

FILED
Court of Appeals
Division II
State of Washington
11/1/2019 11:11 AM

NO. 52874-6-II

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

STATE OF WASHINGTON

Respondent,

vs.

WILLIAM MCGREW

Appellant.

BRIEF OF RESPONDENT

JULIAN E. ST. MARIE
Jefferson County Prosecuting Attorney
Attorney for Respondent
P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180

Table of Contents

TABLE OF AUTHORITIES	iv
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	2
1. Where the trial court relies upon private monitoring agencies to provide EHM as authorized by statute, the trial court does not violate Guarantees of Equal Protection by offering the option of electronic home monitoring where the private monitoring agency requires a fee for its services..	2
2. Appellee concedes that the Judgment and Sentence should not include the \$200 filing fee as Appellant is indigent, or the \$100 DNA fee as Appellant has previously been convicted of a felony offense.	2
C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
1. The trial court did not err by allowing Appellant to serve his jail sentence on EHM where Appellant specifically requested the opportunity to serve his sentence on EHM with full knowledge that the rules of the private EHM monitoring agency include payment for services.....	2
2. The Washington State Legislature determines the standard range sentence; poverty is not used as a sentencing factor in violation of Equal Protection Guarantees where sentencing is within the standard range.....	3
3. Appellant concedes that the Judgement and Sentence in this case should be amended to waive the filing fee and DNA fee, as Appellant is indigent and has previously been convicted of a felony offense.	3

BRIEF OF RESPONDENT

State of Washington v. William McGrew, No. 52874-6-II

D. ARGUMENT3

1. The SRA expressly conditions participation in a home detention program upon abiding by the rules of the program.3

2. The trial court does not violate constitutional guarantees of equal protection by allowing Appellant the option of participating in EHM monitored by a private agency.....4

3. Because Appellant specifically asked the court for EHM with full knowledge payment would be required, the invited error doctrine precludes Appellant from seeking review of an error he helped create, even when the alleged error involves constitutional rights.....5

E. CONCLUSION7

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Williams v. Illinois, 399 U.S. 235, 90 S.Ct 2018, 26 L.Ed 586 (1970)5

U.S. Federal Court Cases

United States v. Flowers, 946 F.Supp. 2d 1295 (M.D. Ala. 2013).....5

Washington State Cases

State v. Murray, 118 Wn. App. 518, 77 P.2d 1188 (2003).....3

State v. Simmons, 152 Wn. 2d 450, 98 P.3d 789 (2004)5

In re Pers. Restraint of Call, 144 Wash.2d 315, 28 P.3d 709 (2001).....6

In re Pers. Restraint of Copland, 176 Wash.App. 432, 309 P.3d 626
(2013).....6

State v. Henderson, 114 Wash.2d 867, 792 P.2d 514 (1990).....6

State v. Lucero 168 Wash.2d 785 P.3d 165 (2010).....6

State v. Lucero, 152 Wash.App. 287, 217 P.3d 369 (2009)6

State v. Momah, 167 Wash.2d 140, 217 P.3d 321 (2009)6

State v. Olson, 126 Wash.2d 315, P.2d 629 (1995).....6

State v. Pam, 101 Wash.2d 507, 680 P.2d 762 (1984).....6

State v. Studd, 137 Wash.2d 533, 973 P.2d 1049 (1999)6

State v. Thomas, 150 Wash.2d 821, 83 P.3d 970 (2004).....6

State v. Wakefield, 130 Wash.2d 464, 925 P.2d 183 (1996)6

BRIEF OF RESPONDENT

State of Washington v. William McGrew, No. 52874-6-II

Statutes

RCW 9.94A.736 (8)(a) 4

RCW 9.94A.030 (29)..... 4

RCW 9.94A.734 (4)..... 4

RCW 9.94A.734 (4)(b)..... 4

A. INTRODUCTION

Following conviction by jury on one count of Trafficking in Stolen Property, Appellant requested that a low-end sentence of three months be imposed and that the court authorize electronic home monitoring. The court imposed a standard, mid-range range sentence of five months. Based on Appellant's specific request the court authorized EHM and ordered Appellant to either report to jail or be hooked up to EHM by 4:00 pm the following Saturday. Appellant moved for Stay of Sentence pending Appeal, which the court granted.

In Jefferson County, Electronic Home Monitoring ("EHM") is administered by one or more private entities. The trial court does not administer or monitor home detention. By statute, eligibility for EHM is conditioned upon a defendant abiding by the rules of the monitoring agency and includes payment of fees for the service. The trial court lacks authority to order a private monitoring agency to waive fees for its services.

Appellant's request for relief asks this Court to order the trial court to perform an act it is not authorized to do: order the monitoring agency to provide EHM services free of charge. The State asks this Court to affirm the standard range sentence as imposed, including the option for EHM conditioned upon defendant abiding by the rules of the monitoring agency

as authorized by statute. In the alternative, the case should be remanded for sentencing within the standard range without the option for EHM.

B. ASSIGNMENTS OF ERROR

1. Where the trial court relies upon private monitoring agencies to provide EHM as authorized by statute, the trial court does not violate Guarantees of Equal Protection by offering the option of electronic home monitoring where the private monitoring agency requires a fee for its services. This is particularly true where Appellant specifically requested the option of EHM with full knowledge that payment to the private monitoring agency would be required.
2. Appellee concedes that the Judgment and Sentence should not include the \$200 filing fee as Appellant is indigent, or the \$100 DNA fee as Appellant has previously been convicted of a felony offense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court did not err by allowing Appellant to serve his jail sentence on EHM where Appellant specifically requested the opportunity to serve his sentence on EHM with full knowledge that

the rules of the private EHM monitoring agency include payment for services. Any error Appellant complains of invited error.

2. The Washington State Legislature determines the standard range sentence; poverty is not used as a sentencing factor in violation of Equal Protection Guarantees where sentencing is within the standard range.
3. Appellant concedes that the Judgement and Sentence in this case should be amended to waive the filing fee and DNA fee, as Appellant is indigent and has previously been convicted of a felony offense.

D. ARGUMENT

The court's sentence does not condition Appellant's alternative to incarceration on his ability to pay.

1. The SRA expressly conditions participation in a home detention program upon abiding by the rules of the program.

A trial court has discretion in sentencing where the SRA allows it.

State v. Murray, 118 Wn. App. 518, 522, 77 P.2d 1188 (2003). The SRA is codified in RCW 9.94A. "Home detention" is a subset of electronic monitoring and means a program of partial confinement available to offenders wherein the offender is confined in a private residence twenty-four hours a day, unless an absence from the residence is approved, authorized, or otherwise permitted in the order by the court or other supervising agency that ordered home detention, and the offender is

subject to electronic monitoring. RCW 9.94A.030 (29). A monitoring agency may be a private entity which electronically monitors an individual. RCW 9.94A. 736 (8)(a).

RCW 9.94A.734 (4) a-c sets forth the conditions for home detention, which include “abiding by the rules of the home detention program.” RCW 9.94A.734 (4)(b). Nothing in the statute prohibits a private monitoring agency from charging a fee for its services. Nothing in the statute allows the court to set the rules for a private monitoring agency. Appellant provides no basis for its proposition that the court exceeded its authority in granting Appellant’s request for EHM. Payment is required by the monitoring agency, not the court. The trial court lacks authority to require a private monitoring agency to waive fees for its services. No authority exists to suggest the trial court should pay the cost of EHM by a private monitoring agency.

2. The trial court does not violate constitutional guarantees of equal protection by allowing Appellant the option of participating in EHM monitored by a private agency.

The mid-range sentence imposed here is within the standard range as set by the Washington State Legislature. Here, Appellant specifically requested the sentence he received. Appellant’s claim that imprisonment is solely because of indigency must fail. The statutory ceiling placed on imprisonment for any substantive offense is the same for all defendants irrespective of their economic status, as contemplated by *Williams v.*

Illinois, 399 U.S. 235, 242, 90 S.Ct 2018, 26 L.Ed 586 (1970). Appellant cites to *United States v. Flowers*, 946 F.Supp. 2d 1295, 1300 (M.D. Ala. 2013) for the general proposition that wealth and poverty must have no place in sentencing decisions. In *Flowers*, because the defendant could not afford EHM, the government refused to recommend it at sentencing and the court did not impose it. Similarly, in this case the State opposed EHM because defendant was indigent and his ability to pay for EHM was unclear. Unlike in *Flowers*, the Appellant specifically requested EHM, with full knowledge that payment was required. Based on his request, the court afforded Appellant the option of EHM. Pursuant to the holding in *Flowers*, resentencing Appellant to a standard range term of confinement without the option of EHM due to his inability to pay for it does not violate equal protection guarantees.

Equal protection requires that similarly situated persons receive like treatment under the law. *State v. Simmons*, 152 Wn. 2d 450, 458, 98 P.3d 789 (2004). Equal protection analysis is not triggered where, as here, the defendant is sentenced within the standard range.

3. Because Appellant specifically asked the court for EHM with full knowledge payment would be required, the invited error doctrine precludes Appellant from seeking review of an error he helped create, even when the alleged error involves constitutional rights.

The invited error doctrine precludes Appellant from seeking review of an error he helped create, even when the alleged error involves

constitutional rights. *State v. Studd*, 137 Wash.2d 533, 546–47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wash.2d 867, 870–71, 792 P.2d 514 (1990). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wash.2d 464, 475, 925 P.2d 183 (1996); *State v. Pam*, 101 Wash.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wash.2d 315, 893 P.2d 629 (1995). To determine whether the invited error doctrine is applicable to a case, a reviewing court may consider whether the petitioner affirmatively assented to the error, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wash.2d 140, 154, 217 P.3d 321 (2009); *In re Pers. Restraint of Copland*, 176 Wash.App. 432, 442, 309 P.3d 626 (2013).

To be invited, the error must be the result of an affirmative, knowing, and voluntary act. *State v. Lucero*, 152 Wash.App. 287, 292, 217 P.3d 369 (2009), *rev'd on other grounds*, 168 Wash.2d 785, 230 P.3d 165 (2010). The defendant must materially contribute to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error. *In re Pers. Restraint of Call*, 144 Wash.2d 315, 328, 28 P.3d 709 (2001); *Wakefield*, 130 Wash.2d at 475, 925 P.2d 183. The State bears the burden of proof on invited error. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004).

In this case, it is undisputed Appellant requested the sentence that was imposed.

E. CONCLUSION

As outlined above, the court's sentence is in accordance with the SRA and does not violate Equal Protection guarantees. Even if the sentence permitting Appellant to serve his standard range sentence on EHM were error, it is invited error. If the Court remands this case for re-sentencing, it should permit sentencing without the option of EHM. The State agrees that the Judgement and Sentence should be amended to strike the \$200 filing fee and the \$100 DNA fee, as Appellant is indigent and the \$100 DNA fee has previously been collected.

Respectfully submitted this 1st day of October, 2019.



JULIAN E. ST. MARIE, WSBA #27268
Jefferson County Deputy Prosecuting Attorney
Attorney for Respondent

PROOF OF SERVICE

I, Laura Mikelson, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

Kate Benward, WSBA #43651
katebenward@washapp.org

I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 1st day of November, 2019, and signed at Port Townsend, Washington.



Laura Mikelson
Legal Assistant

JEFFERSON COUNTY PROSECUTING ATTORNEY'S OFFICE

November 01, 2019 - 11:11 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52874-6
Appellate Court Case Title: State of Washington, Respondent v. William Edward McGrew II, Appellant
Superior Court Case Number: 18-1-00155-8

The following documents have been uploaded:

- 528746_Briefs_20191101111027D2097231_3779.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 2019 11 01 Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- katebenward@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Laura Mikelson - Email: lmikelson@co.jefferson.wa.us

Filing on Behalf of: Julian Elizabeth St. Marie - Email: jstmarie@co.jefferson.wa.us (Alternate Email:)

Address:
PO Box 1220
Port Townsend, WA, 98368
Phone: (360) 385-9181

Note: The Filing Id is 20191101111027D2097231