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No. 101053-2
COA No. 81680-2-I

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

TYLOR SEAN DONNELLY, Petitioner

PETITION FOR REVIEW

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PETITION

A. IDENTITY OF PETITIONER

Tylor Sean Donnelly, citizen of Canada, respectfully asks this court to review the decision of the Court of Appeals terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of Appeals entered March 28, 2022, reversing the trial court's order, filed May 11, 2020, granting Mr. Donnelly's motion to amend his warrant of commitment, equitably relieving Mr. Donnelly of serving his sentence. The Court of Appeals summarily denied Mr. Donnelly's motion to reconsider its opinion on May 26, 2022. A copy of the opinion of the Court of Appeals is attached as Appendix A (hereinafter referred to as "Opinion").

C. ISSUES PRESENTED FOR REVIEW

1. Does RCW 9.94A.680(2), which provides for "sentence conditions that a court may order as substitutes for total confinement," create a sentence condition requiring an offender to complete his community restitution within twenty-four months even though the court did not impose this express limitation in the sentence and the

offender has not violated any express conditions of his community restitution sentence?

2. Do RCW 2.28.010(4) and .060(2), which authorize a court to compel obedience to its judgments and orders, authorize a court to convert community restitution to total confinement when the procedures of RCW 9.94A.6333, specifically authorizing this remedy, are not followed?
3. Does a court abuse its discretion when it refuses to modify its decision granting equitable relief under CrR 7.8, where the party resisting the motion for that relief changes its position after the court has issued its decision in letter form, and does so in a filing one court day prior to the hearing on presentation of the conforming written order?
4. Does a court abuse its discretion granting equitable relief to a defendant when it relies upon the State's positions regarding the interpretation of a relevant statute?
5. Does a defendant's decision to appeal an order of the trial court and to obtain a stay of his sentence constitute "contributing to his release" precluding equitable relief under *Personal Restraint of Roach*, 150 Wn.2d 29, 74 P.3d 134 (2003), when the appeal is denied but is not frivolous?

D. STATEMENT OF THE CASE

Although this appeal is the result of the bad faith of the State and the San Juan County Sheriff in their attempts to deny Tylor Donnelly the right to serve his sentence, this appeal raises important questions of statutory interpretation, of the limits of a court's discretion to not reconsider its decisions when presented with new evidence, and of the limits of the court's discretion to grant equitable relief. The trial court granted Mr. Donnelly's motion for equitable relief from his sentence after determining that, due to the decisions of the Sheriff, Mr. Donnelly could not legally serve his sentence. CP 300-01. The Court of Appeals reversed, finding that the court abused its discretion. *See* Opinion, attached hereto, at 21, 23.

This case is somewhat complicated procedurally. However, the important issues arising from this case are, at this juncture, relatively simple. This petition will only briefly recite earlier procedural history and focus on more recent events.

Mr. Donnelly is a Canadian citizen and resident. In April of 2017, Mr. Donnelly was convicted of Assault in the Third Degree and sentenced

to 3 months. CP 23 (D1).¹ Using the standard sentencing form, the court authorized Mr. Donnelly to serve two months of his sentence on work crew “if eligible and approved.” *Id.* 30 days of total confinement were “hereby converted to 240 hours of community restitution . . . under the supervision of the Department of Corrections (DOC) to be completed on a schedule established by the defendant’s community corrections officer but not less than [blank] hours per month.” CP 24 (D1). Mr. Donnelly was sentenced to 12 months of community custody. *Id.* The sentence provided, “The conditions of community custody shall begin immediately upon release from confinement” CP 25 (D1).

Mr. Donnelly traveled without incident from his home in Canada to San Juan County for his hearings and to begin his work crew sentence. CP 46 (D1). On invitation of the Sheriff, Mr. Donnelly returned home to Canada on the weekends while on work crew on three occasions, twice reentering the United States without incident. *Id.*; CP 56 (D1). Both before and after his sentencing, Mr. Donnelly was subjected to special scrutiny at the border but was allowed entry. *Id.*

¹ On September 15, 2020, the Court of Appeals granted Mr. Donnelly’s request to transfer the record from the first appeal in this matter, *Donnelly I*, to this appeal. Citations to the record of *Donnelly I* are annotated with “D1”.

While returning to San Juan County for his work crew after his third weekend in Canada, Customs and Border Patrol denied Mr. Donnelly entry, informing him that they had been mistaken about his eligibility to enter the United States. CP 46 (D1) Mr. Donnelly learned that the Sheriff had to apply for a parole permit to allow Mr. Donnelly to enter the United States to serve his sentence. *Id.* Only the Sheriff could apply for the permit; Mr. Donnelly was not even allowed to possess it. CP 65 (D1); *see also* 9 FAM 202-3-3(B)(2)(c) (found in CP 62 (D1)). After a few days, the Sheriff terminated Mr. Donnelly from the work crew program and applied for the permit. CP 46 (D1).

Believing that the Sheriff was responsible for the failure to apply for the permit because only he could do so, Mr. Donnelly moved the trial court for equitable relief from his sentence to account for the days between his termination from the work crew program and his reentry into the United States on the parole permit. CP 36 (D1) The trial court denied the motion but granted a stay of Mr. Donnelly's work crew sentence pending appeal. CP 101 (D1) (decision letter); CP 126 (D1) (order denying equitable relief); CP 131 (D1) (stay). Mr. Donnelly returned to Canada due to the stay. The Court of Appeals affirmed the trial court. *Donnelly I*, No. 77816-1-I (Wn. App. Div. I, May 6, 2019).

On November 12, 2019, the trial court held a hearing to issue a new warrant of commitment following the mandate from the Court of Appeals.² Mr. Donnelly had accepted the Court of Appeals' decision and had expected simply to find out when he would be resuming his sentence, which required a new parole permit. Instead, the State asserted on the record, "There is . . . no scenario where the sheriff [is] going to apply for a parole permit." RP 120. The State moved for a bench warrant. *Id.* The trial court denied the motion recognizing that Mr. Donnelly was not trying to avoid his sentence and to allow Mr. Donnelly to seek some form of relief.³

Mr. Donnelly petitioned for a writ of mandate that would order the Sheriff to apply for the parole permit, alleging that the Sheriff was

² In the first sign of the State's bad faith in this case, the State opposed Mr. Donnelly's motion to appear telephonically knowing that Mr. Donnelly could not reenter the United States. RP 119. It then sought a bench warrant for Mr. Donnelly's failure to appear. RP 120.

³ The trial court continued the bench warrant motion to give Mr. Donnelly time to file a petition or motion for relief given the State's position. RP 140–41. At the continued hearing, the court denied the motion for a warrant. This hearing was not transcribed. The State subsequently renewed its motion for a bench warrant the next day after the trial court denied Mr. Donnelly's petition for a writ of mandate. Transcript, found at CP 30 (Writ), at 57. The trial court again postponed ruling on the motion, this time to give Mr. Donnelly time to file his motion for equitable relief. Transcript at 65. The motion was never considered again.

refusing to do so. CP 1 (Writ).⁴ The Sheriff opposed the petition, never denying or qualifying his refusal. CP 119 (Writ) (trial court finding). The trial court denied the petition.⁵ CP 117 (Writ).

With no other choice, Mr. Donnelly moved the trial court on January 6, 2020, for equitable relief from the sentence that he had no legal way to serve. CP 107. The State opposed the motion but, until the very end of the matter, did not deny that the Sheriff was unwilling to apply for the permit. After extensive briefing and argument, the court handed down a decision letter granting equitable relief on April 20, 2020. CP 355. Mr. Donnelly noted a hearing for presentation of conforming written orders for May 11, 2020.

On May 8, 2020, one court day prior to the presentation hearing, the Sheriff filed a declaration for the first time. CP 270. That declaration provided his justification for not applying for the parole permit but offered to apply for one if Mr. Donnelly served his entire sentence in total

⁴ On December 1, 2020, the Court of Appeals consolidated Mr. Donnelly's appeal in the writ-of-mandate case, case # 81532-6-I, into the criminal matter, case #81680-2-I. References to the record in the writ-of-mandate case are annotated with "Writ."

⁵ Mr. Donnelly has appealed this decision. The Court of Appeals affirmed this decision of the trial court. Mr. Donnelly does not seek further review of this decision.

confinement. *Id.* At the presentation hearing on May 11, the court declined to modify its decision at that late date. RP 275; CP 301.

On May 15, the State filed a motion for reconsideration. CP 307. The court denied that motion on several grounds including that it could not consider Sheriff Krebs' late declaration as new evidence that could have been provided before. CP 368 (citing CrR 7.8(b)(2)). In the alternative, the court considered the offer to apply for the permit in the Sheriff's declaration. CP 369–70. It concluded, in part based on the State's own arguments, that it lacked the authority to convert Mr. Donnelly's community restitution to total confinement. *Id.* Without that authority, the court could not meet the Sheriff's conditions. CP 370.

The State appealed this decision. CP 331. The Court of Appeals reversed, holding that the trial court abused its discretion. *See* Opinion. This petition discusses the Court of Appeals' opinion in the following section.

E. ARGUMENT

The parties appear to agree that Mr. Donnelly has a right to serve his sentence. This right was recognized in *Personal Restraint of Roach*, 150 Wn.2d 29, 74 P.3d 134 (2003). That opinion quotes the 10th Circuit in a similar case in which an inmate was released prematurely:

A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past. Yet, under a strict rule . . . a prisoner sentenced to five years might be released in a year, picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back.

Id. at 34 (quoting *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir 1930)).

Roach created a doctrine providing for equitable relief from a sentence under certain conditions.

From November 12, 2019, when the State announced, “There is . . . no scenario where the sheriff [is] going to apply for a parole permit”, until May 8, 2020, when the Sheriff made his 11th hour conditional offer to apply for the permit, it was clear to the parties and the trial court that Mr. Donnelly could not legally serve his sentence. *See* Br. of Resp., filed in Court of Appeals, 81680-2 on May 3, 2021, at 29 (cites to record). The court granted Mr. Donnelly equitable relief on that understanding. CP 361 (trial court finding). It recognized that the Sheriff had the right to decline to apply for the parole permit. CP 362. It also recognized that, given the Sheriff’s refusal, it was not equitable to leave Mr. Donnelly with no way to serve his sentence and a bench warrant on the books. *Id.*

Apparently believing that Mr. Donnelly is fully responsible for his own predicament, the Court of Appeals found that the trial court abused its discretion in several ways. It found:

1. Mr. Donnelly violated his community restitution sentence by not completing it within 24 months even though this condition was not in his sentence, interpreting RCW 9.94A.680(2) as imposing a requirement on Mr. Donnelly independent of his sentence.
Opinion at 9–10.
2. The trial court erred by not exercising its authority under RCW 2.28.010(4) and .060(2) to enforce its sentence by requiring Mr. Donnelly to serve his community restitution as total confinement, ignoring the sanction statutes in the Sentencing Reform Act, RCW 9.94A.633 et seq., ignoring that the State never alleged that Mr. Donnelly violated his community restitution sentence, and ignoring that the State argued that Mr. Donnelly’s community restitution sentence could not be changed. *Id.*
3. The trial court erred by not considering the Sheriff’s 11th-hour declaration as newly discovered evidence which could have been provided earlier, *see* CrR 7.8(b)(2), because Mr. Donnelly’s motion for equitable relief was not really a motion but rather a

response to the State’s motion to enforce the sentence. Opinion at 11.

4. The trial court erred by granting equitable relief under *Personal Restraint of Roche* because Mr. Donnelly’s decision to obtain a stay of his sentence pending appeal contributed to his current situation—that is, the Sheriff’s unwillingness to apply for a second permit unconditionally—disqualifying him for relief. Opinion at 21.

These rulings involve several points of law that require clarification.

1. **The Court of Appeals misconstrued RCW 9.94A.680(2) when it concluded that Mr. Donnelly had violated his community restitution sentence by not completing it with 24 months.**

Mr. Donnelly’s sentence converts 30 days of confinement to 240 hours of community restitution under RCW 9.94A.680(2). CP 19 (D1).

The Court of Appeals misconstrued this statute when it found that Mr. Donnelly had violated his community restitution sentence by not serving it within 24 months, a limitation found in the statute.⁶ See Opinion at 9–10.

⁶ This statute was not cited or briefed in the trial court or in any appellate briefing until Mr. Donnelly’s recent motion for reconsideration in the Court of Appeals. It was raised at oral argument by the appellate panel only after Mr. Donnelly could no longer respond.

Because Mr. Donnelly's sentence did not contain this limitation, he did not violate it.

RCW 9.94A.680 provides alternatives for sentences of one year or less. It lists "sentencing conditions that the court may order as substitutes for total confinement." RCW 9.94A.680. In no place does the statute require the offender to meet any conditions, only that the court "may order" them.

Each of the three subsections of this statute contain limits to the sentencing court's authority to order these alternatives. RCW 9.94A.680(2) provides for conversion of confinement to community restitution.⁷ Consistent with the other two subsections of the statute, this subsection contains limitations including the number of days of confinement that may be substituted, the rate of substitution, and the time-period during which the community restitution must be served. *Id.* This time-period must be during the period of community supervision or, optionally, a period set by the Court. *Id.* However, that time-period must

⁷ The statute reads,

In addition, for offenders convicted of nonviolent offenses only, eight hours of community restitution may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days.

Community restitution hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department.

RCW 9.94A.680(2).

be less than 24 months. *Id.* In any event, the community restitution must be served on a schedule determined by the Department of Corrections. *Id.*

A sentencing court's failure to abide by the restrictions in the statute is error. *See, e.g., State v. Sullivan*, 196 Wn. App. 277, 299, 343 P.3d 574 (2016) ("Sentencing a violent offender under RCW 9.94A.680(3) is error."). In particular, it was arguably error to not require completion of community restitution within 24 months in Mr. Donnelly's sentence.⁸

The Court of Appeals, however, held that the 24-month limit is a condition imposed on Mr. Donnelly independently from his sentence. Opinion at 9. This conclusion would characterize this condition differently than all other conditions in the section. Rather than a condition that is part of an alternative that a court "may order," the Court of Appeals concluded that the 24-month condition is one that comes into effect because community restitution is ordered at all. *Id.* This conclusion is inconsistent with the rest of the statute.⁹ *See Matter of Dodge*, 198 Wn.2d

⁸ If so, the standard sentencing form contains this error.

⁹ At best, the character of the time-period limitations in the second subsection is ambiguous on whether these limitations create an independent obligation on the part of the offender to comply with them. If the statute is ambiguous, the rule of lenity suggests that the limitations in RCW 9.94A.680(2) should be construed as being limitations that the sentencing court was supposed to impose. *Matter of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994) (applying the rule of lenity to the SRA and requiring statutory ambiguities to be resolved in the criminal defendant's favor).

826, 355, 502 P.3d 349 (2022) (“To determine a statute’s plain meaning, we may look to the entirety of the statute in which the provision is found . . .”); *State v. Coley*, 180 Wn.2d 543, 553, 326 P.3d 702 (2014) (considering “context of the statute in which that provision is found”).

The language in RCW 9.94A.680 providing that the sentencing court “may order” the conditions in that section is similar to other mandates in the Sentencing Reform Act. For example, the sentencing court “shall impose conditions of community custody” as listed in RCW 9.94A.703. DOC “shall at a minimum instruct the offender to” meet conditions listed in RCW 9.94A.704(3). Like RCW 9.94A.680, these statutes are instructions to the court and to DOC, not conditions imposed directly on offenders. If a sentencing court fails to impose a condition required in RCW 9.94A.703, the offender would not be found to have violated his sentence if he did not meet that condition. If the trial court had converted a day of confinement to 4 hours of community restitution or had exceeded the 30-day conversion limit, as provided in RCW 9.94A.680(2), would the offender have violated his sentence by following it?

The failure of the trial court to include a 24-month limit in the sentence may be error. However, the error was not appealed. Mr.

Donnelly did not violate his sentence by not completing the community restitution sentence in 24 months.

2. The trial court was not authorized to convert Mr. Donnelly's community restitution to total confinement.

The Court of Appeals cited RCW 2.28.010(4)¹⁰ and .060(2)¹¹ as authority for the trial court to enforce its sentence by converting his community restitution to total confinement. Opinion at 9–10. Even if Mr. Donnelly violated his community restitution sentence by not completing it within 24-months, any remedy is found in the Sentencing Reform Act, not general statutes in Title 2.

The Sentencing Reform Act provides for sanctions should an offender not comply with the terms of his sentence. *See* RCW 9.94A.633 et seq. When an offender is not supervised, RCW 9.94A.6333 provides the procedures and possible sanctions available to the trial court. RCW 9.94A.6332 (allocating sanctioning authority to the court, DOC, and sentencing board). RCW 9.94A.6333 provides for a procedure prior to a trial court's imposition of sanctions against an offender who has violated

¹⁰ RCW 2.28.010(4) provides, "Every court of justice has power . . . (4) [t]o compel obedience to its judgments, decrees, orders, and process . . . in an action, suit, or other proceeding pending therein."

¹¹ RCW 2.28.060(2) provides, "Every judicial officer has power . . . (2) To compel obedience to his or her lawful orders as provided by law."

the terms of his sentence. *See* RCW 9.94A.6333(2). The court must require the offender to show cause why the offender should not be punished for noncompliance. RCW 9.94A.6333(2)(a). It is the State's burden to prove noncompliance. RCW 9.94A.6333(2)(b).

At no time has the State claimed that Mr. Donnelly violated his community restitution sentence. Indeed, the State argued to the trial court that RCW 9.94A.6333 does not apply and that therefore the trial court lacked the authority to modify Mr. Donnelly's community restitution requirements under that statute.¹² CP 358 (trial court finding so). In its motion for reconsideration of the trial court's grant of equitable relief, the State argued for the first time that RCW 9.94A.731 or RCW 9.94B.040 were bases for alteration of Mr. Donnelly's community restitution requirement as a result of his violation of his work crew sentence (when he could not reenter the United States). CP 311–13. The trial court properly found that neither statute applied. CP 369.

Without the State's presentation of proof of a violation under RCW 9.94A.6333, Mr. Donnelly could not be found to have violated the terms of his community restitution sentence. Therefore, the trial court was

¹² The State argued that RCW 9.94A.6333 does not apply because the statute only applies after confinement is complete. *See* CP 358 (finding so).

without authority to modify the sentence. If the trial court erred in not considering whether Mr. Donnelly violated a term of his community restitution, the State invited the error. *See Dependency of A.L.K.*, 196 Wn.2d 686, 695, 478, P.3d 63 (2020) (invited error).

The Court of Appeals appears to get around the issues with RCW 9.94A.6333 by resorting to the grants of general powers in Title 2.¹³ *See* Opinion 9–10. Such a reading of Title 2 would render the more specific statutes meaningless. *See State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”). The Court could bypass the due process procedures set forth in RCW 9.94A.6333 and could impose sanctions beyond those authorized in that statute.

¹³ The Court of Appeals asserts that Mr. Donnelly was only “authorized” to serve 30 days of confinement as community restitution. Opinion at 8, 10. It asserts that, in enforcing its sentence under Title 2, “community restitution days were not being ‘converted’ to jail time.” Opinion at 10. Yet, the trial court is authorized to “substitute” community restitution for confinement. RCW 9.94A.680(2). If Mr. Donnelly violates his sentence, the court may “convert” community restitution to confinement. RCW 9.94A.6333(2)(c)(ii). The SRA provides a scheme where the trial court gave Mr. Donnelly an entitlement to perform a portion of his sentence as community restitution, that entitlement to be taken away only under the procedures of the SRA sanctions statutes, RCW 9.94A.633 et seq.

Therefore, given the positions of the State before the trial court, the court was without authority to convert Mr. Donnelly's community restitution sentence to total confinement.

3. The trial court was within its discretion to not consider the Sheriff's declaration filed one court day before presentation of orders conforming to the court's decision.

On May 11, 2020, the trial court decided whether to consider the Sheriff's declaration filed on the previous court day. After reviewing the declaration, the court decided that the court did not have "errors of fact based on the record before it when the letter decision was issued." RP 275; CP 301. The court declined to consider the Sheriff's conditional offer to apply for the parole permit at that late date. *Id.* However, the Court invited a motion for reconsideration. RP 275. On reconsideration, the trial court ruled that it could not consider the declaration as newly discovered evidence under CrR 7.8(b)(2). CP 368. However, in the alternative, it considered the declaration anyway and determined that it legally could not meet the condition demanded of the Sheriff (as discussed above). CP 370.

The Court of Appeals ruled that the trial court abused its discretion by not considering the declaration. Opinion at 11. It held that CrR 7.8 did not apply to the declaration because the procedural posture of the case was

a motion to enforce the sentence, not a motion for equitable relief from it.

Id. It concluded that Mr. Donnelly's motion for equitable relief was really a response to the State's motion to enforce the sentence. *Id.*

The difficulty with this perspective is that, with the trial court's grant of Mr. Donnelly's motion, there was no longer an enforceable sentence. If the court was ruling on a motion to enforce the sentence, and Mr. Donnelly's "motion" for equitable relief was merely a response to the State's motion, then the trial court had ruled on the motion to enforce the sentence. Whatever was the motion before the court, it had ruled on that motion by granting Mr. Donnelly equitable relief. Any challenge to that decision fell under CrR 7.8.

While the Court of Appeals does not do so, it is helpful to consider the State's late filing as two motions as it was intended: one to reconsider the decision letter prior to entry of final order, and one to reconsider the final orders themselves. *See* CP 260 (State's motion in these two alternatives).

The Court had discretion to decline to consider the Sheriff's offer. Throughout the proceedings, the State had stuck with the position that the Sheriff would not, under any circumstances, apply for the parole permit and that, since Mr. Donnelly could not enter the country to serve his sentence, the court should issue a bench warrant for Mr. Donnelly's arrest.

See Br. of Resp., filed in Court of Appeals, 81680-2 on May 3, 2021, at 29 (cites to record). Only one day prior to presentation of the court's decision, after the court ruled that it would not let the State put Mr. Donnelly in a hopeless bind, did the State offer the Sheriff's declaration. CP 270. Courts should not allow gamesmanship like that the State engaged in. The court was within its discretion to not consider the Sheriff's declaration.

The Court also could not consider the new declaration when deciding the State's motion for reconsideration. *See* CrR 7.8(b)(3).¹⁴ The State made no showing that the declaration contained information that could not have been brought forward much earlier.

The trial court was within its discretion to decline to consider the Sheriff's declaration both before or after entry of final orders.

4. Mr. Donnelly's decision to seek a stay of his sentence pending appeal should not disqualify him from equitable relief.

The Court of Appeals cites to Mr. Donnelly's decision to seek a stay of his sentence pending his first appeal and to return to Canada to await the Court of Appeals' decision as a basis for disqualifying Mr.

¹⁴ The parties agreed that CrR 7.8 applied to the State's motion. However, the court would have reached the same result under CR 59(a)(4) or CR 60(b)(3).

Donnelly from equitable relief pursuant to *Personal Restraint of Roach*. Opinion at 17–18. This opinion effectively puts Mr. Donnelly in a Hobson’s Choice between his right to appeal and his right to serve his sentence. He should not be at the mercy of the Sheriff because he exercised his right to an appeal.

This case is similar to *State v. Proctor*, 68 Wn.2d 817, 415 P.2d 634 (1966). In *Proctor*, the State argued that a deferred sentence was not appealable. *Id.* at 818. The State argued that an offender can choose to decline the deferred sentence and ask for a normal sentence from which he can appeal. *Id.* at 818–19. The Washington Supreme Court rejected that theory because it confronted the offender with a Hobson’s choice between his right to appeal and the deferred sentence. *Id.* at 819; *see also*, *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (choice between speedy trial right and right to prepare defense).

The Court of Appeals goes to some trouble to analyze the Sheriff’s reasons for declining to apply for the parole permit and his reasons for now offering to apply for the permit only if Mr. Donnelly serves his time as total confinement. Opinion at 13–16. While it seems more likely that the Sheriff was angry and simply wanted to punish Mr. Donnelly, *see* CP 276 (“I must also add that I am not happy that I applied for a SPBP with the expectation that Mr. Donnelly would serve his sentence and he

declined to remain in San Juan County to make that happen.”), Mr. Donnelly recognizes that the Sheriff has discretion whether to apply for the permit. The question before the trial court was, given the Sheriff’s decision, is Mr. Donnelly entitled to equitable relief. Therefore, the reasons for the Sheriff’s decision are relevant only to the extent that they point to wrongdoing on the part of Mr. Donnelly.

The Sheriff’s only accusation of wrongdoing is that Mr. Donnelly did not stay to complete his sentence after the Sheriff applied for the parole permit. *See* CP 270. It is obvious that, had Mr. Donnelly stayed, his appeal would have been moot. Therefore, the Sheriff effectively put Mr. Donnelly in an untenable Hobson’s Choice. The remedy is equitable relief.

The Court of Appeals enumerates several examples of other cases in which an appeal resulted in undesirable consequences for the appellant. Opinion at 20. All but one of those cases involves the payment of money such as attorney fees and costs rather than the loss of a valuable right such as the ability to serve one’s sentence. *See id.* The one non-financial case involves a resentencing that occurred after an intervening conviction, also not involving a choice between valuable rights. *See id.* (citing *State v. Collicott*, 118 Wn.2d 649, 827 P.2d 263 (1992)).

The Court of Appeals also faults the trial court for downplaying Mr. Donnelly's responsibility for his initial inability to enter the United States during his work crew sentence. Opinion at 19. While the Court of Appeals has decided that Mr. Donnelly was responsible for this error—a responsibility that Mr. Donnelly now accepts—all evidence points to Mr. Donnelly's good faith despite his erroneously legal conclusion. Mr. Donnelly's error should not preclude any relief from the Sheriff's subsequent decision to attempt to prevent Mr. Donnelly from serving his sentence while maintaining the bench warrant over his head. The trial court's conclusions here only recognized this inequity.

The trial court recognized that Mr. Donnelly had a reasonable albeit erroneous belief that he would be able to reenter the United States to complete his work crew. *See* CP 362. It recognized Mr. Donnelly's right to his first appeal and to return to Canada after obtaining a stay of his sentence pending that appeal. *Id.* And, it recognized that Mr. Donnelly's right to serve his sentence is destroyed by the Sheriff's refusal to obtain a parole permit that he admits he could choose to obtain. *Id.* The trial court was within its discretion to grant Mr. Donnelly relief from this intolerable situation.

F. CONCLUSION

The Court of Appeals stretched the law too far in its refusal to allow the trial court to provide a remedy to Mr. Donnelly's bind. It faulted the trial court for refusing to consider the Sheriff's new declaration filed one court day prior to entry of final orders conforming the Court's decision; it held that CrR 7.8 did not apply to the State's motion for reconsideration by recharacterizing Mr. Donnelly's motion for equitable relief as a response to the State's motion (which Mr. Donnelly asserts does not change the rule's applicability anyway); it applied general statutes in Title 2 because the procedures in the on-point enforcement statutes in the SRA were not followed; it held that the trial court could modify Mr. Donnelly's community restitution sentence even though the State argued to the trial court that it could not; and it held that a limitation in the statute authorizing conversion of confinement to community restitution applied to Mr. Donnelly even though the trial court did not order that limit.

The result is that Mr. Donnelly has no legal path to serving his sentence. This result is not equitable.

Respectfully submitted,

I certify, pursuant to RAP 18.17(b), that the word count of the foregoing is 4720 words.

BRANDLI LAW PLLC

Dated: June 27, 2022

By: 

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Attorney for Petitioner

Appendix A

FILED
3/28/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant/Cross-Respondent,

v.

TYLOR SEAN DONNELLY,

Respondent/Cross-Appellant.

DIVISION ONE

No. 81680-2-1 (consol. with
No. 81532-6-1)

UNPUBLISHED OPINION

DWYER, J. — The State appeals from the superior court’s order granting Tylor Donnelly’s motion to amend the warrant of commitment to award him credit for time served at liberty. Because Donnelly is not entitled to this form of equitable relief from the sentence, we reverse the superior court’s order amending the warrant of commitment.

Additionally, Donnelly cross appeals from the superior court’s order denying his petition for a writ of mandamus. This petition sought a writ requiring the San Juan County sheriff to apply for a second parole permit so that Donnelly could reenter the United States to serve the remainder of the sentence imposed upon him. Because Donnelly fails to demonstrate that the sheriff had a clear duty to apply for the parole permit, we affirm the superior court’s order denying the petition.

Most of the facts underlying this appeal are set forth in our first opinion in this matter, State v. Donnelly, No. 77816-1-I, slip op. at 1-6 (Wash. Ct. App. May 6, 2019) (unpublished), <https://www.courts.wa.gov/opinions/pdf/778161.pdf>. In his prior appeal, Donnelly asserted that the superior court erred by denying his motion to amend the warrant of commitment to award him credit for days during which he was unable to report for work crew. Donnelly, No. 77816-1-I, slip op. at 1. We rejected Donnelly's argument and affirmed the superior court's order. Donnelly, No. 77816-1-I, slip op. at 1. In so doing, we reasoned that Donnelly failed to meet the requirements to be granted credit for time served at liberty. Donnelly, No. 77816-1-I, slip op. at 11.

On December 5, 2017, Donnelly, for whom the sheriff had arranged the issuance of a permit issued by the United States Department of Homeland Security allowing entry into the United States, filed a motion in the superior court to stay the sentence pending his first appeal.¹ The State opposed this motion. On December 12, the superior court entered an order granting Donnelly's motion to stay, but only with regard to the term of work crew service that was authorized

¹ Under federal immigration law, Donnelly's felony conviction renders him unable to enter the United States, absent special authority from the Secretary of the Department of Homeland Security. U.S. DEP'T OF HOMELAND SEC'Y, PRIVACY IMPACT ASSESSMENT FOR THE ICE PAROLE AND LAW ENFORCEMENT PROGRAMS UNIT CASE MANAGEMENT SYSTEMS, at 1 (Dec. 3, 2018), [https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-plepucms-december2018.pdf#:~:text=The%20Parole%20and%20Law%20Enforcement%20Programs%20Unit%20%28Parole,in%20the%20ICE%20Parole%20Unit%20Case%20Management%20Systems\[https://perma.cc/T47M-4AXP\]](https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-plepucms-december2018.pdf#:~:text=The%20Parole%20and%20Law%20Enforcement%20Programs%20Unit%20%28Parole,in%20the%20ICE%20Parole%20Unit%20Case%20Management%20Systems[https://perma.cc/T47M-4AXP]).

under the sentence. Sometime thereafter, Donnelly departed the United States and returned to Canada.²

On October 24, 2019, following our decision in the first appeal, the State filed a motion in the superior court wherein it sought an order requiring Donnelly to appear and complete the remainder of the sentence. In response, Donnelly filed a memorandum in which he made the following two requests:

1. That his commit date be set in the second week in January at the earliest; and
2. That an appropriate order be entered requiring the Sherriff's Office to monitor Mr. Donnelly for an additional month so that he can complete the community service portion of his sentence in compliance with federal regulations.

On November 12, 2019, the superior court heard the State's motion.

Donnelly did not appear at the hearing, but his attorney was present. During the hearing, the State requested that the superior court issue a bench warrant for Donnelly's arrest. Additionally, the State opposed both of the requests made in Donnelly's memorandum. The superior court declined to issue a bench warrant for Donnelly's arrest and suggested that Donnelly file a written motion clarifying his requests. 

On November 18, 2019, Donnelly filed a petition for a writ of mandamus to require the San Juan County sheriff to apply for a second parole permit from the Department of Homeland Security so that Donnelly could reenter the United States to serve the remainder of his sentence. That same day, Donnelly also filed a motion to modify the sentence pursuant to CrR 7.8(b)(5). In this motion,

² In his response brief, Donnelly states: "Having entered the United States a few days prior to the stay on the parole permit that the Sheriff had obtained, Mr. Donnelly returned to Canada." Br. of Resp't at 6.

Donnelly sought an order requiring the sheriff to electronically monitor him “up to one month following completion of his work crew sentence so that he can complete his community service in the United States.” Alternatively, Donnelly requested “that he be allowed to complete his community service in Canada.”

On November 25, 2019, the State filed a memorandum opposing Donnelly’s motion to modify the sentence. On November 26, the sheriff filed an answer to Donnelly’s petition for a writ of mandamus in which the sheriff requested that the superior court dismiss the petition.

On December 10, 2019, the superior court heard both Donnelly’s motion to modify the sentence and his petition for a writ of mandamus. During the hearing, the superior court denied Donnelly’s petition for a writ of mandamus.³ Also during the hearing, Donnelly’s counsel withdrew his motion to modify the sentence and indicated that he would file a different motion following the hearing. Accordingly, the superior court did not rule on the motion to modify the sentence. 

On January 6, 2020, Donnelly filed a motion to amend the warrant of commitment pursuant to CrR 7.8(b)(5). In this motion, Donnelly asserted that he was entitled to credit for time served at liberty with regard to the remainder of the sentence. Donnelly claimed that he was entitled to this form of equitable relief because the sheriff declined to apply for a second parole permit after Donnelly decided to depart the United States following the institution of his appeal in Donnelly, No. 77816-1-1.

³ On May 11, 2020, the superior court entered a written order denying with prejudice Donnelly’s petition for a writ of mandamus.

On February 5, 2020, the State filed a motion for a bench warrant. That same day, the State also filed a memorandum opposing Donnelly's motion to amend the warrant of commitment. In its memorandum, the State asserted that no new circumstances had arisen, since Donnelly filed his notice of appeal in Donnelly, No. 77816-1-1, that entitled him to credit for time served at liberty. The State also contended that the superior court lacked authority to modify Donnelly's sentence pursuant to CrR 7.8.

On February 28, 2020, the superior court heard both the State's motion for a bench warrant and Donnelly's motion to amend the warrant of commitment. On April 20, the superior court issued a letter decision on both of these motions. In this letter decision, the superior court concluded that it could review Donnelly's motion to amend the warrant of commitment pursuant to CrR 7.8(b)(5). The superior court also explained that Donnelly was entitled to credit for time served at liberty with regard to the remainder of the sentence. In so doing, the superior court reasoned as follows:

I conclude that the equitable doctrine should be applied here and that Mr. Donnelly is entitled to credit, in equity, for time spent at liberty against the 44 days remaining on his sentence (30 of which were converted to 240 hours of community service). Where the Sheriff controls the ability for Mr. Donnelly to enter the country with a parole permit to serve the remainder of his sentence and chooses not to obtain the permit, it is inequitable to allow Mr. Donnelly to remain in limbo, with a sentence tolled that he cannot fulfill, perhaps indefinitely.

The Court acknowledges that Mr. Donnelly made the choice to return to Canada, including after the hearing on December 12, 2017. However, given the specific facts here, the Court concludes that those choices do not qualify as his fault or contribution to the problem in the way that was foreseen and intended by the Court in

Roach.^[4] The initial choice to return home was with the permission of the Sheriff's Office and after Mr. Donnelly had done some due diligence with regards to his ability to re-enter the United States following conviction. The second choice to return home was related to his choice to pursue his legal right of appeal. It would not be appropriate for the Court to "punish" Mr. Donnelly for appealing or to conclude that his choice to appeal is equivalent to contributing to the problem at issue. Further, the choice to return home and appeal was made with the expectation that the Sheriff would again seek a parole permit to allow him to serve his sentence, if necessary.

Also in this letter decision, the superior court denied the State's motion for a bench warrant.

On May 8, 2020, the State filed a motion to revise the letter decision. In this motion, the State provided more complete information regarding the sheriff's willingness to apply for a second parole permit:

The Sheriff is willing to apply for a second Substantial Public Benefit Parole if the tracking requirements of the Homeland Security can be satisfied in a responsible and safe manner. This will require that the sentence of the defendant be converted to all jail, as authorized by RCW 9.94A.731. The Sheriff Deputy will meet the defendant at the border and take him to jail and return him to the border. No additional penalties are proposed. The duration of the original sentence remains unchanged. A total of 44 days in county jail would be served. Before being released to return to Canada the defendant will be given an opportunity to meet with an official with the Department of Corrections to arrange for their continued supervision.

Attached to the State's motion was a declaration of the sheriff, which provided support for the statement quoted above. Also in this declaration, the sheriff provided numerous reasons why he was unwilling to apply for a second parole permit unless Donnelly was subject to total confinement.

⁴ In re Pers. Restraint of Roach, 150 Wn.2d 29, 74 P.3d 134 (2003).

On May 11, 2020, the superior court held a presentation hearing. At the hearing, the superior court declined to revise its letter decision and stated that it would, after entering a final order, consider the State's motion as a motion for reconsideration. That same day, the superior court entered an order granting Donnelly's motion to amend the warrant of commitment. In this order, the superior court explained that it declined to consider the State's motion to revise the letter decision because "the letter decision did not have errors of fact based on the record before it when the letter decision was issued." However, the order provided that the superior court would "consider it as a motion for reconsideration, and the court has requested argument on the same."

On May 15, 2020, the State filed a memorandum in support of reconsideration. On May 26, the superior court heard the State's motion for reconsideration. On June 26, the superior court denied the motion.

The State appeals. Donnelly cross appeals.

II

We begin by clarifying the sentence that was imposed on Donnelly and the superior court's authority to enforce that sentence. The parties express the belief that Donnelly was sentenced to a term of 60 days of work crew and 30 days of community restitution. On remand from our first opinion in this matter, the superior court articulated a similar belief.⁵ However, Donnelly was not sentenced to 60 days of work crew and 30 days of community restitution.

⁵ For example, in its letter order denying the State's motion for reconsideration, the superior court stated that "the State has not established legal authority for the Sheriff or the Court to *convert* the 30 days of community service to jail time in order to allow Sheriff Krebs to supervise the Defendant under a parole permit as proposed." (Emphasis added.)

Rather, Donnelly was sentenced to “[a] term of *total confinement* in the custody of the county jail” for “3 months on Count I.” (Emphasis added.) Donnelly was then *authorized* to satisfy that sentence of total confinement through a  combination of both work crew service and community restitution.

With regard to work crew, the sentence provided that “[t]he defendant *may* serve the sentence, *if eligible and approved*, in partial confinement in . . . work crew” pursuant to RCW 9.94A.725. (Emphasis added.) When an offender is authorized to satisfy his or her sentence through work crew service, the term of total confinement remains the underlying sentence imposed by the court. Indeed, “[p]articipation in a work crew *is conditioned . . . upon* compliance with the rules of the program.” RCW 9.94A.725 (emphasis added). Furthermore, if an offender fails to comply with the rules of work crew, the offender may be required, without further court order, to serve the remainder of his or her term of work crew in total confinement:

An offender in a county jail ordered to serve all or part of a term of less than one year in . . . work crew . . . who violates the rules of . . . work crew . . . may be transferred to the appropriate county detention facility without further court order.

RCW 9.94A.731(2).

Next, regarding community restitution, the sentence provided that, pursuant to RCW 9.94A.680,

30 days of total confinement ordered above are hereby converted to 240 hours of community restitution (service) (8 hours = 1 day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Corrections (DOC) to be completed on a schedule established by the defendant’s community corrections officer.

Under RCW 9.94A.680, the sentence of total confinement also remains the underlying sentence imposed by the court. Indeed, this statute provides:

Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include the following *sentence conditions* that the court may order as substitutes for total confinement:

. . .
(2) In addition, for offenders convicted of nonviolent offenses only, eight hours of community restitution may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days. *Community restitution hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department.*

RCW 9.94A.680 (emphasis added).

As the statute makes clear, an express condition of community restitution is that it be completed within a period that “shall not exceed twenty-four months.”

RCW 9.94A.680. When an offender fails to satisfy this condition of community restitution, two foundational provisions of Title 2 RCW authorize the superior court to enforce its underlying sentence of total confinement. Indeed, RCW 2.28.010(4) provides that “[e]very court of justice has power . . . [t]o compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein.” Likewise, RCW 2.28.060(2) states that “[e]very judicial officer has power . . . [t]o compel obedience to his or her lawful orders as provided by law.”



Here, Donnelly failed to satisfy the conditions of both work crew and community restitution. On November 1, 2017, the sheriff informed Donnelly that he had been terminated from the work crew program for his failure to report to work crew. Because Donnelly failed to report to work crew, the sheriff was

statutorily authorized to transfer Donnelly “to the appropriate county detention facility without further court order” so that Donnelly could satisfy the remainder of his term of work crew in total confinement. RCW 9.94A.731. Furthermore, Donnelly did not satisfy the additional 30 days remaining on the sentence through community restitution within 24 months, which was a condition of community restitution required by statute.⁶ See RCW 9.94A.680(2). Therefore, the superior court was authorized to enforce the underlying sentence of total confinement with regard to these 30 days. See RCW 2.28.010(4); RCW 2.28.060(2).

To be clear, community restitution days were not being “converted” to jail time, as the superior court judge expressed. Rather, the sentencing condition of completing community restitution within 24 months was not met. Thus, the judgment requiring 30 days of incarceration was not satisfied by timely community restitution performance. Enforcement of the underlying sentence is allowable.⁷



⁶ Donnelly was sentenced on April 28, 2017. On December 12, 2017, the superior court entered its order staying Donnelly’s sentence pending his appeal in Donnelly, No. 77816-1-I. This order provided that the “execution of the *work crew portion* of Mr. Donnelly’s sentence [is] STAYED pending appeal.” (Emphasis added.) Additionally, the order clarified that “[t]his order *does not* stay Defendant’s sentence relating to his *community service . . . obligations*.” (Emphasis added.) In other words, Donnelly’s obligations with regard to the portion of his sentence that was authorized to be satisfied through community restitution was unaffected by this order. Therefore, more than 24 months elapsed between the sentencing date and October 24, 2019, when the State filed its motion in superior court for an order requiring Donnelly to appear and complete his sentence (the first action taken by either party after remand).

⁷ Because community restitution is a condition of the sentence, the defendant must satisfy the condition to receive its benefit. If, at any point following the imposition of sentence, the superior court enters an order finding that the condition has not, will not, or cannot be satisfied, the execution of the underlying term of confinement is warranted.

III

We next address whether the superior court erred by declining to consider the declaration of the sheriff, which contained information regarding the sheriff's willingness to apply for a second parole permit. Despite the significance of this information, the superior court ruled that, pursuant to CrR 7.8, it could not consider the declaration. However, the superior court's reasoning fails to recognize that the nature of the proceeding before it was an action to enforce a judgment and sentence. Indeed, on October 24, 2019, the State filed a motion wherein it sought an order requiring Donnelly to appear and complete the remainder of the sentence. Donnelly's motion to amend the warrant of commitment, in which he sought equitable relief from serving the remainder of the sentence, was filed in response to the State's motion to enforce the sentence. As already explained, the superior court was vested with the statutory authority to enforce its judgment and sentence. The most important information for the court to acquire was what, exactly, the sheriff was willing to do and what was the sheriff's reasoning behind his decision. The superior court abused its discretion by choosing to ignore this information at a stage of the proceeding at which it still had time and statutory authority to enforce its judgment and sentence.

IV

We next discuss the process by which a Homeland Security parole permit may be issued and whether the sheriff herein lawfully declined to apply for a

second parole permit unless Donnelly was required to serve the remaining portion of his sentence in total confinement.

Federal law provides that the United States Attorney General “may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.” 8 U.S.C. § 1182(d)(5)(A). This statutory provision has been interpreted to “provide[] the Secretary of Homeland Security discretion to parole any foreign national applying for admission into the United States temporarily for urgent humanitarian reasons or significant public benefit.” PRIVACY IMPACT ASSESSMENT, supra, at 1.

“Parole is an extraordinary measure, sparingly utilized to permit an otherwise ineligible noncitizen to enter the United States for a temporary period due to an urgent humanitarian reason or for significant public benefit.” 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 202.3-2(A)(b). “[Significant public benefit parole] cases involve an individual whose presence is *necessary* in connection with legal cases or investigations, whether at the federal, state, local, or tribal level of government.” 9 F.A.M. 202.3-3(B)(2)(c) (emphasis added). As such, “[p]arole should be a last option for individuals . . . [w]hose travel to the United States presents a significant public benefit.” 9 F.A.M. § 202.3-3(B)(1)(c)(4). Finally, only a “law enforcement agenc[y]” is authorized to request a parole permit, and the law enforcement agency must make its request “through Department of Justice channels.” 9 F.A.M. 202.3-3(B)(2)(c).

Once a parole permit is issued, the Department of Homeland Security requires that the requesting law enforcement agency track the activities of the parolee while the parolee is located in the United States:

The requesting law enforcement agency is responsible for tracking the parolee's activities while in the United States and throughout the duration of the parole period, as well as for providing case updates to the Parole [and Law Enforcement Programs] Unit. This information (along with possible parole extensions, parole terminations, the date the parolee departs, and if the parolee absconds) is also updated in [the Parole Case Tracking System]. The requesting law enforcement agency provides a final update to the Parole Unit when the parolee has completed his or her parole, and the Parole Unit closes the case in [the Parole Case Tracking System] once the parolee's departure from the United States is confirmed.

PRIVACY IMPACT ASSESSMENT, supra, at 4. Thus, as the requesting law enforcement entity, the sheriff is required to be responsible for both the security and behavior of the parolee during the parolee's time in the United States.

Before Donnelly filed his first appeal, the sheriff applied for a substantial public benefit parole permit so that Donnelly could enter the United States to serve the remainder of the sentence imposed on him. That application was granted on November 13, 2017. The permit issued authorized Donnelly to enter the United States on December 5, 2017. At that point, Donnelly was perfectly able to enter the United States on December 5, 2017, and complete his sentence, as envisioned by the sentencing judge.⁸

After Homeland Security issued that parole permit, however, Donnelly filed a motion in the superior court wherein he complained that, if he were required to

⁸ The sentencing judge has since retired. On remand, all decisions were made by his successor judge.

serve the sentence at that time, he would “miss Christmas with [his] family.” Donnelly also protested that, during the holiday season, the cost of rental housing in San Juan County would “be a great deal more expensive than the one [he] had for October and November.” Finally, after Donnelly entered the United States on December 5, 2017, pursuant to the parole permit that the sheriff had obtained for him from Homeland Security, Donnelly chose not to serve the sentence as arranged by the sheriff. Rather, Donnelly filed a motion to stay the sentence, filed an ultimately meritless appeal, and returned to Canada.

In the declaration of the sheriff that was attached to the State’s motion for revision, the sheriff stated that he would be willing to apply to Homeland Security for a second parole permit, but only if Donnelly was required to serve the remainder of the sentence in total confinement. The sheriff provided several reasons for this.

First, the sheriff stated that “Mr. Donnelly insists that he is entitled to service of his sentence as ‘originally negotiated.’ He has been terminated from the Work Crew program and therefore should serve the remainder of his sentence in jail.”

Second, the sheriff explained that,

because Homeland Security requires me to track the parolee, I am unwilling to apply for a second [parole permit] that would include conditions such as those that were imposed before, regarding work crew, days off, and monitoring with an ankle bracelet. We do not have ankle bracelet monitoring 24/7, therefore this . . . form of tracking is not acceptable to me.

Third, the sheriff stated:

I must also add that I am not happy that I applied for a [parole permit] with the expectation that Mr. Donnelly would serve his sentence and he declined to remain in San Juan County to make that happen. Yes, he had a right to appeal Judge Eaton's decision, but he also must face the consequence of his choice to return to Canada and its effect on his power to return to the United States to finish his sentence. The original substantial benefit parole was for a duration that extended into February 2018 which allowed him to complete all things required under the supervision of this office.

Finally, the sheriff explained:

I question the value or significant public benefit of multiple applications for accommodating a person for their business and personal desires without considering the need to accomplish the punishment ordered by Judge Eaton. Of course, the defendant is entitled to serve his sentence, but in his special status as a parolee he does not have a right to do it in pieces and return home as needed for personal reasons. Finally, I questioned the substantial public benefit for a person who voluntarily returned to Canada after first parole was granted for the purpose of completing his sentence. The defendant has shown to me that he has a propensity to say one thing and do another, which creates an unacceptable risk for me as the head of the "requesting law enforcement agency" who takes on tracking requirements of the Department of Homeland Security.

Given Donnelly's behavior after the sheriff convinced Homeland Security to issue the first parole permit on November 13, 2017, the sheriff expressed that, in essence, he now believed that Donnelly was not a sincere person who truly desired to serve his sentence and pay his debt to society (as he first believed) but, rather, was an insincere person who was dedicated to avoiding as much punishment as possible by any means available. As a result of this change of perception, the sheriff expressed the reasonable belief that Donnelly would not be a secure prisoner if he was not subject to total confinement. In short, the sheriff's view of Donnelly's security risk had changed based on Donnelly's own behavior. Especially considering the fact that Donnelly had engaged in a violent

criminal act in the United States, the sheriff's evaluation of his security risk was an important fact that the superior court erred by ignoring.

The sheriff was entitled to decline to apply for a second parole permit unless Donnelly was to be subject to total confinement. In making this determination, he acted within the discretion afforded him as an elected public safety official.

V

Having clarified the authority of the superior court to enforce its judgment and sentence and the circumstances under which the sheriff was willing to apply for a second parole permit, we now turn to the merits of the State's challenge on appeal. The State contends that the superior court erred by awarding Donnelly credit for time served at liberty. Because no circumstances arose after our first decision in this matter that entitle Donnelly to this form of equitable relief, we agree.

Our Supreme Court has made clear the conditions that an applicant must meet in order to be entitled to credit for time served at liberty:

[A] convicted person is entitled to credit against his sentence for time spent erroneously at liberty due to the State's negligence, provided that the convicted person has not contributed to his release, has not absconded legal obligations while at liberty, and has had no further criminal convictions.

In re Pers. Restraint of Roach, 150 Wn.2d 29, 37, 74 P.3d 134 (2003).

In our first opinion in this matter, we held that, under the then-existing facts, Donnelly was not entitled to credit for time served at liberty. Donnelly, No. 77816-1-I, slip op. at 11. Therefore, only circumstances arising after our decision

in that opinion could apply to qualify Donnelly for this form of equitable relief.

See Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988)

(“It is . . . the rule that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.” (quoting Adamson v. Traylor, 66 Wn.2d 338, 339, 402 P.2d 499 (1965))).

After the sheriff obtained the parole permit that authorized Donnelly’s entry into the United States on December 5, 2017, the sole reasons why Donnelly did not serve the remainder of the sentence were the consequence of his own actions. First, Donnelly sought a stay of the sentence and, thereafter, departed the United States. The State opposed Donnelly’s motion to stay the sentence. As such, Donnelly’s failure to serve the sentence when arranged by the sheriff and permitted by Homeland Security was the result of his own conduct. Furthermore, because the State opposed the motion to stay the sentence, Donnelly’s inability to reenter the United States after he returned to Canada was not the result of the State’s negligence.

Second, Donnelly departed the United States after he decided to pursue a meritless appeal. See Donnelly, No. 77816-1-I. In that appeal, the State again opposed Donnelly. See Donnelly, No. 77816-1-I. Therefore, Donnelly’s own decision to file a meritless appeal contributed to his inability to reenter the United States to serve the remainder of the sentence. Moreover, because the State

opposed Donnelly's first appeal in this matter, Donnelly's inability to reenter the United States was, again, not in any way the result of the State's negligence.

In any event, Donnelly was never *released* from serving the sentence. As we explained in Donnelly, No. 77816-1-I at 10, "[t]he trial court . . . correctly ruled that Donnelly was not released from his obligation to serve the sentence imposed on him by the superior court." Instead, Donnelly was terminated from the work crew program after he failed to report. Donnelly, No. 77816-1-I at 9-10. Additionally, Donnelly did not satisfy the statutory condition of community restitution that it be completed within 24 months. See RCW 9.94A.680(2). Accordingly, Donnelly remains subject to the underlying sentence of total confinement that was imposed by the superior court.

Following our decision in Donnelly, No. 77816-1-I, the superior court ruled that Donnelly was entitled to credit for time served at liberty for several reasons.

First, the superior court reasoned:

Where the Sheriff controls the ability for Mr. Donnelly to enter the country with a parole permit to serve the remainder of his sentence and chooses not to obtain the permit, it is inequitable to allow Mr. Donnelly to remain in limbo, with a sentence tolled that he cannot fulfill, perhaps indefinitely.

Contrary to the superior court's reasoning, the sheriff explained in his declaration that he was willing to apply for a second parole permit, but only if Donnelly was required to serve the remainder of the sentence in total confinement. As already explained, the sheriff acted well within his discretion to decline to apply for a second parole permit unless Donnelly was subject to total confinement. With regard to the portion of Donnelly's sentence that was

originally authorized to be satisfied through work crew, the sheriff had the authority to transfer Donnelly “to the appropriate county detention facility without further court order.” RCW 9.94A.731(2). Furthermore, and contrary to the superior court’s understanding, once the 24-month statutory period expired, the superior court had the authority to deem the community restitution sentencing condition not met and order Donnelly to serve in total confinement the remaining term of the sentence.

Next, the superior court concluded that Donnelly was not at fault for returning to Canada before he was *initially* denied entry into the United States:

The initial choice to return home was with the permission of the Sheriff’s Office and after Mr. Donnelly had done some due diligence with regards to his ability to re-enter the United States following conviction.

However, this reasoning directly contradicts our first opinion in this matter:

Donnelly’s predicament was not the result of negligence by the State. To the contrary, he executed a guilty plea statement in which he acknowledged that he understood the possibility that his conviction could render him excludable from the United States. Nevertheless, he exercised *no diligence* in discerning whether he would be able to enter the United States, when necessary to do so to comply with the requirements of his sentence.

Donnelly, No. 77816-1-1, slip op. at 12 (emphasis added). On remand, the superior court was without authority to set aside our expressed judgment and substitute its own view of the matter. It erred by so doing.

Finally, the superior court reasoned that Donnelly could not be disadvantaged as a result of pursuing a meritless appeal:

The second choice to return home was related to his choice to pursue his legal right of appeal. It would not be appropriate for the Court to “punish” Mr. Donnelly for appealing or to conclude that his

choice to appeal is equivalent to contributing to the problem at issue.

The superior court was wrong to so reason. Litigants often find themselves in worse positions after filing an unsuccessful appeal. For example, in civil cases, appellants have been required, following an unsuccessful appeal, to either pay the opposing party's attorney fees or fulfill their obligations pursuant to a supersedeas bond. See, e.g., TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 214-15, 165 P.3d 1271 (2007) (holding that respondent was entitled to an award of attorney fees on appeal from appellant); Holmquist v. King County, 192 Wn. App. 551, 558, 368 P.3d 234 (2016) ("Washington courts follow the established rule that once an appeal has failed, the supersedeas obligor's 'liability for damages . . . is *absolute*.'" (alteration in original) (quoting John Hancock Mut. Life Ins. Co. v. Hurley, 151 F.2d 751, 755 (1st Cir. 1945))).

Likewise, in criminal cases, defendants have, upon remand from an appeal, been resentenced with higher offender scores as a result of an intervening conviction. See, e.g., State v. Collicott, 118 Wn.2d 649, 668-69, 827 P.2d 263 (1992). Additionally, nonindigent criminal defendants have been required to pay court costs for an unsuccessful appeal. See, e.g., State v. Gonzales, 198 Wn. App. 151, 155-56, 392 P.3d 1158 (2017). Cases are legion in which a party—in either a civil or criminal matter—is worse off for pursuing a meritless appeal. There is nothing unjust or unusual about this outcome.

Donnelly decided to depart the United States after filing what proved to be a meritless appeal. Thus, he alone contributed to his inability to reenter the

United States, after remand, to serve the remainder of the sentence. It is of no consequence that he now finds himself in a worse position after filing the unsuccessful appeal. Most importantly, the State in no way contributed to Donnelly's decision to act in this way.

Accordingly, the superior court erred by granting Donnelly's motion to amend the warrant of commitment.⁹

VI

On cross appeal, Donnelly asserts that the superior court erred by denying his petition for a writ of mandamus to compel the sheriff to apply for a second parole permit. Because the sheriff did not have a clear duty to apply for a parole permit, we disagree.

"[M]andamus is an extraordinary writ." Mower v. King County, 130 Wn. App. 707, 718, 125 P.3d 148 (2005).¹⁰ Indeed, "[a] party seeking a writ of mandamus must show that (1) the party subject to the writ has a clear duty to act; (2) the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law; and (3) the petitioner is beneficially interested." Seattle Times Co. v. Serko, 170 Wn.2d 581, 588-89, 243 P.3d 919 (2010) (citing RCW 7.16.160, .170)).

⁹ The State also contends that the superior court erred by ruling that Donnelly's motion to amend the warrant of commitment was timely. According to the State, Donnelly's motion was untimely under RCW 10.73.090 because it amounted to a collateral attack on the judgment and sentence and was filed more than one year after the judgment became final. We disagree.

The issue before the superior court was the enforcement of a judgment and sentence. Donnelly's motion to amend the warrant of commitment did not amount to a collateral attack on the judgment and sentence. Instead, this motion merely sought a means by which Donnelly's sentence could be satisfied in equity. Therefore, the one-year time constraint under RCW 10.73.090 did not apply to Donnelly's motion to amend the warrant of commitment.

¹⁰ We review de novo a trial court's decision regarding the issuance of a writ of mandamus. Mower, 130 Wn. App. at 719.

“The duty to act must be ministerial in nature rather than discretionary.” Seattle Times Co., 170 Wn.2d at 589. Moreover, “[w]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial.” SEIU Healthcare 775NW v. Gregoire, 168 Wn.2d 593, 599, 229 P.3d 774 (2010) (internal quotation marks omitted) (quoting State ex rel. Clark v. City of Seattle, 137 Wash. 455, 461, 242 P. 966 (1926)). Accordingly, “mandamus can direct an officer or body to exercise a mandatory discretionary duty, but not the manner of exercising that discretion.” Mower, 130 Wn. App. at 719.

Donnelly contends that, pursuant to the following statute, the sheriff was required to apply for a parole permit so the Donnelly could reenter the United States to complete the remainder of the sentence:

When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his or her deputy, a transcript from the minutes of the court of such conviction and sentence, duly certified by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly.

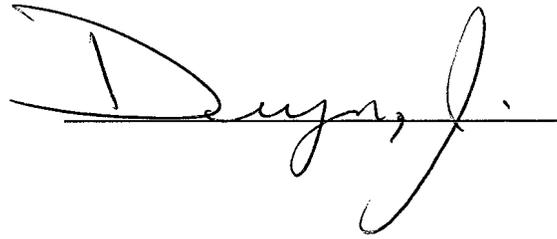
RCW 10.70.020.

By its terms, this statute applies when a person is sentenced to be imprisoned in total confinement. The sheriff made clear in his declaration that, if Donnelly was ordered to serve the remainder of his sentence in total confinement, he was willing to both apply for a second parole permit and undertake the tracking requirements imposed by the Department of Homeland Security. In any event, nothing in RCW 10.70.020 imposes a clear duty on

behalf of the sheriff to apply to the Department of Homeland Security for a parole permit.

Accordingly, Donnelly's assignment of error fails.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

A handwritten signature in cursive script, appearing to read "Donnelly", written over a horizontal line.

WE CONCUR:

Two handwritten signatures in cursive script, one reading "Verellen" and the other "Appelwick, J.", both written over a horizontal line.

BRANDLI LAW PLLC

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