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A. ASSIGNMENT OF ERROR

The trial court acted outside its authority in refusing to issue the certificate of discharge once informed by the department of corrections (the department or DOC) the terms of appellant's sentence were complete.

Issue Pertaining to Assignment of Error

Appellant seeks restoration of his voting rights. Although the department considers his cases "terminated," the court refused to issue the final certificate of discharge,¹ reasoning that the community placement portion of appellant's sentence has tolled the last 13 years and will continue to toll until appellant is released from the Special Commitment Center (SCC). Where the Legislature has vested exclusive authority in the department to determine sentence tolling, did the trial court act outside its authority in refusing to issue the certificate of discharge?

B. STATEMENT OF THE CASE

Appellant Samuel Donaghe is appealing from the court's refusal to issue a certificate of discharge following the department's notification Donaghe completed all requirements of his 1991 judgment and sentence for rape. CP 11-14, 38-41, 42-43, Supp.

CP __ (sub. no. 157, Plaintiff's Reply to Memorandum Re Defendant's Motion for Final Discharge, 5/17/00), appendix 1.

On October 30, 1991, Donaghe was sentenced to concurrent sentences of 42 and 17 months for second and third degree rape, respectively, under Thurston County Superior Court cause no. 90-1-001510-6. Supp. CP __ (sub. no. 157), appendix 1. He was also sentenced to community placement for one year. Id. On the same day, he was sentenced under a separate cause number (91-1-00389-4) to 13 months for solicitation to commit assault to run concurrently with the other sentences. Supp. CP __ (sub. no. 152, Plaintiff's Memorandum Re Defendant's Motion for Final Discharge, 4/13/00).

According to the state, Donaghe was given a release date of May 1995; preceding his release, however, he was transferred to the Special Commitment Center (SCC) for involuntary commitment proceedings.² He remains there to this day. Supp. CP __ (sub. no. 152); 2RP (9/19/07 & 12/6/07) 4.

¹ Under RCW 9.94A.637(4), "the discharge shall have the effect of restoring all civil rights lost by operation of law upon conviction[.]"

² Donaghe asserted at the 2007 hearing on his motion for a certificate of discharge that he was released to Tacoma pre-release for seven hours, but returned to Shelton for two months before DOC sent him to Monroe. 2RP 6-7.

In 2000, while still awaiting his commitment trial, Donaghe moved for certificates of discharge for both cause numbers. Supp. CP ___ (sub. no. 145, Motion for Final Discharge and Restoration of Civil Rights, 3/31/00). In his pleadings, he noted the tolling statute in effect at the time the crimes were committed required the trial court to determine tolling; the statute provided:

For confinement sentences, the date for the tolling of the sentence shall be established by the entity responsible for the confinement. For sentences involving supervision, the date for the tolling shall be established by the Court, based upon reports from the entity responsible for the supervision.

RCW 9.94A.170(4) (1991);³ Supp. CP ___ (sub. no. 154, Defendant's Reply, 4/19/00). Donaghe argued that since the sentencing judge did not indicate Donaghe's community placement would toll prospectively, that portion of his sentence was not tolled during his stay at the SCC. Id.

The state agreed the statute in effect at the time the crimes were committed applied, and the court, rather than DOC, should

³ The Legislature has since recodified the statute as RCW 9.94A.625 and amended subsection (4) as follows:

(4) For terms of confinement or community custody, community placement, or community supervision, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision.

determine tolling. Supp. CP ___ (sub. no. 157, Plaintiff's Reply). However, the state disagreed the court's tolling determination was required at the time of sentencing. On the contrary, the "[c]ourt cannot make a determination whether a certain period of confinement acts to toll a period of supervision until the confinement either occurs or at least is ordered to occur." Id.

Because the court imposed no community custody on the solicitation offense, the state agreed the court should issue a certificate of discharge for it. However, the state asked the court to deny Donaghe's motion for discharge of the other judgment and sentence on grounds the community custody portion of the sentence tolled while Donaghe resided at SCC. Id.; Supp. CP ___ (sub. no. 152).

Judge Paula Casey granted the motion with respect to the solicitation offense. The minutes for the hearing indicate:

Court reviewed Judgment and Sentence. Court ruled that Mr. Donaghe has not served his community placement, so he is not entitled to a discharge. If there is to be a tolling of time, the Court is to make that decision. Court signed the "Certificate and Order of Discharge Pursuant to RCW 9.94A.220 in 91-1-00389-4 cause.

Supp. CP ___ (sub. no. 165, Letter to Donaghe from Clerk, 11/15/05).

On November 2, 2007, the Honorable Gary Tabor entertained Donaghe's renewed motion for a certificate of discharge for the remaining 1991 judgment and sentence. 1RP (11/2/07) 3-4. The state objected Donaghe's motion should have been filed under its corresponding criminal cause number, not his civil commitment case. 1RP 4. The court resolved to rule on the merits but agreed with Judge Casey "the defendant's custodial detention tolls the running of the community placement requirement, and, thus, all aspects of the sentence have not yet been completed." 1RP 7.

Donaghe revealed that since Judge Casey's ruling, Donaghe received a letter from the department indicating he had completed the period of supervision and the department terminated his case. 1RP 7. Donaghe offered to retrieve the letter for the court. 1RP 7. Assuming the existence of the letter, Judge Tabor responded his and Judge Casey's rulings "may need to be reconsidered." 1RP 7. The court continued the matter and instructed Donaghe to file additional pleadings under the criminal cause number. 1RP 8.

Donaghe thereafter filed a motion for reconsideration, attaching the department's letter. CP 38-41. The letter was written

by DOC Correctional Records Specialist Virginia Shamberg in
January 2006 and stated:

Dear Mr. Donaghe

This letter is in response to your request for conviction information and the dates of incarceration of the above named.

Mr. Donaghe was convicted out of Thurston County (cause #901001516) on 10/30/91 for Rape 2nd and sentenced to a maximum term of 3 years & 6 months. He was convicted out of Thurston County (cause #901001516) on 10/30/91 for Rape 3 and was sentenced to a maximum term of 1 year & 5 months. Mr. Donaghe was received at the Washington Corrections Center on 6/8/94 and released on 4/25/96.

Mr. Donaghe was also convicted out of Thurston County (cause #911003894) on 10/30/91 for Assault 2nd and sentenced to a maximum term of 1 year & 1 month.

He was on supervision with the Department of Corrections from 4/25/96 until 11/24/04 when these cases were terminated.

CP 41 (punctuation added).

In support of reconsideration, Donaghe cited RCW

9.94A.637(1), which provides:

When an offender has completed all requirements of the sentence, including any and all legal financial obligations, and while under the custody and supervision of the department, the secretary or the secretary's designee shall notify the sentencing court,

which shall discharge the offender and provide the offender with a certificate of discharge[.]

Donague argued the statute requires the court to issue the certificate upon notification by DOC that the terms of the sentence are complete. CP 39.

Thurston County Presiding Judge Chris Wickham entertained the motion for reconsideration. 2RP (9/19/07 & 12/6/07). While recognizing DOC considered Donaghe's sentence complete, the court refused to issue the certificate of discharge:

[T]he letter from the department of corrections would imply that they're taking the position that the community custody portion has been satisfied in the civil commitment. I see nothing in the statutes to support that position, and I believe the state's position is better taken that rather than substituting for the community custody, the civil commitment period merely tolls the time to delay the onset of the community custody period, and that makes the most sense.

The civil commitment does not result in a period of time in the community, which is contemplated by community custody, a time that the department of corrections can supervise a individual and ensure that their transition back into civil society is appropriate and such that the community is kept safe.

I also note that this issue was previously decided by Judge Casey on essentially the same motion. So for both those reasons . . . I will adopt the state's position and deny the request for certificate of discharge.

2RP 9-10; see also CP 44-46.

C. ARGUMENT

THE TRIAL COURT ACTED OUTSIDE ITS AUTHORITY IN REFUSING TO ISSUE THE CERTIFICATE OF DISCHARGE UPON DOC'S NOTIFICATION OF TERMINATION.

Under RCW 9.94A.637(1), the court must issue the certificate of discharge upon receiving notification from the department the terms of sentence are complete. The court here refused to do so, reasoning Donaghe's community placement sentence tolls while he resides at SCC. Under RCW 9.94A.625(4), however, the court does not have authority to determine tolling. That authority rests exclusively with DOC. The court acted outside its authority in refusing to issue the certificate of discharge.

Statutory construction is a question of law reviewed de novo. State v. Ammons, 136 Wn.2d 453, 456, 963 P.2d 812 (1998); State v. Masangkay, 121 Wn. App. 904, 907, 91 P.3d 140 (2004). The fundamental objective is to ascertain and carry out the intent of the legislature. Masangkay, 121 Wn. App. at 907. Where the statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. Masangkay, at 907 (quoting Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)). When the legislature's intent is not clear from the face

of the statute, the court may resort to various tools of statutory construction in determining which interpretation best advances the legislature's intent. Masangkay, at 907.

RCW 9.94A.637 is plain and unambiguous:

When an offender has completed all requirements of the sentence, including any and all legal financial obligations, and while under the custody and supervision of the department, the secretary or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender's last known address.

RCW 9.94A.637(1) (emphasis added).

The word "shall" in a statute is imperative and creates a mandatory duty. State v. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994); Spokane County Health Dist. v. Brockett, 120 Wn.2d 140, 149, 839 P.2d 324 (1992); State v. Dodd, 120 Wn.2d 1, 14, 838 P.2d 86 (1992). Upon notification that the department terminated Donaghe's sentence, the court had a mandatory duty to issue the certificate of discharge.

The court instead refused, relying on the tolling statute, which provides:

Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in

confinement for any reason. However, if an offender is detained pursuant to RCW 9.94A.740 or 9.94A.631 and is later found not to have violated a condition or requirement of community custody, community placement or community supervision, time spent in confinement due to such detention shall not toll the period of community custody, community placement, or community supervision.

RCW 9.94A.625(3).

Confinement means total or partial confinement. RCW

9.94A.030(11). Partial confinement means:

confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

RCW 9.94A.030(32). Total confinement means:

confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

RCW 9.94A.030(47).

Whether these definitions support the trial court's interpretation that Donaghe's community placement tolled, the court was without authority to use its own interpretation to deny the

certificate of discharge. Under the current version of RCW 9.94A.625, tolling is to be determined by the department:

For terms of confinement or community custody, community placement, or community supervision, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision.

RCW 9.94A.625(4).

In 1993, the Legislature amended subsection 4, which previously read:

For confinement sentences, the date for the tolling of the sentence shall be established by the entity responsible for the confinement. For sentences involving supervision, the date for the tolling of the sentence shall be established by the court, based on reports from the entity responsible for the supervision.

Laws of 1993, ch. 31, § 2. In so doing, the Legislature expressly divested the court of its authority to make tolling determinations. See e.g. State v. McNeal, 99 Wn. App. 617, 625, 994 P.2d 890 (2000) (recognizing Legislature provided DOC exclusive authority to enforce community custody conditions of first time offender waiver sentence).

Although Donaghe was sentenced to community custody in 1991, the current version of the tolling statute – vesting tolling determinations in DOC – applies to Donaghe's motion for a

certificate of discharge. Generally, remedial statutes are enforced as soon as they are effective, even if they relate to transactions predating their enactment. See e.g. Miebach v. Colasurdo, 102 Wn.2d 170, 180-81, 685 P.2d 1074 (1984). A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. Id. At 181. If a statute is remedial in nature and retroactive application would further its remedial purpose, it will be enforced retroactively. Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981).

The Legislature's amendment to subsection 4 of RCW 9.94A.625 is clearly remedial. It does not affect a substantive or vested right. It merely effects a change of procedure: which entity will determine sentence tolling. The Legislature reasonably vested that exclusive authority in the entity responsible for supervising the individual. Based on the plain language of RCW 9.94A.637 and RCW 9.94A.625, the court therefore acted outside its authority in denying Donaghe the certificate of discharge.

And contrary to the court's reasoning below that tolling of community placement is necessary to ensure "a time that the department of corrections can supervise an individual and ensure that their transition back into civil society is appropriate and such

that the community is kept safe,” the department already has such authority under the civil commitment scheme. See e.g. RCW 71.09.092 (Conditional release to less restrictive alternative).

Moreover, application of the tolling statute in this instance does not serve its purpose. Logically, the purpose behind tolling is to prevent an individual from obtaining community custody credit while serving time for violating a condition thereof or some other wrongful act that interrupts the community custody period. See e.g. State v. Flores-Serpas, 89 Wn. App. 521, 524, 949 P.2d 843 (1998) (in interpreting a different subsection of the tolling statute, court recognized Legislature intended tolling only where individual *voluntarily* absented himself not where he was deported against his will). Similarly, Donaghe is involuntarily committed not because of some voluntary action he took after serving the confinement portion of his sentence, but because he was committed against his will.

Finally, providing for community custody tolling here would render SCC commitment punitive and unconstitutional. The United States Supreme Court has recognized that a civil commitment statute could be applied in a punitive fashion and consequently violate the double jeopardy clause. Kansas v. Hendricks, 521 U.S. 346, 361-63, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

Disenfranchisement is punitive. State v. Schmidt, 143 Wn.2d 658, 23 P.3d 462 (2001) (C. Johnson, J., dissenting) (“Loss of liberty, property, the right to vote, and the right to possess a firearm collectively encompass the punishment the state imposes on a convicted felon.”) Providing for tolling in this circumstance could lead to the disenfranchisement of numerous SCC residents for the remainder of their lives, although their commitment is supposedly not punishment.

D. CONCLUSION

For the reasons stated above, this Court should reverse the lower court’s ruling and remand with instructions to issue the certificate of discharge as required pursuant the department’s notification that Donaghe completed the terms of his sentence.

Dated this 31st day of July, 2008.

Respectfully submitted

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

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 SAMUEL DONAGHE,)
)
 Appellant.)

COA NO. 37008-5-II

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DIVISION II
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STATE OF WASHINGTON
BY DEPUY

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JULY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2008.

x *P. Mayovsky*

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STATE OF WASHINGTON
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