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NO. ~~76608-0-1~~

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

STATE OF WASHINGTON

Appellant

v.

KEVIN E. SLATTUM,

Respondent

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. THE PLAIN MEANING OF THE TERM IMPRISONMENT EXCLUDES OFFENDERS WHO ARE ON COMMUNITY CUSTODY.

The parties agree that undefined statutory terms are given their plain and ordinary meaning. The respondent disputes the position that the plain meaning of imprisonment excludes persons who are free in the community subject to some conditions.

The dictionary definitions the respondent relies on to support his argument conflict with that argument. The Webster's definition states imprisonment means "[t]o confine in or as if in a prison." Websters Third New International Dictionary 1137 (1993)¹ (emphasis added) BOR at 7. The phrase "as if" means "as it would be if" www.merriam-webster.com/dictionary/as+if. The definition of "as" is "to the same degree or amount." Webster's Third New International Dictionary, 125 (2002). An offender on community custody is not restricted "to the same degree or amount" as an offender whose movements have been restricted by the walls of a jail or prison. A person in prison has little or no control over

¹ A newer version of Webster's Third New International Dictionary has updated the definition of imprisonment to state "1. to put in prison; confine in a jail, 2. to limit, restrain, or confine as if by imprisoning" Webster's Third New International Dictionary 1137 (2002).

whether or what kind of work he performs and when and who he may associate with. In contrast an offender who is on community custody is free to be “gainfully employed and is free to be with family and friends...” In re Blackburn, 168 Wn.2d 881, 884, 232 P.3d 1091 (2010), quoting Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed. 484 (1972). The dictionary definition cited by the respondent therefore does not support his argument.

The dictionary definitions for imprisonment cited by both parties include the term “confine”. The defendant concludes that term broadens the definition of imprisonment to include persons who are outside an actual prison. However “confine” is not so broad. That term has been defined as “1. To keep within bounds; restrict 2. To shut within an enclosure; imprison.” The American Heritage Dictionary of the English Language 279 (New College Edition 1978); “a: To keep in narrow quarters: IMPRISON, b: to prevent free outward passage or motion of: SECURE, ENCLOSE, FASTEN,...c: to keep from leaving accustomed quarters...” Webster’s Third New International Dictionary, 476 (2002). Contrary to the respondent’s position, the definition of imprison means just that. It means to restrict a person’s movements within the enclosure of walls constituting either a prison or jail.

The respondent also suggests that the Court should apply the rule of lenity to find that he was entitled to testing under RCW 10.73.170. The Court should decline to apply the rule when considering a statute that is procedural, and does not provide for any criminal sanctions.

The Court articulated the policy considerations on which the rule of lenity was founded in United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). The first policy is directed at giving fair warning as to what the law proscribes, and what will happen in the event of a violation of that law. Id. The second policy recognizes the seriousness of criminal penalties. “This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should’” Id. quoting H. Friendly Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967).

Those policy considerations clearly indicate the Court’s intent to apply the rule of lenity when construing a criminal statute. The only circumstance in which a court has applied the rule in construing a statute in the context of a civil case is when a violation of that statute may result in criminal sanctions. United States v. Thompson/Center Arms Company, 504 U.S. 505, 518, 112 S.Ct.

2102, 2109-10, 119 L.Ed.2d 308 (1992). In light of that the Court should not apply the rule to RCW 10.73.170 which proscribes no criminal conduct.

A successful motion for post conviction DNA testing will not result in a challenge to the offender's conviction. At most it would result in an order for testing. That testing may result in a new proceeding to challenge the conviction, if the testing produced exculpatory evidence. The proceedings authorized by RCW 10.73.170 are three steps removed from any such challenge.

The reason for applying the rule of lenity in a civil case also does not apply here. RCW 10.73.170 does not proscribe any conduct. Unlike the statute at issue in Thompson/Center Arms Company there is no potential for any criminal sanctions because the statute cannot be violated.

The rule should not be applied in this case as well because it applies only if the statute is ambiguous. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). A statute is ambiguous if it is subject to two or more reasonable interpretations. State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). . A statute is not ambiguous merely because different interpretations are conceivable. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d

155 (2006). The respondent asserts that the statute is not ambiguous. BOR at 12. As such he is not entitled to the benefit of the rule.

The rule of lenity does not apply here for third reason. Clearly the State and the respondent have two different interpretations of the term "imprisonment." But when looking at the definition of the term, how the Court has treated the term in the context of other statutes, and the Legislative history, discussed below, the only reasonable interpretation of the term is that it includes persons who are confined in prison or jail, and excludes persons who are on community custody. Thus, the Court should not resort to the rule of lenity to up hold the trial court's ruling.

B. THE LEGISLATIVE HISTORY SUPPORTS THE CONCLUSION THAT THE TERM IMPRISONMENT DOES NOT INCLUDE OFFENDERS WHO ARE ON COMMUNITY CUSTODY.

The respondent argues that the legislative history supports the conclusion that the Legislature intended to broaden the class of offenders who are eligible to obtain post conviction DNA testing to those on community custody. He points to this Court's statement that the 2005 amendments to RCW 10.73.170 was intended to broaden access to DNA testing, citing State v. Gray, 151 Wn. App. 762, 215 P.3d 961 (2009). Those amendments addressed only the

forum in which a request for DNA testing was made and the substantive and procedural requirements necessary to be eligible for testing. It did not address the class of offenders who were permitted to make that request. Laws of Washington 2005, Ch. 5, §1.

The relevant legislative history occurred in 2001. As originally enacted only those persons who were sentenced to death or a term of life imprisonment without the possibility of parole were entitled to seek post conviction DNA testing. Laws of Washington 2000, Ch. 92, §1. The next year the Legislature amended the statute to expand the class of offenders to “a person in this state who has been convicted of a felony and is currently serving a term of imprisonment...” Laws of Washington 2001, Ch. 301, § 1. The legislature kept the term “imprisonment” previously enacted when referring to persons serving a sentence of life without possibility of parole. Since persons serving a sentence of life without possibility of parole would never serve a term of community custody, the legislature’s use of the same term when broadening access to testing signals the intent to limit the class of persons eligible for testing to those who are currently with a prison or jail.

The Legislative reports give further support to the conclusion that when the Legislature expanded access to testing it did not expand it to offenders on community custody. The Substitute Senate Bill Report dated March 13, 2001 summarizes the arguments for and against the amendments². Those testifying in support of the amendments cited concern for those “innocent persons [who] are presently incarcerated for crimes they did not commit.” Those testifying against the amendments recognized that some tests were necessary, but argued the amendments would be too costly.

It is clear from the report that the amendments were made to balance the concerns of both sides impacted by requests for post conviction DNA testing. While there was concern that DNA testing could prove persons who had not been sentenced on a capital crime were innocent, the reality of the public cost weighed in as well. Thus while the Legislature enlarged the pool of prospective applicants for post conviction DNA testing, it did not open the floodgates to anyone who had ever been convicted of a crime.

² A copy of the report is attached as an appendix. By separate motion the State has asked the court to accept the report as part of the record on review.

II. CONCLUSION

For the foregoing reasons the State asks the Court to find the trial court erred in concluding offenders who are on community custody are entitled to post conviction DNA testing under RCW 10.73.170.

Respectfully submitted on July 25, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*
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SENATE BILL REPORT

SSB 5896

As Passed Senate, March 13, 2001

Title: An act relating to DNA testing of evidence.

Brief Description: Providing for additional DNA testing of evidence.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Constantine, Kline, Hargrove, Costa, Thibaudeau, Kohl-Welles and Regala).

Brief History:

Committee Activity: Judiciary: 2/22/01, 2/26/01 [DP].

Ways & Means: 3/8/01 [DPS].

Passed Senate: 3/13/01, 48-0.

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.

Signed by Senators Kline, Chair; Constantine, Vice Chair; Costa, Hargrove, Kastama, McCaslin and Thibaudeau.

Staff: Lilah Amos (786-7421)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Substitute Senate Bill No. 5896 be substituted therefor, and the substitute bill do pass.

Signed by Senators Brown, Chair; Constantine, Vice Chair; Fairley, Vice Chair; Fraser, Hewitt, Honeyford, Kline, Kohl-Welles, Rasmussen, Regala, Rossi, B. Sheldon, Snyder, Spanel, Thibaudeau, Winsley and Zarelli.

Staff: Bryon Moore (786-7726)

Background: DNA testing is a reliable forensic technique for identifying criminals when biological material is left at a crime scene. Advances in DNA technology now allow successful testing of very small and degraded samples which would not have been possible a few years ago. These advances produce much more informative and accurate results than was yielded by earlier DNA testing. Groups studying this issue report that at least 65 persons who were convicted in the U.S. and Canada have been exonerated by DNA evidence during the past decade, including eight persons who were sentenced to death. The Department of Justice and a number of legal scholars advocate that postconviction testing be available in those limited cases where biological evidence is still available and where use of new DNA methods might provide useful information regarding the identity of the perpetrator. There is also concern that biological material which is collected as evidence is preserved for postconviction DNA testing.

Summary of Bill: A convicted felon, who is currently imprisoned, on or before December 31, 2004, may submit a request for post-conviction DNA testing to the prosecutor of the county where the conviction was obtained. The request may only be made if the DNA evidence was not admitted in court because it did not meet acceptable scientific standards or the testing technology was not sufficiently developed to test the DNA evidence in the case. After January 1, 2005, DNA issues must be raised at trial or on appeal. The prosecutor must review requests for DNA testing based on the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. If it is determined that testing should occur, and the evidence still exists, the prosecutor must request testing by the Washington State Patrol crime lab. A person denied a request for DNA testing may appeal the denial to the Office of the Attorney General.

Any biological material that was secured before the effective date of this act may not be destroyed before January 1, 2005.

The act does not create a legal right or cause of action, nor does it deny or alter any existing legal right.

Appropriation: None.

Fiscal Note: Requested on February 14, 2001.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For (Judiciary): Innocent persons are presently incarcerated for crimes they did not commit. Their innocence can be proven by DNA testing which was not available at the time of trial or could not produce useful results. Advances in DNA technology make testing of biological samples possible even if the evidence is old or degraded. This proposal gives defendants the ability to obtain court review of their request and identifies payment responsibility. Retention of evidence during the period of defendants' incarceration is necessary so testing can be done if appropriate.

Testimony Against (Judiciary): While some tests are necessary, the procedure creates a new class of motions and will be too costly. The requirement that evidence be retained lacks specificity about the identity and procedure for evidence retention. Testing should be available for a limited time and should be patterned after existing DNA testing provisions for death penalty cases and cases involving life without parole.

Testified (Judiciary): Senator Dow Constantine; Jerry Sheehan, ACLU; Roger Hunko, WCDL; Joanne Moore, Wash. Office of Public Defense; Martha Harden, Superior Ct. Judges' Assn.; Tom McBride, WAPA.

Testimony For (Ways & Means): The substitute provides the appropriate mechanism to ensure that DNA testing can take place to determine if innocent persons are presently incarcerated for crimes they did not commit. This is limited in scope to control the costs. This will only apply to a very limited number of people.

Testimony Against (Ways & Means): None.

Testified (Ways & Means): Jerry Sheehan, ACLU; Tom McBride, WAPA.

House Amendment(s): Post-conviction DNA testing is available only for persons convicted of Class B felonies which are crimes against persons as defined in RCW 9.94A.440. These offenses include assault of a child in the second degree, child molestation in the second degree, assault in the second degree, robbery in the second degree, and indecent liberties.

Persons convicted of Class A felonies which are crimes against persons are not eligible for post-conviction DNA testing. Those Class A felonies include rape in the first and second degree, murder in the first and second degree, assault in the first degree, and robbery in the first degree.