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THE DEFENDER ASSOC

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

JOSHUA HARRIS,
Respondent,

RECEIVED
COURT OF APPEALS
DIVISION ONE

NOV 10 2008

vs.

HONORABLE EDSONYA CHARLES, DIRECTOR OF KING COUNTY ADULT
DETENTION and CITY OF SEATTLE,
Appellants.

BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR

1. The superior court erred by granting respondent's petition for writ of habeas corpus.

2. The superior court erred by determining that the statutory requirement that a felon be granted credit against his jail sentence for time on electronic home monitoring prior to sentencing applies to a non-felon.

B. ISSUES PRESENTED FOR REVIEW

1. May a criminal defendant use a writ of habeas corpus to challenge a sentence he is not yet serving? (Assignment of Error 1)

2. Does the constitution require that a defendant convicted of a non-felony crime be given credit against his jail sentence for time he was on electronic home monitoring as a condition of pretrial release? (Assignments of Error 1 & 2)

C. STATEMENT OF THE CASE

The superior court, on a writ of habeas corpus, ordered the trial court to give respondent credit against his jail sentence on a non-felony charge for time he was on electronic home monitoring prior to sentencing. The City appeals.

In 2001, respondent was charged with Driving Under the Influence (DUI) and Driving While License Suspended/Revoked (DWLS/R) 1st degree in Seattle Municipal Court. CP at 31. Later that year, he entered into a deferred prosecution for these charges. CP at 32. In 2004, after respondent had completed alcohol treatment, his deferred prosecution was revoked because of a DUI conviction in another court. CP at 33-34. Respondent's sentence was suspended for five years on certain conditions, including no criminal law violations and no driving without an ignition interlock device. CP at 30.

In 2007, respondent was charged with Driving While License Suspended (DWLS) 3rd degree and Operating a Motor Vehicle Without a Required Ignition Interlock (IID) in Seattle Municipal Court. CP at 12. The court set bail at \$5,000, which respondent posted, and imposed conditions of release including electronic home monitoring. CP at 10-11. Respondent later pled guilty to both of

these charges. CP at 13. On the first charge,¹ he was sentenced to 90 days in jail with zero days suspended, and, on the second charge,² to 90 days in jail with 90 days suspended; these sentences to run consecutively. CP at 8-9 & 11. The trial court declined to give respondent credit against this sentence for 140 days he was on electronic home monitoring before his guilty plea. CP at 14. In addition, 90 days of his suspended sentence on the 2001 DUI charge was revoked, and this jail time was to run consecutively to the other charges. CP at 29 & 36. Respondent was ordered to report to jail by April 9, 2008. CP at 14 & 36. Respondent apparently was or would also be serving a jail sentence imposed by another court. CP at 3.

On March 31, 2008, respondent sought a writ of habeas corpus to force the trial court to give him credit against his 90-day DWLS 3rd degree jail sentence and his 0-day IID jail sentence for the 140 days he was on electronic home monitoring prior to his guilty

¹ The maximum sentence for DWLS 3rd degree is 90 days in jail and a \$1,000 fine. Seattle Municipal Code (SMC) 11.56.320(D); SMC 11.34.020(B).

² The maximum sentence for IID is 90 days in jail and a \$1,000 fine. SMC 11.56.350; SMC 11.34.020(B).

pleas. CP at 5-7. On April 7, 2008, the superior court granted the requested relief, concluding as follows:

RCW 9.94A.120(16), RCW 9.94A.030(8)(26) and (42) states that a criminal defendant is entitled to credit against sentence for pretrial time spent on electronic home detention. I find that the rule albeit for felonies shall apply here.³

CP at 38.

D. ARGUMENT

1. Respondent's petition for a writ of habeas corpus should have been denied because he was not currently "restrained of his liberty" and would not be "restrained of his liberty" until he had served his unchallenged sentences.

When he petitioned for a writ of habeas corpus, respondent was not incarcerated or subject to any conditions of release imposed by Seattle Municipal Court. Nevertheless, the superior court granted him relief. RCW 7.36.010 provides:

Every person restrained of his liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint and shall be delivered therefrom when illegal.

³ These statutory references are obviously incorrect and should have been to RCW 9.94A.505(6), RCW 9.94A.030(11), (27) and (32).

Unlike a personal restraint petition available under RAP 16.4 *et al.*, which authorizes relief if the petitioner is confined, subject to imminent confinement or under some other disability,⁴ issuance of a writ of habeas corpus requires that there be an actual or physical restraint of a person.⁵ Although a person need not be in jail to be entitled to habeas corpus relief,⁶ he must be restrained in some manner.⁷ Respondent's expected reliance on *In re Powell*⁸ for the proposition that "release from confinement is no longer the sole function of a writ of habeas corpus" is plainly misplaced as that case was a personal restraint petition.⁹

The statutes governing the procedural aspects of a writ of habeas corpus show that an actual or physical restraint is required.

⁴ See RAP 16.4(b).

⁵ *In re Powell*, 191 Wash. 152, 153, 70 P.2d 778 (1937).

⁶ See, e.g., *Born v. Thompson*, 154 Wn.2d 749, 752-53, 117 P.3d 1098 (2005) (petitioner confined at Western State Hospital); *Butler v. Kato*, 137 Wn. App. 515, 154 P.3d 259 (2007) (petitioner subject to pretrial conditions of release).

⁷ See *State v. Eichman*, 69 Wn.2d 327, 335-36, 418 P.2d 418 (1966) (petitioner being held on an unchallenged judgment not entitled to habeas corpus relief regarding allegedly invalid judgment).

⁸ 92 Wn.2d 882, 887, 602 P.2d 711 (1979).

⁹ *Powell*, 92 Wn.2d at 884 ("Petitioner Powell has brought a personal restraint petition challenging the legality of her detention based on a conviction for possession of a controlled substance.")

RCW 7.36.030 requires that the petition specify “by whom the petitioner is restrained of his liberty, and the place where.” No person was presently restraining respondent nor was there any place where he was being restrained. RCW 7.36.050 requires that the writ be directed “to the officer or party having the person under restraint, commanding him to have such person before the court.” Neither the trial judge, City of Seattle nor the Director of Adult Detention could have delivered respondent to superior court. RCW 7.36.120 provides that “if no legal cause be shown for the restraint or for the continuation thereof, [the court] shall discharge the party.” How the superior court could discharge a person who was not then restrained is something of a mystery.

Respondent did not challenge the 90-day probation revocation from his 2001 DUI charge,¹⁰ but only his prospective 90-day

¹⁰ Inasmuch as he was never detained, either in jail or on electronic home monitoring, for the probation violation from the 2001 charges, respondent cannot claim any right to credit against this 90-day sentence for the time he was on electronic home monitoring for the 2007 charges. See *In re Personal Restraint of Schillereff*, 159 Wn.2d 649, 651-52, 152 P.3d 345 (2007); see also *In re Personal Restraint of Costello*, 131 Wn. App. 828, 833, 129 P.3d 827 (2006) (defendant serving consecutive sentences entitled to credit for confinement time served before sentencing on one sentence only).

incarceration for the DWLS 3rd degree charge. Where a person has been sentenced to serve consecutively two terms of imprisonment, he may not attack the second sentence through a writ of habeas corpus before the first has been served.¹¹ Until the valid portion of a sentence has expired, the alleged void portion may not be attacked in a habeas corpus proceeding.¹² A person challenging as illegal his cumulative sentences is not entitled to a writ of habeas corpus where he has not yet served the sentence which was lawfully imposed.¹³

Inasmuch as respondent was challenging only a sentence that he was not currently serving, the superior court erred by granting him relief in a habeas corpus proceeding.

¹¹ *In re Grant v. Smith*, 24 Wn.2d 839, 842, 167 P.2d 123 (1946).

¹² *In re Blystone*, 75 Wash. 286, 134 Pac. 827 (1913).

¹³ *In re Miller*, 129 Wash. 538, 539-40, 225 Pac. 429 (1924); see also *In re Ashley v. Delmore*, 49 Wn.2d 1, 5, 297 P.2d 958 (1956), cert. denied, 353 U.S. 986 (1957).

2. The superior court erred by granting relief pursuant to a writ of habeas corpus because respondent did not establish any constitutional violation in denying him credit against his jail sentence for time on electronic home monitoring prior to sentencing.
 - a. The constitution does not require that a defendant be given credit against his jail sentence for time on electronic home monitoring prior to sentencing.

The superior court's authority to grant relief by way of a petition for habeas corpus is set forth in and limited by RCW 7.36.130, which provides:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge the party when the term of commitment has not expired, in either of the cases following:

(1) Upon any process issued on any final judgment of a court of competent jurisdiction except where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the state of Washington or of the United States have been violated and the petition is filed within the time allowed by RCW 10.73.090 and 10.73.100.

Under this statute, a court may grant relief only when the petitioner has alleged facts showing that his constitutional rights

were invaded.¹⁴ A writ of habeas corpus is available only for the purpose of inquiring into the legality of the petitioner's restraint, and to determine whether his constitutional right to due process of law has been violated.¹⁵ The sole basis for the superior court's decision was that the requirement of the Sentencing Reform Act (SRA) that a felon be given credit against his sentence for pretrial time spent on electronic home detention should also apply to a non-felon. Absent from this decision was any analysis or determination that the constitution requires this result.

In *State v. Speaks*,¹⁶ the Court of Appeals concluded that the constitution does not require that a defendant be given credit against his felony jail sentence for time on electronic home monitoring prior to sentencing.

The rationale for awarding pre-trial credit is that the defendant has served part of his sentence before trial. If credit were not given, he would in essence be

¹⁴ *Palmer v. Cranor*, 45 Wn.2d 278, 281, 273 P.2d 985 (1954); see also *In re McNear v. Rhay*, 65 Wn.2d 530, 534, 398 P.2d 732 (1965) (court reviews allegations in application for writ of habeas corpus to determine whether any fundamental constitutional rights have been so violated as to result in the denial of due process).

¹⁵ *In re Allen v. Rhay*, 52 Wn.2d 609, 611, 328 P.2d 367 (1958).

¹⁶ 63 Wn. App. 5, 816 P.2d 95 (1991), *reversed*, 119 Wn.2d 204 (1992).

required to serve a greater sentence than that ultimately imposed by the court, and a greater sentence than others able to obtain release pending sentencing, in possible violation of due process and equal protection of the laws. This rationale does not apply here. Home detention cannot be part of the sentence of a sex offender, RCW 9.94A.030(35), and it was not part of the sentence in this case. When the defendant was on home detention prior to sentencing, he was not serving any part of his sentence, and he was not accumulating time for which he would later be entitled to credit.

Even if home detention had later been made part of the sentence, the court would not have been required to credit it. A defendant held in jail prior to sentencing is entitled to credit against his or her maximum, mandatory minimum and discretionary minimum sentences. A defendant is not, however, entitled to credit for probation time served prior to the imposition of sentence. Home detention is more analogous to probation than to jail time, and as a result it need not be credited against the sentence ultimately imposed.¹⁷

The Supreme Court reversed this decision,¹⁸ but solely based on the specific definitions of “confinement” and “partial confinement” in the SRA.

In the case before us, the Court of Appeals held that denial of credit for time served by an accused on home detention does not violate due process, equal protection or double jeopardy. As that court reasoned, home detention is more analogous to probation time than to jail time and therefore the constitution does not

¹⁷ *Speaks*, 63 Wn. App. at 7 (citations and footnote omitted).

¹⁸ *State v. Speaks*, 119 Wn.2d 204, 829 P.2d 1096 (1992).

require that such detention be credited against the sentence ultimately imposed.

While the Court of Appeals conclusion that presentence home detention is not *constitutionally* mandated may well be correct, we deem it unnecessary to reach that issue in this case since state statutes resolve the question.¹⁹

The SRA does not apply to sentencing in courts of limited jurisdiction.²⁰ Thus, the definitions of “confinement” and “partial confinement” in that statute are irrelevant to respondent’s sentence. Outside the context of these specific SRA definitions, electronic home monitoring is not considered confinement or jail.²¹ No statute governing the sentencing of a non-felon requires a court to give credit against a jail sentence for time on electronic home monitoring before sentencing. As the Court of Appeals determined, and the Supreme Court did not expressly reject, electronic home monitoring before sentencing is not analogous to jail time for constitutional purposes.

¹⁹ *Speaks*, 119 Wn.2d at 207 (emphasis in original; footnote omitted).

²⁰ *Bremerton v. Bradshaw*, 121 Wn. App. 410, 413, 88 P.3d 438 (2004), *review denied*, 153 Wn.2d 1012 (2005).

²¹ *State v. Perrett*, 86 Wn. App. 312, 317-19, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997).

The other cases that have addressed electronic home monitoring do not suggest that giving credit against a jail sentence for time on electronic home monitoring prior to sentencing is required by the constitution. *State v. Anderson*²² involved a defendant who was on electronic home monitoring after being sentenced for a felony. The court first determined that this situation was governed by a different statutory term – “imprisoned” – that did not encompass electronic home monitoring.²³ The court did, however, conclude that “[s]ince the Legislature has chosen to grant jail time credit to those who serve pretrial electronic home detention, as recognized by *Speaks*, equal protection requires the same credit to be granted to those who serve electronic home detention after their conviction and pending their appeal.”²⁴ Again, the Legislature has not chosen to grant this credit to a non-felon defendant.

In *State v. Vasquez*,²⁵ the court rejected the defendant’s argument that he was entitled to credit against his jail sentence for

²² 132 Wn.2d 203, 937 P.2d 581 (1997).

²³ *Anderson*, 132 Wn.2d at 206-08.

²⁴ *Anderson*, 132 Wn.2d at 213.

time he was on home detention prior to conviction. Although the defendant was prohibited from leaving his home except to go to work and was subject to unannounced visits by the police to verify compliance with this restriction, he was not monitored electronically.²⁶ Inasmuch as this presentence detention was not “home detention” as defined in the SRA, the defendant had no right to credit for it against his sentence.²⁷ The court did not suggest that the defendant had any constitutional right to such credit.

In *Bremerton v. Bradshaw*,²⁸ the court held that a DUI defendant who was on electronic home monitoring before sentencing was not entitled to credit for that time against his jail sentence. The DUI sentencing statute does not give the defendant such credit nor does any other statute support such a claim.²⁹ The court also rejected an equal protection claim as the defendant did not show that she had been treated differently from anyone else in the same class.³⁰

²⁵ 75 Wn. App. 896, 881 P.2d 1058 (1994), *review denied*, 126 Wn.2d 1005 (1995).

²⁶ *Vasquez*, 75 Wn. App. at 897.

²⁷ *Vasquez*, 75 Wn. App. at 898.

²⁸ 121 Wn. App. at 413.

²⁹ *Bradshaw*, 121 Wn. App. at 413.

³⁰ *Bradshaw*, 121 Wn. App. at 413 n. 7.

Likewise, respondent did not show that he is being treated any differently than any other person convicted of a non-felony after having been on electronic home monitoring.

The superior court's reliance on the SRA statutes and cases interpreting those statutes is clearly misplaced. The superior court's apparent belief that all defendants should be given credit for time on electronic home monitoring before sentencing may well be a valid policy position, but such decisions are properly matters for the Legislature.³¹

- b. Equal protection does not require that a non-felon defendant be given credit against his jail sentence for time on electronic home monitoring prior to sentencing.

Although the superior court did not indicate any constitutional basis for its decision, respondent had argued that the result was required by equal protection. Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but the doctrine is not intended to provide

³¹ See *In re Personal Restraint of Knapp*, 102 Wn.2d 466, 471, 687 P.2d 1145 (1984) (credit for nonjail probation time is properly a matter for the Legislature).

complete equality among individuals or classes.³² Sentencing distinctions are reviewed under the rational relationship test, under which a classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives; the burden of proof is upon the party challenging the classification.³³

In *State v. Bowen*,³⁴ the court held that a defendant sentenced for a non-felony in excess of the presumptive range for a defendant with the same criminal history who is convicted of a felony did not violate equal protection. "The policy reasons for distinguishing between felony sentencing and sentencing for gross misdemeanors are apparent from the different treatment and consequences which flow from conviction."³⁵

The sentencing of felons under the SRA and that of non-felons under other statutes serve quite different purposes.

³² *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004).

³³ *In re Personal Restraint of Stanphill*, 134 Wn.2d 165, 174-75, 949 P.2d 365 (1998) (distinctions between felony defendants sentenced pursuant to the SRA and those sentenced prior to adoption of the SRA do not violate equal protection).

³⁴ 51 Wn. App. 42, 45-47, 751 P.2d 1226, *review denied*, 111 Wn.2d 1017 (1988).

³⁵ *Bowen*, 51 Wn. App. at 47.

Rehabilitation is not the goal of sentencing under the SRA,³⁶ but it is one purpose of sentencing for non-felons.³⁷ Setting restitution is quite different under each system.³⁸ While a defendant charged with DUI in a court of limited jurisdiction may petition for a deferred prosecution, a defendant charged with the same crime in superior court is not eligible for this sentencing option.³⁹ The most significant difference is the greater sentencing discretion of the judge in courts of limited jurisdiction. While under the SRA a judge generally is limited to imposing a sentence within the standard sentence range,⁴⁰ no such statutory restriction exists for a judge sentencing a non-felon. Felons and non-felons are not similarly situated for purposes of sentencing.

³⁶ *State v. Barnes*, 117 Wn.2d 701, 711, 818 P.2d 1088 (1991).

³⁷ *See State v. Williams*, 97 Wn. App. 257, 262-63, 983 P.2d 687 (1999), *review denied*, 140 Wn.2d 1006 (2000).

³⁸ *See State v. Marks*, 95 Wn. App. 537, 977 P.2d 606 (1999) (SRA time limit for setting restitution does not apply to non-felony sentencing); *State v. Ring*, 134 Wn. App. 716, 720, 141 P.3d 669 (2006) (SRA requirement that court must consider the defendant's ability to pay restitution does not apply to non-felonies).

³⁹ *State v. Hayes*, 37 Wn. App. 786, 788-89, 683 P.2d 237, *review denied*, 102 Wn.2d 1008 (1984).

⁴⁰ RCW 9.94A.505(2)(a)(i).

Moreover, the purposes and function of pretrial electronic home monitoring demonstrate that it is not a type of punishment for which a defendant is entitled to credit against his jail sentence.⁴¹ Indeed, restrictions imposed as punishment cannot be imposed as pretrial conditions of release.⁴² Not giving a defendant credit against his jail sentence for time on electronic home monitoring prior to trial serves to reinforce the distinction between pretrial release and punishment. The needs of the criminal justice system for assuring the presence of a defendant at trial justify treating a defendant detained pending trial differently from a defendant detained pursuant to a sentence with respect to credits against a sentence.⁴³

To the extent that the superior court's decision rested on an equal protection analysis, it was incorrect. Respondent did not sustain his burden of proving that denying him credit against his

⁴¹ See CrRLJ 3.2(b)(6) (authorizing requirement of electronic monitoring based on determination that a defendant is not likely to appear if released on personal recognizance) & 3.2(d)(9) (authorizing requirement of electronic monitoring based on determination that a defendant will commit a violent crime, seek to intimidate witnesses or unlawfully interfere with the administration of justice).

⁴² *Butler*, 137 Wn. App. at 524-25.

⁴³ *In re Personal Restraint of Cromeenes*, 72 Wn. App. 353, 357-58, 864 P.2d 423 (1993).

sentence for the time on electronic home monitoring before sentencing violates equal protection.

E. CONCLUSION

Based on the foregoing argument, the superior court's decision ordering Seattle Municipal Court to give respondent credit against his DWLS 3rd degree sentence for the time on electronic home monitoring should be reversed and respondent's petition for writ of habeas corpus should be dismissed.

Respectfully submitted this 10th day of November, 2008.

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