NO. 94257-9

SUPREME COURT OF THE STATE OF WASHINGTON

AHMET HOPOVAC,
Petitioner,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS and KIMBERLY ALLEN,
Respondents,

Respondents.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Carl P. Warring
Assistant Attorney General
WSBA#27164
1116 W. Riverside, Suite 100
Spokane, Washington 99201-9106
(509) 456-3123
OID#91106

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I. INTRODUCTION

The Washington State Department of Corrections owes no duty to protect offenders on community supervision from the misconduct of third parties. Only in cases of incarceration do the Restatement (Second) of Torts § 314A, and the appellate decisions that apply it, support a duty to protect offenders from the misconduct of third parties. The rationale for treating incarcerated offenders differently than community supervision offenders is simple. Incarcerated individuals are deprived of their normal opportunities to protect themselves and are subject to the complete control of their jailers. In stark contrast, the Department lacks actual, immediate control over offenders on community supervision, who therefore have significant autonomy in their daily decisions compared to their incarcerated counterparts. Thus, the Court of Appeals below properly dismissed Hopovac's lawsuit against the Department and Community Corrections Supervisor Kim Allen based upon a lack of duty.

No good reason exists to review of the Court of Appeals' decision. Although Hopovac claims the Court of Appeals' decision conflicts with opinions from this Court and other published Court of Appeals opinions, he is incorrect. Hopovac effectively concedes this point by admitting this was an issue of first impression for the Court of Appeals. Nor does this case present an issue of substantial public interest as Hopovac claims. The

dangerous circumstance Hopovac faced in the community resulted from his consistent disregard of his conditions of supervision – the conditions did not create the danger. For these reasons, review should be denied.[1]

II. STATEMENT OF ISSUES

1. Should The Court Deny Hopovac's Petition For Review Where Hopovac Fails To Demonstrate Any Actual Conflict Between Division III's Decision And Prior Appellate Court Decisions?
2. Should The Court Deny Hopovac's Petition For Review Where Hopovac's Circumstance, Which Arose From His Own Repeated Violations Of Conditions Of Supervision, Fails To Present An Issue Of Substantial Public Interest?

III. STATEMENT OF THE CASE

A. Ahmet Hopovac's Period Of Community Supervision

On April 14, 2011, Petitioner Ahmet Hopovac signed modified conditions of community supervision. CP at 222-24. The modified terms of community supervision expressly prohibited Hopovac from entering bars, consuming alcohol, possessing firearms, and possessing or using controlled substances. CP at 222-24. Nonetheless, three days later on April

[1] Should this Court grant review, the Department and Allen reserve the right to challenge the Court of Appeals' conclusion that mere "legal authority" over a person constitutes "custody of another" within the meaning of the Restatement (Second) of Torts § 314A(4).

17, 2011, Hopovac spent the evening drinking at a bar with Christopher Jones and Kristin Clark. CP at 88-89. When the threesome returned to Jones' home at about 3:00 a.m., they were joined by Gilberto Valdovinos Medina ("Diablo"), a Poco Locos[2] gang member and his girlfriend, Stephanie Ziegler. CP at 88-89. Diablo told the trio he just shot a rival drug dealer who had been undercutting his price for heroin. CP at 88-89. Clark and Ziegler attempted to conceal Ziegler's vehicle. CP at 88-89. Hopovac and Jones both handled the gun that had been used in the shooting. CP at 157. Diablo asked Jones to hold the gun for him, which Jones did in exchange for a quarter ounce of crystal meth. CP at 89. The entire group sought cover in a house on the property, monitored a police scanner, and smoked crystal meth together. CP at 89. This episode is the genesis for the tension between the Poco Locos and Hopovac.

The April 17, 2011, episode was not the first time Hopovac defied his conditions of community supervision. Hopovac's original conditions of community supervision required him to report and be available for contact with his Community Corrections Officer (CCO) and not possess or use controlled substances. CP at 217. Hopovac first reported for community supervision on January 19, 2011. CP at 52-53. The next day Hopovac

[2] The Poco Locos are a sect of the Surenos gang. CP at 86. Hopovac was familiar with Poco Locos gang members from the parties he attended at Chris Jones' home where he used crystal meth, opiates and heroin. CP at 78-9, 84-5.

absconded from supervision. CP at 52-53. Hopovac was eventually arrested on a Secretary's Warrant seven weeks later on March 10, 2011. CP at 52. While in jail following his arrest, Hopovac used methadone, methamphetamine, and marijuana. CP at 50.

The April 17, 2011, episode also was not the last time Hopovac defied his conditions of community supervision. Between April 18, 2011, and April 26, 2011, Hopovac failed to report in person on two occasions (although he did call into the Department on both days) and Hopovac provided a urine sample (UA) that was presumptively positive for methamphetamine. CP at 49. As a result, Hopovac's reporting requirement increased to daily reporting on April 26, 2011. CP at 49. While Hopovac reported on April 27-28 and May 3, he failed to report on April 29 and May 2. CP at 48-49. After May 3, 2011, Hopovac stopped reporting all together. CP at 47-48. The Department issued a Secretary's Warrant for Hopovac's arrest on May 9, 2011, because: (1) Hopovac had failed to report daily as previously directed; and (2) a May 4, 2011, UA report confirmed Hopovac's April 26, 2011, presumptive positive test for meth. CP at 47. Hopovac was eventually apprehended on May 30, 2011, nearly one week after the May 24, 2011, assault of which he now complains. CP at 47.

B. Ahmet Hopovac's May 3, 2011, Meeting With CCS Allen

When Hopovac reported on May 3, 2011, he met with Community Corrections Supervisor (CCS) Kim Allen in the Moses Lake office. CP at 47. Hopovac told CCS Allen that he believed his life was in danger because he had witnessed another person attempt to hand off a gun that had been used in a recent shooting. CP at 47. Hopovac asked CCS Allen to have his community supervision transferred to Idaho where his parents lived. CP at 47-48. Allen instructed Hopovac to report what he had witnessed to law enforcement officers, who could generate an official report that would be used to support an emergent transfer request. CP at 47-48. Hopovac indicated he would think about the issue and report back with a statement. CP at 47-48. Hopovac did not return. CP at 47-48. Instead, he absconded from supervision. CP at 47-48.

With regard to the May 3, 2011, meeting, Hopovac's Petition For Review sets forth a chronology of events that is not supported by the record. In particular, Hopovac suggests that when he met with Allen on May 3, 2011, gang members had already begun to follow him. Petition For Review at 3. This is not true. During his deposition, Hopovac conceded that Poco Locos gang members had not actually threatened him when he spoke with CCS Allen on May 3, 2011. CP at 74-76, 80-81. Hopovac also testified that on May 4, 2011, an article ran in the local paper detailing how the

suspect had attempted to hand off the gun. CP at 77. Approximately five to seven days after the May 4th article, Poco Locos gang members assaulted and interrogated Hopovac. CP at 79-80. Then, a day or two after this first assault, Hopovac noticed for the first time that gang members were following him. CP at 81-82. A second assault and interrogation by the gang happened within a few more days, followed by the May 24, 2011, assault of which Hopovac now complains. CP at 81-83. Hopovac did not contact the Department to report any of the events that occurred after May 3, 2011. CP at 46-48.

C. Department Requests To Transfer Hopovac's Supervision

When Hopovac first reported for supervision in January 2011, he asked to have his supervision transferred to Idaho. CP at 53. His assigned Community Corrections Officer told Hopovac they would discuss the issue at a supervision meeting the next day, but Hopovac failed to report for that meeting and a Secretary's Warrant was eventually issued for Hopovac's arrest. CP at 52-53. The CCO did make a supervision transfer request on April 22, 2011. CP at 60. Idaho rejected the request. CP at 66. Idaho indicated on May 2, 2011, "This Transfer Request does not include a PSI or police report. Also, the information in the supervision history clearly states the offender has been in violation status for drug use and failing to report, both within the past 30 days. Although Washington feels this offender is in

sufficient compliance for transfer, we can not [sic] conduct an investigation without either a police report or PSI." CP at 66. The CCO submitted a second transfer request on May 2, 2011, with a police report. CP at 48, 67. However, the Department withdrew the transfer request on May 9, 2011, following the issuance of a Secretary's Warrant after: (1) Hopovac failed to report daily as previously directed; and (2) a May 4, 2011, UA report confirmed Hopovac's April 26, 2011, presumptive positive finding for meth. CP at 48.

D. Procedural History

On June 13, 2014, Ahmet Hopovac sued the Department and CCS Allen asserting a failure to protect theory. CP at 4-11. The Grant County Superior Court dismissed Hopovac's lawsuit on December 3, 2015, when it entered an Order Granting Defendants' Motion For Summary Judgment Re: Duty. CP at 275. Specifically, the superior court found that no actionable duty existed. CP at 275. Hopovac appealed. CP at 277. On February 14, 2017, in a published opinion, Division III of the Court of Appeals affirmed the dismissal of Hopovac's lawsuit. *Hopovac v. State , Dep't of Corr.*, 197 Wn. App. 817, 391 P.3d 570 (2017). The Court of Appeals held that no actionable duty existed. *Hopovac*, 197 Wn. App. at 819. Hopovac now seeks discretionary review of the Court of Appeals' decision in this Court.

IV. ARGUMENT

This Court grants discretionary review only if at least one of four issues are present:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, Hopovac argues the Court of Appeals' decision is in conflict with decisions by this Court and published decisions by the Court of Appeals. *See* Petition For Review at 5-10. He also argues that his petition involves an issue of substantial public interest. *See* Petition For Review at 11. Hopovac is wrong on both assertions.

A. The Court Should Deny Hopovac's Petition For Review Where Hopovac Fails To Demonstrate Any Actual Conflict Between Division III's Decision And Prior Appellate Court Decisions

To justify review, a petition must establish that the lower appellate court decision is in conflict with a decision of the Washington State Supreme Court or a published Court of Appeals decision. RAP 13.4(b)(1)-(2). In his Petition for Review, Hopovac concedes that no actual conflict exists. He does so when he writes, "[t]he issue raised by Mr. Hopovac is a matter of first impression for the Court . . . ." Petition for Review at 5.

Hopovac's concession is consistent with Division III's view of the legal question it decided. Division III recognized, "There does not appear to be any authority addressing this question." *Hopovac*, 197 Wn. App. at 824. Thus, Hopovac cannot establish any actual conflict between existing appellate court decisions in Washington and Division III's decision in his case. So, Hopovac simply repeats his earlier arguments on the merits, which the Court of Appeals appropriately rejected. 197 Wn. App. at 824-26.

Hopovac argues that the plain language of the Restatement (Second) of Torts § 314A, along with *Shea v. City of Spokane,* 17 Wn. App. 236, 562 P.2d 264 (1977), establishes a duty on the part of the Department to protect community supervision offenders from the misconduct of third parties. *See* Petition For Review at 5-10. Hopovac's reasoning is erroneous for two reasons. First, community supervision offenders are not in the Department's "custody" within the meaning of § 314A(4). Second, community supervision offenders enjoy normal opportunities for protection while on community supervision.

1. Custody, Within The Meaning Of § 314A(4), Requires An Element Of Physical Control That Is Not Present In The Context Of Community Supervision

The Restatement (Second) of Torts § 314A (1965) provides that:

> (1) A common carrier is under a duty to its passengers to take reasonable action

> (a) to protect them against unreasonable risk of physical harm, and
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
> (2) An innkeeper is under a similar duty to his guests.
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
> **(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.**

Restatement (Second) of Torts § 314A (emphasis added). For more than 100 years, through published cases that pre-date and post-date the Restatement's 1965 pronouncement, the duty to keep an offender in health and safety has been applied to cases only where an offender is within the physical custody of a jailor. *See Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 630, 244 P.3d 924 (2010); *Kusah v. McCorkle*, 100 Wash. 318, 319, 323, 170 P. 1023 (1918); *Riggs v. German*, 81 Wash. 128, 131–32, 142 P. 479 (1914); *Winston v. State/Dep't of Corr.*, 130 Wn. App. 61, 62, 64, 121 P.3d 1201 (2005); *Shea*, 17 Wn. App. at 241-42. And even then, the duty to keep an offender in health and safety is not absolute. In the case of protecting incarcerated offenders from assaults by other inmates, the duty is limited:

> In order to hold the State liable for injury to one inmate inflicted by another inmate, there must be proof of knowledge on the part of the prison officials that such an

> injury will be inflicted, or good reason to anticipate such, and then there must be a showing of negligence on the part of these officials in failing to prevent the injury.

See Winston, 130 Wn. App. at 64; *see also Garrott v. Vail*, 549 Fed. Appx. 669 (9th Cir. 2013). Hopovac's analysis of § 314A(4) ignores how Washington cases have applied and refined the duty as it applies to offenders. In fact, the only case cited by Hopovac that involved an offender on supervision did not involve § 314A(4). *See* Petition For Review at 7 (*citing Taggart v. State*, 118 Wn.2d 195, 223, 822 P.2d 243 (1992), which involved the duty to control under Restatement (Second) of Torts §§ 315, 319 (1965)).

Indeed, this Court has previously emphasized that actual physical control gives rise to the duty to protect in the context of offenders. "The duty owed 'is a positive duty arising out of the special relationship *that results when a custodian has complete control over a prisoner deprived of liberty.*'" *Gregoire v. Oak Harbor*, 170 Wn.2d at 636 (emphasis added) (citing *Shea*, 17 Wn. App. at 242). Division III sidestepped this principle in favor of a general definition of "Custodians" borrowed from the Law of Torts, a treatise separate and distinct from the Restatement of Torts. *Hopovac,* 197 Wn. App. at 824-25; *Compare* Dan B. Dobbs, The Law of Torts § 326 (2000) and Restatement (Second) of Torts §§ 314A (1965). In doing so, Division III overlooked that every example provided in

§ 314A(1)-(4) involves an element of physical custody or control that is not present in the context of community supervision. For example, a common carrier maintains physical control over the mode of transportation and the passengers who are permitted to ride. An innkeeper maintains physical control over the condition of the inn and the customers who are permitted inside. A landowner maintains physical control over the condition of the land and those permitted to enter. A jailor maintains physical control over the facility and those committed to the facility. In contrast, the Department does not maintain physical control over Grant County and its residents, visitors and passersby. Thus, Division III departed from this Court's prior guidance, and from the context in which § 314A was written. Ultimately, however, this issue does not require review because Division III reached the correct conclusion when it determined that community supervision offenders are not denied their normal opportunities for protection. *Hopovac*, 197 Wn. App. at 819, 826.

2. Community Supervision Offenders Enjoy Normal Opportunities For Their Protection

Conditions of community supervision do not render community supervision offenders defenseless or unable to help themselves, and, therefore, the Court of Appeals properly concluded that offenders on community supervision are not deprived of the "normal opportunities for

protection" contemplated by § 314(A). *Hopovac*, 197 Wn. App. at 825-26. This conclusion is also why Hopovac's circumstances are markedly different from those of the inmate in *Shea v. City of Spokane*, the case upon which Hopovac primarily relies.

The inmate in *Shea* was physically ill while incarcerated. *Shea*, 17 Wn. App. at 238. At the onset of his illness, he sought assistance from the jailor and received none. *Id.* When his condition worsened, the inmate asked for his medication and was again denied. *Id.* The inmate also asked to call a doctor. *Id.* His jailor refused. *Id.* In fact, the jailor went so far as to threaten the sick inmate with confinement in a special cell, if the inmate did not relent. *Id.* The *Shea* Court pointed to the inmate's inability to simply call a doctor for himself as illustrative of the complete control the prison had over the inmate's health. *Id.* at 242. In contrast, Hopovac's community supervision requirements placed no such control or restrictions to jeopardize his health or safety. Unlike the inmate in *Shea* who could not make a simple phone call for aid, *Id.* at 238, Hopovac could have called police officers when he first felt threatened. Unlike the inmate in *Shea* who could not leave the jail, *Id.*, Hopovac could have gone directly to police officers when the Department did not give him what he wanted. Thus, Division III properly held that conditions of community supervision, such

as those here, do not deprive offenders of normal opportunities for their protection. *Hopovac*, 197 Wn. App. at 825-26.

Indeed, it was Hopovac's disregard of his conditions of supervision on April 17, 2011, that led to the tension between Hopovac and the Poco Locos and put his safety at risk. Hopovac was not supposed to frequent bars or consume alcohol on April 17, 2001. CP at 222-24. But he did until the early morning hours. CP at 88-89. Hopovac was not supposed to possess firearms on April 17, 2011. CP at 222-24. But he did when he handled a murder weapon. CP at 157. Hopovac was not supposed to possess or use controlled substances on April 17, 2011. CP at 222-24. But he did when he smoked methamphetamine with a self-confessed killer. CP at 89. These stark contrasts between the autonomy of an incarcerated offender like *Shea* and an offender on community supervision like Hopovac support the Court of Appeals' conclusion that offenders on community supervision are not deprived of normal opportunities for their protection.

B. The Court Should Deny Hopovac's Petition For Review Where Hopovac's Circumstance, Which Arose From His Own Repeated Violations Of Conditions Of Supervision, Fails To Present An Issue Of Substantial Public Interest

Hopovac also argues that his case presents a substantial public interest because of ". . . his status as a suspected police informant." Petition For Review at 11. But Hopovac never cooperated with the police in

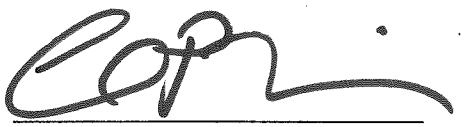
advance of the May 24, 2011, assault. CP at 47-48. If he had, he could have provided Allen the report she needed to seek an emergent transfer request to Idaho. CP at 47-48. Moreover, when Hopovac met with Allen on May 3, 2011, he had not yet been threatened, followed or assaulted by the Poco Locos. CP at 74-77, 79-83. Hopovac cannot seriously argue that the Department "turned its back on informants (real or suspected) facing foreseeable danger at the hands of the criminals upon whom they inform." If Hopovac had followed his conditions of community supervision, he would not have found himself at odds with the Poco Locos. More to the point, he cannot now claim that his violations of community supervision, which left him at odds with the Poco Locos, represent a substantial public interest justifying review.

V. CONCLUSION

For the reasons discussed above, the Court should deny Petitioner Ahmet Hopovac's Petition For Review.

RESPECTFULLY SUBMITTED this 15 day of May, 2017.

ROBERT W. FERGUSON
Attorney General



CARL P. WARRING, WSBA
#27164

PROOF OF SERVICE

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

☐ US Mail Postage Prepaid to:

BREEAN L. BEGGS
PAUKERT & TROPPMANN PLLC
522 W RIVERSIDE, SUITE 560
SPOKANE, WA 99201

MARK J. HARRIS
WILLIAM C. MAXEY
MAXEY LAW OFFICES
1835 WEST BROADWAY
SPOKANE, WA 99201

☒ Delivery to:

BREEAN L. BEGGS
PAUKERT & TROPPMANN PLLC
522 W RIVERSIDE, SUITE 560
SPOKANE, WA 99201

MARK J. HARRIS
WILLIAM C. MAXEY
MAXEY LAW OFFICES
1835 WEST BROADWAY
SPOKANE, WA 99201

☐ Via Facsimile to:

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

DATED this 15 day of May, 2017, at Spokane, Washington.

NIKKI GAMON