

78097-8

Court of Appeals No. 238741

NO. 75664-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

JOHN L. SWIGER, RESPONDENT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE ROBERT D. AUSTIN

---

BRIEF OF APPELLANT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Kevin M. Korsmo  
Deputy Prosecuting Attorney  
Attorneys for Appellant

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

ASSIGNMENT OF ERROR ..... 1

ISSUES PRESENTED..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT ..... 4

A. A PRISONER RELEASED FROM THE  
DEPARTMENT OF CORRECTIONS  
PURSUANT TO COURT ORDER IS  
NOT IN CUSTODY FOR PURPOSES  
OF CREDIT FOR TIME SERVED ..... 4

B. THE TRIAL COURT LACKED  
AUTHORITY TO ALTER THE  
CONDITIONS OF CONFINEMENT  
WITH THE DEPARTMENT OF  
CORRECTIONS..... 8

CONCLUSION ..... 10

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

STATE V. ANDERSON, 132 Wn.2d 203,  
937 P.2d 581 (1997)..... 4, 5, 7, 8

STATE V. BERNHARD, 108 Wn.2d 527,  
741 P.2d 1 (1987), *overruled in part by*  
State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989)..... 9, 10

STATE V. SHOVE, 113 Wn.2d 83,  
776 P.2d 132 (1989)..... 9, 10

STATE V. SPEAKS, 119 Wn.2d 204,  
829 P.2d 1096 (1992)..... 4, 6, 7, 8

**STATUTES**

RCW 9.94A.030(26)..... 6

RCW 9.94A.030(31)..... 6

RCW 9.94A.030(45)(a)(i)..... 6

RCW 9.94A.734..... 6

RCW 9.94A.734(1)(a) ..... 6

RCW 9.98.040 ..... 10

RCW 9A.36.011(2)..... 6

**COURT RULES**

RAP 7.2(f)..... 10

I.

ASSIGNMENT OF ERROR

(1) The trial court erred in crediting defendant for time served “in custody” after he was released from prison while his appeal was pending.

II.

ISSUES PRESENTED

(1) When a trial court uses its authority to release a prisoner pending appeal, is the prisoner “in custody” for purposes of the sentence he ultimately is ordered to complete serving?

(2) Can a trial court control the nature of a sentence to the Department of Corrections?

(3) Can a trial court impose a sentence of partial confinement that has been forbidden by the Legislature for the offense in question?

III.

STATEMENT OF THE CASE

Defendant/respondent John L. Swiger was charged with first degree assault in the brutal beating of Timothy Feagan. CP 1-5. He

was convicted at jury trial. CP 6-8. While the case was on appeal, the trial court granted a new trial. CP 19. Ultimately, the trial court's various rulings were affirmed and this court declined to review the cases. *See* file nos. 21223-8-III and 74683-4.

Defendant was again convicted of first degree assault at the second jury trial in 2001. CP 26-29. Spokane County Superior Court Judge Robert Austin sentenced him to prison on May 17, 2002. CP 30-43. Defendant began serving that sentence before sentencing. CP 24-25. He also filed an appeal of his new conviction.

He subsequently sought to be released pending the outcome of his appeal. CP 44-45. Judge Austin heard the matter on October 25, 2002. RP 1-17. Defendant requested that he be released from custody and be permitted to live and work at home subject to electronic monitoring. RP 2-4, 7. The prosecution objected, arguing that release was not appropriate and that electronic home monitoring was not available for crimes of violence. RP 4-6. Judge Austin agreed to release the defendant on bond and required GPS monitoring, even while noting that electronic confinement was not available for violent offenders. RP 14-15; CP 46-48. Defendant was actually released from prison on October 31, 2002. RP 18-19, 22; CP 73.

The Court of Appeals affirmed defendant's conviction and this court declined to review the matter. *See* file nos. 21223-8-III and 74583-4. The State then moved to revoke bond and set a reporting date. Judge Austin heard that matter on June 3, 2004. RP 18-31. Defendant argued that he was entitled to credit for time served on electronic home monitoring from his prison release date of October 31, 2002. RP 20-25; CP 67-70. The defense also asked that defendant be permitted to remain "out of custody" because he intended to file a federal habeas action. RP 21. The State contended that there could be no credit because defendant was in the custody of the Department of Corrections at the time he was "released" and the court lacked authority to alter a sentence of total confinement to one of partial confinement, especially where the Legislature had determined partial confinement was not an available for violent offenses. RP 25-28; CP 50-64.

Judge Austin took the matter under advisement. RP 31. He then issued a ruling awarding credit for time served while on home release. CP 71-73. The State appealed directly to this court. CP 74-78.

#### IV.

#### ARGUMENT

#### A. A PRISONER RELEASED FROM THE DEPARTMENT OF CORRECTIONS PURSUANT TO COURT ORDER IS NOT IN CUSTODY FOR PURPOSES OF CREDIT FOR TIME SERVED.

The basic problem with this case is that the defendant obtained what he styled a “release” and then successfully claimed he was in “custody” while he was released. He can not have it both ways. His case does not present the equal protection issue that this court’s previous case on the topic did. State v. Anderson, 132 Wn.2d 203, 937 P.2d 581 (1997), is quite distinguishable. The governing authority is actually State v. Speaks, 119 Wn.2d 204, 829 P.2d 1096 (1992).

In Anderson, the defendant was released at sentencing to home detention and remained on home detention for three years during his appeal. He was required to remain in his brother’s house and could only leave to go to work or attend anger management classes. Id. at 205. Thus, defendant Anderson never went into DOC custody. He later claimed that he should be credited for time served while the case was on appeal.

This court unanimously agreed that the SRA did not require defendant be given credit for any time served while the case was on appeal. Id. at 208. The majority of the court, over an objection from

Chief Justice Durham, determined that defendant was entitled to credit as a matter of Equal Protection since there was no basis for distinguishing between pre-trial and post-trial custody. Id. at 209-210. When the prosecutor argued that home detention was not authorized for this type of offense, the court noted that the State had previously acquiesced in the trial court's ruling. Id. at 213.

For several reasons this case is not Anderson. First, the trial court's release order here did not confine defendant to his home. Rather, it specified that was his residence and also limited the areas where he could work. He was not limited to being in his home at all times other than when he was at work. Under the plain language of this release order, defendant could be out partying all night and not be in violation. Nothing required him to be home when not working. He was not under home confinement as the statute and the Anderson case defined the term. Indeed, the order was styled a "release" order and not designated as an order for home confinement.

Secondly, the issue of defendant's eligibility for home detention was contested in this case. In Anderson the issue apparently was not raised until the appeal. This court ruled that the prosecution had acquiesced in the home detention and, hence, the propriety of the decision "is an entirely separate issue not before this court." Id. at 213. Here, in

contrast, the prosecutor protested the decision and foresaw that defendant would later try to claim credit for being “in custody” even at the time he was being released from custody. RP 6.

For both reasons, defendant Swiger was not in the same situation as defendant Anderson. Respondent here was not in home detention within the meaning of the statute, and his eligibility was not acquiesced in. Alternatives to jail or prison are only considered “custody” when the Legislature so declares. State v. Speaks, supra at 207. Washington’s statutes narrowly proscribe the use of home detention. It is a form of “partial confinement.” The statute defines the concept as “a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.” RCW 9.94A.030(26). Participation in the program is limited by RCW 9.94A.734. Among the several exclusions is one for violent offenses. RCW 9.94A.734(1)(a). First degree assault is considered a “violent offense.” RCW 9.94A.030(45)(a)(i); RCW 9A.36.011(2). Since home detention is a form of partial confinement, it also is limited to sentences of less one year. RCW 9.94A.030(31).

The trial court’s order violates several of these directives. It imposed “home detention” that does not even qualify under the statute for a crime that is excluded from the program and it did so for a time

period in excess of the statutory maximum. This order simply could not properly be considered “custody” under the Legislature’s definition.

Rather than Anderson, the governing case actually is Speaks. There the trial court had released a person accused of a sex offense to home detention pending trial. 119 Wn.2d at 205. He spent five months on home monitoring before pleading guilty. The trial court declined to credit that time against the sentence. Id. at 206. This court reversed, concluding that the pre-trial detention fell within the scope of the legislative definition of custody. Id. at 207-209. Critically for this case, the prosecution also argued that defendant was not entitled to serve time on home detention because sex offenses were excluded from the home detention statute. Id. at 208. This court found that the limitation was only applicable to post-conviction custody:

The appropriateness of a type of postconviction confinement for a given crime is a different issue, however, than whether the statute affords credit for a type of presentence restraint. While it is true that in this case, home detention would not have been a postconviction sentencing option, the foregoing statute nonetheless clearly provides for credit against a sentence for time served in presentence “partial confinement”, including home detention.

Id. (emphasis supplied).

In this case, the “custody” fight here most certainly involves postconviction “confinement.” Defendant at various times was in and out of custody before his trial and received the appropriate credit at each sentencing proceeding. The sole issue here involves the time spent on release during his last appeal. As Speaks indicates, home detention was not available in that postconviction situation. Because there was no waiver by acquiescence in this case, unlike in Anderson, the time spent on appellate release can not be considered “custody.”

Defendant was not in custody when the trial court exercised its power to release him pending the appeal. The trial court erred in granting credit for the time spent on home monitoring.

**B. THE TRIAL COURT LACKED AUTHORITY TO ALTER THE CONDITIONS OF CONFINEMENT WITH THE DEPARTMENT OF CORRECTIONS.**

If the defendant was actually “in custody” while he was out on release, the change in his custody status was illegal because the trial court lacked authority, for two reasons, to do what it did. On that basis, also, the order must be reversed.

The first reason the trial court lacked authority is because the SRA does not permit sentencing courts to change valid sentences. The effect of the trial court’s “release” ruling was to modify the sentence of

total confinement to one of partial confinement. As noted previously, partial confinement is not available for a first degree assault charge. Even if it had been available under this court's precedent, the trial court's order modifying the sentence violated other precedent. The governing case is State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989).

In Shove the trial court had imposed a twelve month sentence that included work release. After a period of time, defendant contended that the sentence was too onerous. The trial court agreed and changed the sentence to five months, which had already been served. Id. at 84-85. This Court reversed, finding that the trial court lacked statutory authority to modify the judgment and sentence. Id. at 85-87.

Similarly here, the trial court lacked authority to convert a term of total confinement to one of partial confinement, even if partial confinement had been a statutory alternative for this offense. The order violates Shove.

There is a second reason the order is invalid. That reason is because once a defendant is committed to the Department of Corrections, the trial court loses authority to designate the place of confinement. State v. Bernhard, 108 Wn.2d 527, 532, 741 P.2d 1 (1987), *overruled in part by* State v. Shove, 113 Wn.2d 83, 85, 776 P.2d 132 (1989). Once a prisoner is committed to the department, courts retain power to release

offenders whose cases are on appeal and transfer offenders from the prison to the local jail for additional court proceedings. See RAP 7.2(f); RCW 9.98.040. The trial court can not change the place or length of confinement for DOC prisoners. State v. Bernhard, *supra*; State v. Shove, *supra*.

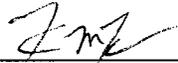
Here, if the “release” order is in fact a form of custody, it involves a change from total to partial confinement and a change in location from a DOC prison to the defendant’s own home. Both of those changes are beyond the power of a court under the SRA. For that reason, also, the trial court’s actions were beyond its powers. The trial court erred in changing the form and location of defendant’s “confinement.”

V.

#### CONCLUSION

For the reasons stated, the order granting credit for time spent on release should be reversed.

Respectfully submitted this 24<sup>th</sup> day of September, 2004.

  
\_\_\_\_\_  
Kevin M. Korsmo #12934  
Deputy Prosecuting Attorney

Attorney for Appellant