NO. 90675-1

SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I
No. 70403-6-I

RICHARD BLICK,

Petitioner/Appellant,

v.

STATE OF WASHINGTON, ELDON VAIL, BERNIE WARNER, and DOES 1-20, Respondents,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

DANIEL J. JUDGE #17392
Senior Counsel
RONDA D. LARSON #31833
Assistant Attorney General

P.O. Box 40126
Olympia, WA 98504-0126
360-586-6300

ORIGINAL

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I. INTRODUCTION

Mr. Blick brings state tort claims, alleging the Department of Corrections ("Department") deprived him of his early release time received from the county jail because the Department did not transfer him to community custody before the end of his prison sentence. But Mr. Blick was not transferred because he admittedly did not obtain an approved release plan that included an approved residence and living arrangement ("approved release address"), prior to that time.

Mr. Blick's lawsuit is falsely premised on his allegation that the Department ignored or rescinded his early release time from the King County Jail because he was not transferred to community custody in lieu of early release without an approved release address. Mr. Blick's premise falsely claims an automatic entitlement to such transfer on a particular date, regardless of other clear statutory requirements. His premise falsely equates early release time with time actually served. His premise also ignores the early release time Mr. Blick received from the jail, enabling him to propose a release address earlier.

As the Court of Appeals properly concluded, offenders sentenced for an offense categorized as a sex offense, like Mr. Blick, must obtain an approved release address before being transferred to community custody *in lieu* of early release. *Blick v. State*, ___ Wn. App. ___, 328 P.3d 952,

954, 955 (2014) (Slip Op. at 3, 6). An offender's early release time—whether it has been received from the county jail or the prison—merely makes him eligible for an earlier transfer. Here, the undisputed record of this case shows that Mr. Blick was *eligible* for early release not only as a result of his early release time received while in the Department's custody, but also as a result of his 52 days of early release time received from the King County Jail. However, despite that eligibility, Mr. Blick remained confined because he failed to obtain an approved release address.

The Court of Appeals properly concluded Mr. Blick's negligence and false imprisonment claims—alleging denial of early release time received from the county jail—lacked merit and should be dismissed. The decision is consistent with Washington case law, Washington statutes, and public policy. This Court's discretionary review is not warranted.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed the superior court's order granting summary judgment and dismissing Mr. Blick's complaint on June 23, 2014. Thereafter, Mr. Blick timely filed a motion for reconsideration that the Court of Appeals denied on July 23, 2014. Mr. Blick's petition for discretionary review, filed on August 22, 2014, is therefore timely.

III. QUESTIONS PRESENTED

If review were granted, the issues before the Court would be:

1. RCW 9.94A.729(5) prohibits the Department from transferring an offender to community custody in lieu of early release unless the offender has obtained a release address approved by the Department. Must the Department nevertheless transfer such an offender without an approved release address 52 days before the end of his prison sentence because he received 52 days early release time from the county jail, as opposed to the early release time received from the Department?

2. The Department released Mr. Blick from prison in compliance with the judgment and sentence and statewide statutes and policy precluding release without an approved release address. Mr. Blick did not challenge the duration of his confinement due to the address approval requirement through a personal restraint petition. In light of these factors, are Mr. Blick's tort claims barred by judicial and discretionary immunity and by his failure to challenge his confinement through a personal restraint petition or other proceeding?

IV. STATEMENT OF THE CASE

The statutes governing the transfer of an offender from total confinement to community custody prior to an offender's prison maximum

expiration date are set forth in RCW 9.94A.728 and RCW 9.94A.729.[1] Section 728 provides that "[n]o person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except" through early release time under RCW 9.94A.729. *See* RCW 9.94A.728(1).

RCW 9.94A.729(5), the address approval statute, directs the Department to transfer the prisoner to community custody only on the Department's approval of the prisoner's release plan. RCW 9.94A.729(5)(b) ("*All offenders* with community custody terms eligible for release to community custody in lieu of earned release *shall* provide an approved residence and living arrangement prior to release to the community") (emphasis added).

Police arrested and jailed Mr. Blick in the King County Jail on June 1, 2000, where he was held until April 6. 2001, shortly after his felony sentencing by the King County Superior Court. Then, he was transferred to the Department of Corrections. He received credit for the

[1] The Legislature has amended RCW 9.94A.728 several times over the past three years. The Legislature re-codified the provisions regarding jail early release credits and address approval into a new statute, RCW 9.94A.729. Laws of 2010, ch. 224 § 7 (codified as amended at RCW 9.94A.729); Laws of 2009, ch. 455 § 3 (codified at RCW 9.94A.729). However, the language of the provisions at issue here was unchanged. *See* RCW 9.94A.729(1)(b) (jail certification); and RCW 9.94A.729(5) (the address approval statute).

time he served in the jail; the jail certified his receipt of early release time while in the jail. There is no dispute that Mr. Blick received 52 days of early release time from the King County Jail. CP at 8-10, 73, 174.

Mr. Blick's judgment and sentence specifically required that he receive "prior approval for living arrangements and residence location." CP at 81. Mr. Blick is a Level 3 sex offender (CP at 153) convicted of two counts of second degree rape of a child (CP at 73).

Mr. Blick transferred from prison to community custody on September 30, 2011, his prison maximum expiration date. CP at 8-9. In other words, he was in prison for the full length of time he was sentenced to prison. Mr. Blick also had an early release date calculated from the early release time he received from both the county jail and prison. CP at 174. Although Mr. Blick's early release date made him eligible for transfer to community custody earlier than September 30, 2011, Mr. Blick failed to obtain an approved release address.[2] CP at 153-55, 174-75.

As early as March 2010, in light of Mr. Blick's early release date as calculated at that time, Mr. Blick's assigned Community Corrections Officer, Iris Peterson, reviewed Mr. Blick's proposed release address, which was an apartment owned by a landlord who has taken sex offenders in as tenants. CP at 153, 174. However, this landlord informed

[2] Mr. Blick's early release date was March 15, 2010. CP at 153, 174.

Ms. Peterson that he was not taking Level 3 sex offenders; he only takes Level 1 and 2 sex offenders. Therefore, Ms. Peterson rejected Mr. Blick's plan of this proposed address. CP at 153, 174.

Ms. Peterson also rejected a later proposal, offered during a conversation with Mr. Blick's chaplain and friend, who suggested he live in the University District in Seattle. Ms. Peterson considered and rejected this suggestion because of: (1) Mr. Blick's sex offense history, including his two counts of rape involving young females; and (2) the number of college-age females residing and going to school in this area. CP at 153-55.

Mr. Blick alleged in his complaint he "earned release credits while under the jurisdiction of a Washington State county jail in accordance with RCW 9.92.151." CP at 10. He also alleged he should have been released on or by a date he refers to as his "county jail maximum release date" or "MNED," a date representing the amount of county early release time (52 days) deducted from his prison maximum expiration date, resulting in the earlier date of August 9, 2011. *See* Petition at 3; CP at 8-10. However, no such date exists under Department practice or policy. CP at 155, 174-75, 178-79, 232-33. Mr. Blick admitted in his complaint that he was "subject to the requirement that his or her release address be approved

by the Department prior to his or her release from custody in accordance with RCW 9.94A.729(5) . . . ." CP at 10.

V. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court Of Appeals Decision Does Not Conflict With Other Opinions And Merely Applied Unambiguous Statutes

Following the decisions of this Court and the clear language of the applicable statutes, the Court of Appeals properly determined that the Department "may deny a transfer to community custody in lieu of earned early release if the prisoner fails to satisfy other statutory prerequisites such as failure to obtain an approved release plan." *Blick,* 328 P.3d at 954 (Slip Op. at 1). There is no conflict with prior opinions and this Court should deny review.

1. The Court of Appeals properly followed this Court's decision in *Mattson.*

This Court has rejected claims that the Department has a duty to transfer an offender to community custody before his maximum prison expiration date. *In re Mattson*, 166 Wn.2d 730, 214 P.3d 141 (2009). In *Mattson*, this Court held that Washington law does not create any right of the inmate to receive conditional release, as an inmate does not have a

right to community custody or to release before the expiration of a valid sentence. *Mattson*, 166 Wn.2d at 737.[3]

The *Mattson* Court therefore rejected the claim that Washington's community custody statutes (as they were codified at the time the action arose) granted an offender a state-created liberty interest in the Department's discretionary approval of his proposed release address on or after his early release date. The Court explained "[t]he statute does not create an expectation of release and cannot establish a liberty interest." *Mattson*, 166 Wn.2d at 740. An inmate's only right under the statute is the right to have the Department consider his proposed release plan. *Mattson*, 166 Wn.2d at 741.

The *Mattson* Court discussed that the Ninth Circuit had reached the same conclusion in *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009):

> Noting the statute's "classically permissive language," the Ninth Circuit held that RCW 9.94A.728(2) sets no requirements under which DOC *must* grant an offender's plan and does not create a liberty interest in release to community custody. *Id.* at 875. Citing [*In re Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994)] with approval, the Ninth Circuit held that the statute merely establishes procedural requirements and in effect "reserves discretion for DOC

[3] The *Mattson* Court also rejected such claims under federal grounds, citing with approval the United States Supreme Court's decision that there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Mattson*, 166 Wn.2d at 737 (citing *Greenholtz v. Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979)). Here, Mr. Blick raised no federal constitutional claims under 42 U.S.C. § 1983 in the Superior Court or the Court of Appeals. He presents only state claims of negligence and false imprisonment.

> officials precisely so they may deny release plans of prisoners *like Carver* who remain threats to the community." *Id.* at 876 (emphasis added).

Mattson, 166 Wn.2d at 740 (quoting and citing *Carver*). In accord, the *Mattson* Court held, "RCW 9.94A.728(2) grants sex offenders only the right to have DOC follow its own legitimately established policies regarding early release into community custody." *Mattson*, 166 Wn.2d at 741.

Here, the Court of Appeals followed *Mattson* and *Carver*, as well as Division One's determination that it is not the Department's duty to find an acceptable release plan. *Blick*, 328 P.3d at 955-56 (Slip Op. at 7) (citing *In re Crowder*, 97 Wn. App. 598, 601, 985 P.2d 944 (1999) (it is the inmate's obligation to propose an acceptable release plan, not the Department's)).

2. The Court of Appeals decision is consistent with decisions and statutory language addressing jail early release time.

Mr. Blick fails to demonstrate the Court of Appeals decision is, in any way, in conflict with Washington law regarding jail early release time. As the Court of Appeals properly recognized, RCW 9.94A.729, the address approval statute, "authorizes DOC to transfer offenders sentenced to community custody from total confinement to community custody in lieu of earned early release *on DOC's approval of each offender's release*

plan . . ." *Blick*, 328 P.3d at 955 (Slip Op. at 6) (quotation omitted) (emphasis added). The statute does not distinguish between prisoners who have received early release time from their jail incarceration and those who have not. The offender must propose "a release plan that includes an approved residence and living arrangement" prior to release to the community. RCW 9.94A.729(5)(b). The Department then reviews the plan and "may deny transfer to community custody in lieu of earned release time" if it determines the "release plan, including proposed residence location and living arrangements" may violate sentence conditions, place the offender at risk to reoffend, or present a risk to victim or community safety. RCW 9.94A.729(5)(c).[4] The Court of Appeals correctly concluded that Mr. Blick "fails to demonstrate how jail

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[4] RCW 9.94A.729(5)(b) and (c) provide in full:

(b) The department shall, as a part of its program for release to the community in lieu of earned release, require the offender to propose a release plan that includes an approved residence and living arrangement. All offenders with community custody terms eligible for release to community custody in lieu of earned release shall provide an approved residence and living arrangement prior to release to the community;

(c) The department may deny transfer to community custody in lieu of earned release time if the department determines an offender's release plan, including proposed residence location and living arrangements, may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety. The department's authority under this section is independent of any court-ordered condition of sentence or statutory provision regarding conditions for community custody;

earned early release credit trumps DOC's authority under RCW 9.94A.729(5)(b) and (c)." *Blick*, 328 P.3d at 955 (Slip Op. at 7).

Mr. Blick argues the 52 days of early release time he received from county jail under RCW 9.92.151 exempt him from the address approval requirement because only the county has jurisdiction over those days. *See* Petition for Review at 3-4. In support, Mr. Blick points to RCW 9.92.151 and cases[5] recognizing the county's authority to award such time, arguing that county jails have jurisdiction to award good time to prisoners as an incentive for good behavior. *See* Petition for Review at 5-10.

Mr. Blick's "jurisdiction" arguments erroneously confuse receipt of early release time with an entitlement to release, regardless of an approved release address. He then equates his release from prison on September 30 with a denial of those 52 days of early release time.

Mr. Blick fundamentally misunderstands the nature of early release time. It is not the same as credit for time served. Early release time or "good conduct time" does not automatically reduce an offender's sentence where that offender is required by law and his sentence to serve a term of community custody. *See* RCW 9.94A.729(5)(b) and (c). Rather, it makes

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[5] *See, e.g., In re Personal Restraint of Talley*, 172 Wn.2d 642, 260 P.3d 868 (2011); *In re Personal Restraint of Williams*, 121 Wn.2d 655, 853 P.2d 444 (1993). None of these cases cited by Mr. Blick exempt him from the address approval requirement. Nor does Mr. Blick cite any statute exempting his last 52 days of prison confinement from the address approval requirement of RCW 9.94A.729.

an offender *eligible* for transfer to community custody on an earlier date, just as this Court observed in *Mattson*. *Mattson*, 166 Wn.2d at 741 (an inmate's only right under the statute is the right to have the Department consider his proposed release plan). Offenders must still obtain an approved release address before being transferred to community custody *in lieu* of earned early release. Their county earned early release time merely makes them eligible for an earlier transfer than if they had not received such early release time. Mr. Blick truly confuses apples and oranges by arguing those 52 days of early release time equate with time actually served.

Although the plain language of the address approval statute applies to all offenders who will be supervised by the Department, Mr. Blick essentially argues that his county early release time exempts him from the release address approval requirement during the last 52 days of his prison sentence. Despite the clear and unambiguous language of RCW 9.94A.729 (the address approval statute applicable to all offenders who will be supervised) and RCW 9.94A.728 (the statute requiring that all offenders complete their sentences), Mr. Blick erroneously argues he was entitled to automatic release during the last 52 days of his prison sentence. *See* Petition for Review at 3-4.

Mr. Blick argues that county early release time under RCW 9.92.151 is "separate and equal" from the Department's grant of early release time, and ostensibly, the Department's administration of its address approval program under RCW 9.94A.729. *See* Petition for Review at 10-11 (citing RCW 9.94A.729(5)(a) that "[a] person who is eligible for earned early release *as provided in this section* and who will be supervised by the department . . . shall be transferred to community custody in lieu of earned release time") (emphasis added). Mr. Blick's argument is flatly contradicted by the rest of the address approval statute, the same *section* of RCW 9.94A. It expressly requires the Department's program for address approval to recognize early release time received from the county jail. *See* RCW 9.94A.729(1)(b) ("Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration.").

That is precisely what happened here. Mr. Blick's "separate and equal" argument[6] ignores that he participated in the Department's address approval program using the 52 days of early release time he received from the county. Mr. Blick proposed a release address in March 2010 in anticipation of his early release date. This date was 52 days earlier because of the early release time he received from the county jail.

[6] *See* Petition for Review at 9, 11.

Mr. Blick makes no objection to the Department having reviewed and rejected his proposal at that time. The clear and unambiguous language of RCW 9.94A.728 and .729 does not allow Mr. Blick to seek an earlier release under these statutes, and then to simply depart prison 52 days earlier without ever having obtained an approved release address.

Because the Department did not ignore the early release time Mr. Blick received from King County, but rather properly credited that time in determining when he was first eligible for transfer to community custody, there is no conflict with RCW 9.92.151 or the cases Mr. Blick cites. *See* Petition at 5-10. Those cases never addressed the issue presented here. Neither the holdings nor the rationale of those cases conflict in any way with the Court of Appeals conclusion that, regardless of an offender's eligibility for transfer to community custody, the offender must still have an approved release address.

Here, Mr. Blick's release from prison at the end of his prison sentence was not because of any failure by the Department to recognize Mr. Blick's early release time from the county jail. Rather, the Department acknowledged that Mr. Blick was *eligible* for early release based on both his early release time earned while at the King County Jail and his early release time earned while in the Department's custody. As the Court of Appeals concluded, Mr. Blick remained confined because he

failed to obtain an approved release address. *Blick*, 328 P.3d at 955-56 (Slip Op. at 7-8). Because the premise of Mr. Blick's claims of negligence and false imprisonment was clearly false under Washington law, the Court of Appeals properly affirmed the dismissal of those claims.

B. There Are No Issues Of Substantial Public Importance Because Mr. Blick Simply Failed To Obtain An Approved Release Address Before His Prison Sentence Expired

The Washington State Legislature has clearly announced its policy choice that offenders serve their full sentences before receiving release from prison. *See* RCW 9.94A.728 ("[n]o person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except" through early release time under RCW 9.94A.729). Under these two statutes, the Legislature has made a clear and unambiguous policy choice elevating public safety above an offender's transfer to community custody before his prison term has expired.

The public's interest in safety outweighs the offender's or his family's disappointment in an anticipated early release not realized because the offender failed to obtain an approved release address. As *Mattson* recognized, early release merely provides offenders the opportunity to propose a release address at an earlier time and obtain

approval. *Mattson*, 166 Wn.2d at 741 (an inmate's only right under the statute is the right to have the Department consider his proposed release plan). However, under the clear and express language of the address approval statute, that opportunity is the same for the early release time received from county jail as for the early release time received from prison. *See* RCW 9.94A.729(1)(b) ("Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration.").

Although the Legislature has authorized and directed county jails to implement systems allowing offenders to earn early release time, no such legislation has ever given offenders the special advantage of an exemption to the address approval requirement. Rather, the goal has been to give offenders the same opportunity to earn early release time in the jail that offenders have while incarcerated in a Department prison facility.

Here, Mr. Blick demonstrates no issue of substantial public importance. Washington statutes clearly required Mr. Blick to obtain an approved release address. He did not obtain an approved address, including during the time he was eligible for an earlier transfer because of the early release time he received from King County. Therefore, Mr. Blick was released at the conclusion of his prison sentence, not before.

VI. CONCLUSION

For the above discussed reasons, the State respondents respectfully request that the Court deny Mr. Blick's Petition for Review.

RESPECTFULLY SUBMITTED this 19th day of September, 2014.

ROBERT W. FERGUSON
Attorney General

DANIEL J. JUDGE, WSBA #17392
Senior Counsel
RONDA D. LARSON, WSBA #31833
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

☒ Federal Express Priority Overnight
Michael C. Kahrs
5215 Ballard Ave. NW, #2
Seattle, WA 98107

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED This 19th Day of September, 2014.

Linda K. Harrison

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The attached Respondents' Answer to Petition for Review is being filed for the following:
Case Name: Richard Blick v. State of Washington, Eldon Vail, Bernie Warner, and Does 1-20
Case Number: 90675-1
Attorney for Respondents: Daniel J. Judge, Senior Counsel
Attorney General's Office
WSBA #17392
Telephone: 360-586-6428
E-Mail address for Mr. Judge: DanielJ@atg.wa.gov

Thank you for your assistance.

Linda Harrison, Legal Assistant to
DANIEL J JUDGE, Senior Counsel
360-586-6420