does not authorize a sentencing court to determine a person's sentence based on their ability to pay.

The State argues the court's sentence is dictated by a private monitoring agency's fees for EHM. BOR at 4. This argument is not supported by the SRA, which specifically limits the role of private monitoring agencies, and subsumes their authority to the court and public agencies charged with establishing the EHM monitoring conditions.

RCW 9.94A.736(1) and (2) specifically distinguish between the "supervising agency" and "monitoring agency" for EHM. Under RCW

9.94A.736(1), the “supervising agency” establishes the terms and conditions of electronic monitoring for each individual in their jurisdiction. The “supervising agency” is a “public entity” that authorizes, approves, administers or manages the home detention program. RCW 9.94A.736(8)(b). This public agency must communicate the terms and conditions to the “the monitoring agency” and establish protocols for when and how the monitoring agency must notify the supervising agency when a violation of the terms and conditions occurs. RCW 9.94A.736(1). A monitoring agency must comply with the terms and conditions as established by the supervising agency. *Id.*

A “monitoring agency” is “an entity, private or public, which electronically monitors an individual, pursuant to an electronic monitoring or home detention program, including the department of corrections, a sheriff’s office, a police department, a local detention facility, or a private entity.” RCW 9.94A.736(8)(a). It is the “supervising agency” that informs the “monitoring agency” of the EHM requirements, not the other way around. Indeed, RCW 9.94A.736(2) imposes strict requirements and limitations on the monitoring agency, including requiring the monitoring agency to provide notification to the court and other relevant parties when a monitored individual is unaccounted for, goes beyond a designated geographic location, or violates a court-ordered condition. RCW

9.94A.736(3) places additional requirements on the administration of the monitoring agency's program and supervision. Nowhere does the SRA grant the monitoring agency authority to bind the court's ability to sentence a person to EHM, or deny a person access to the program based on their inability to pay. RCW 9.94A.736(2)(a)-(d); (3).

There is simply no authority to support the State's argument that the sentencing court may only order EHM when the defendant meets the requirements of a private monitoring agency. BOR at 4. The fact that a private entity may charge an unknown fee for its service is irrelevant to the question before this Court, which is whether a sentencing court can condition a person's EHM sentence on their ability to pay where this is not a criterion for eligibility under the SRA. RCW 9.94A.734.

Even though the SRA nowhere states that a person's ability to pay is required for participation in the EHM program, the State argues the "rules" of EHM as provided in RCW 9.94A.734(4)(b) could include the ability to pay for the program. BOR at 4. Neither the statute nor this record supports the State's argument. First, it is the public "supervising agency," not the private "monitoring agency" that will establish the conditions of Mr. McGrew's participation. RCW 9.94A.736(1). Second, RCW 9.94A.734(4)(a)-(c) provides the minimum criteria for "participation" in the program, not preconditions governing the court's ability to sentence a

person to EHM. For example, the State complained at sentencing that it was unable to confirm Mr. McGrew's employment status, which is a specific requirement for participation in EHM under RCW 9.94A.734(4)(a). RP 406. But the court did not condition Mr. McGrew's participation in the program on proof of his employment or any of the other "rules" of the program—only on his ability to pay. CP 67; RP 407.

The court's requirement that Mr. McGrew pay for EHM or else serve his sentence in jail is a condition that is not provided for by statute. The court exceeded its statutory sentencing authority by conditioning Mr. McGrew's EHM on a factor not provided for by the SRA.

2. Conditioning Mr. McGrew's sentence on his ability to pay violates equal protection.

The State confuses the fact that the court imposed a standard range sentence with the unconstitutionality of this sentence. BOR at 5. The trial court's decision to grant Mr. McGrew EHM on the condition that he pay for the program in the next few days or else serve his sentence in jail violates the Equal Protection Clause because it imposes incarceration based on his poverty. *See e.g. Tate v. Short*, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971); U.S. Const. amend. XIV.

All persons who are eligible for EHM under the criteria established by the SRA should be entitled to this sentence, whether they are rich or

poor. The court erred by using Mr. McGrew's financial status to drive its sentencing decision. *United States v. Flowers*, 946 F. Supp. 2d 1295, 1300 (M.D. Ala. 2013). The State fails to distinguish Mr. McGrew's case from the critical failing at issue in *Flowers*, which was that the court's sentencing decision was impermissibly based on the wealth or poverty of the defendant. *Id.*

The State argues, without citation to the record, that Mr. McGrew "specifically requested EHM" with "full knowledge that payment was required." BOR at 5. Even if Mr. McGrew knew that EHM required payment, the court's conditioning of his sentence on his ability to pay still violates equal protection. The record does not reflect that Mr. McGrew had "full knowledge" that his request for EHM required payment—only that he requested this sentence to keep his job and be with his child. RP 405; CP 95.

Because the court's sentence is based on Mr. McGrew's wealth or poverty, it violates equal protection. *Flowers*, 946 F. Supp. 2d at 1302. The answer is not, as suggested by the State, that Mr. McGrew and other indigent defendants be denied this statutory alternative to total confinement, because this too would violate equal protection. BOR at 5. To the extent that financial constraints limit the availability of a statutory sentencing option, "the burden of sentencing inequalities resulting from a

dearth of resources must be borne by the government,” not indigent defendants. *Id.* at 1302. This Court should reverse and remand for the court to resentence Mr. McGrew to EHM, regardless of his ability to pay.

3. Mr. McGrew did not invite the court’s error of imposing an unlawful sentence that incarcerates him because he is poor.

Mr. McGrew’s request for a sentence for which he was statutorily eligible did not invite the court’s error of conditioning this sentence on his ability to pay for it. BOR at 5.

Mr. McGrew was statutorily eligible for EHM due to his lack of criminal history and conviction for a minor offense. *See* RCW 9.94 9.94A.734; CP 66. He asked to serve his sentence on EHM in order to keep his part-time fast food job and care for his child. RP 405; CP 95. Mr. McGrew did not ask the court to condition his sentence on his ability to pay for it, or deny him this sentence if he could not pay for it, as ordered by the court. RP 405-07; CP 67. Only after the court ordered Mr. McGrew to serve his sentence on EHM on the condition that he fund it, did Mr. McGrew’s counsel restate that Mr. McGrew would be required to pay an EHM fee starting the next month. RP 408. In no way can this be construed as invited error as argued by the State on appeal. BOR at 5-7.

Mr. McGrew requested a sentence for which he was statutorily eligible. He did not invite the court’s error of conditioning this sentence on

his ability to pay for it or else report to jail, in violation of the SRA and the U.S. Constitution.

C. CONCLUSION

Electronic home monitoring should be available to those who are statutorily eligible, whether they are rich or poor. The court's requirement that Mr. McGrew have the means to pay for EHM or else report to jail sentences Mr. McGrew based on his poverty, in violation of the SRA and the Constitution. This Court should reverse and remand for the court to resentence Mr. McGrew to EHM regardless of his ability to pay.

DATED this 3rd day of January, 2020.

Respectfully submitted,

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