FILED
SUPREME COURT
STATE OF WASHINGTON
5/30/2017
BY SUSAN L. CARLSON
CLERK

NO. 94439-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

V.

ERIK PETTERSON

STATE OF WASHINGTON'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Mandy L. Rose, WSBA #38506
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
MandyR@atg.wa.gov

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES PRESENTED FOR REVIEW 2

III. STATEMENT OF THE CASE 2

IV. REASONS WHY THE COURT SHOULD DENY REVIEW 4

A. The Court of Appeals' Decision is Consistent with Previous Decisions by This Court 6

1. The Court of Appeals Properly Decided the Only Issue Before It: Whether the Superior Court Can Eliminate A Mandatory Condition of Community Custody 6

B. Mr. Petterson's Disagreement with the Court of Appeals' Analysis Does Not Create an Issue of Substantial Public Interest 10

V. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

State v. Harkness,
145 Wn. App. 678, 186 P.3d 1182 (2008) 6

State v. Ibanez,
62 Wn. App. 628, 815 P.2d 788 (1991) 10

State v. Shove,
113 Wn.2d 83, 776 P.2d 132 (1989) 6, 10

Statutes

RCW 9.94A.030(10) 9

RCW 9.94A.030(5) 9

RCW 9.94A.670(4) 3

RCW 9.94A.670(5)(b) 3

RCW 9.94A.670(8) 2, 7

RCW 9.94A.670(8)(9) 7

RCW 9.94A.670(9)(b) 3

RCW 9.94A.704(7)(b) 11

RCW 9.94A.712 3

Rules

RAP 12.3(3)(d) 11

RAP 13.4(b) 2, 4, 11

RAP 13.4(b)(1)-(2) 6

RAP 13.4(b)(4) 11

RAP 16.4.. 11

I. INTRODUCTION

There is no need for this Court to accept review. The Court of Appeals correctly applied the plain language of sentencing statutes regarding Special Sex Offender Sentencing Alternatives (SSOSA) to conclude that the Department of Corrections may impose conditions on those offenders it supervises under a SSOSA. Mr. Petterson seeks review of a decision denying his appeal of a superior court order. The superior court order granted the Department of Corrections' (Department) motion to modify and reinstated the condition that Mr. Petterson must comply with conditions imposed by the Department. Mr. Petterson contends the Superior Court retains authority to modify conditions in a SSOSA sentence at any time and can eliminate the statutorily required condition that Mr. Petterson comply with Department imposed conditions. The Court of Appeals correctly rejected these arguments. The current version of the SSOSA statute provides two instances in which the Superior Court can modify conditions, during annual review hearings *while the offender is in treatment* and at the treatment termination hearing. At the time Mr. Petterson committed his offense, the SSOSA statute allowed modification of the conditions *once*, at the treatment termination hearing. Additionally, the SSOSA statute specifically requires that an offender comply with conditions imposed by the Department as part of community custody.

II. ISSUES PRESENTED FOR REVIEW

This Court should deny review because none of the requirements of RAP 13.4(b) have been met. If the Court did grant review, the issue would be:

Former RCW 9.94A.670(8) authorized trial courts to modify conditions of a SSOSA community custody only at a treatment termination hearing, and statutes otherwise require the court to order compliance with conditions imposed by the Department. Did the trial court err when it reimposed conditions of community custody that it had earlier removed because the earlier order had not been at a treatment termination hearing?

III. STATEMENT OF THE CASE

In 2001, when Mr. Petterson was 32, he molested his 10-year-old step-daughter. CP 6-13; CP 4. After Mr. Petterson pleaded guilty to first degree child molestation (domestic violence), the superior court imposed a determinate plus sentence consisting of a minimum term of 68 months of confinement and a maximum term of life, with community custody for any period Mr. Petterson is released prior to the maximum term. CP 7. The Court then suspended the confinement term and imposed a SSOSA sentence of six months of confinement plus community custody for the length of the maximum term (*i.e.*, life). CP 7-8.

As part of the SSOSA sentence, and in accordance with statutory requirements, the superior court imposed the mandatory requirement that Mr. Petterson comply with conditions imposed by the Department during the term of community custody. CP 8; *see also* RCW 9.94A.670(5)(b) (former RCW 9.94A.670(4) (2001)).

Mr. Petterson began supervision on February 11, 2002. CR 83. On October 5, 2005, the Court found that Mr. Petterson had successfully completed sex offender treatment and terminated his treatment condition, pursuant to RCW 9.94A.670(9)(b). CP 14-16. At the same time, the Court entered an order terminating both the SSOSA and the term of community custody. CP 14-16. The order terminating Mr. Petterson's SSOSA was in error and on March 9, 2007, the Court entered an order reinstating community custody for life in accordance with RCW 9.94A.712. CP 22-23. Treatment was not terminated in error and was never reinstated. Mr. Petterson appealed from the March 9, 2007 order, and this Court affirmed. CP 24 and 35-39.

On May 30, 2008, the superior court entered an order in which it "suspended" all conditions of community custody except for the conditions that Mr. Petterson obey all laws and inform the Department of his change of address or phone number. CP 40. On August 9, 2013, the Court entered an order adding conditions prohibiting Mr. Petterson from

leaving the state without permission of the Department, and from moving to another state without going through the application process required by the Interstate Compact for Adult Offender Supervision. CP 52-53. Both the 2008 and 2013 orders state that any party or the Department may move at any time to modify the conditions.

On July 30, 2015, the Department filed an Amicus Motion to Modify Conditions of Community Custody. CP 57-93. The superior court heard oral argument on August 14, 2015. RP (August 14, 2015). On September 16, 2015, the Court entered an order imposing the condition of community custody that required Mr. Petterson to comply with conditions imposed by the Department. CP 142-146. Again treatment was not an issue.

Mr. Petterson appealed the September16, 2015 order. The Court of Appeals heard argument on October 28, 2016. The Court of Appeals denied Mr. Petterson's appeal, finding the superior court's order requiring Petterson to comply with conditions imposed by the Department of Corrections was correct.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

RAP 13.4(b) sets forth four limited circumstances where this Court may choose to accept review of a decision by the Court of Appeals. Mr. Petterson argues he meets the requirements for discretionary review under

two prongs, claiming that the decision conflicts with decisions of this Court and the petition involves an issue of substantial public interest that should be determined by the Supreme Court. *See* Petition, at 9-10; 13-14. Mr. Petterson is mistaken on both points. The Court of Appeals decision is entirely consistent with this Court's previous case law and correctly resolved the issues in Mr. Petterson's appeal.

Further, while the decision of the Court of Appeals is of general interest and provides guidance to trial courts where a sex offender attempts to effectively eliminate community custody and remove required conditions from his or her SSOSA sentence, this does not equate with an issue of substantial public importance requiring review by the Supreme Court. Mr. Petterson's argument supporting substantial public importance is that review of Department imposed conditions is necessary to ensure conditions imposed are constitutional. *See* Petition at 10. This argument attempts to insert an issue that was not actually before the Court of Appeals. The issue was whether the trial court could eliminate the requirement that Mr. Petterson comply with the Department's conditions, not whether any particular condition was constitutional. Mr. Petterson has never filed a personal restraint petition or appeal specific to any particular condition imposed by the Department.

A. The Court of Appeals' Decision is Consistent with Previous Decisions by This Court

This Court may accept review of a Court of Appeals decision if the decision conflicts with this Court's prior decisions or a Court of Appeals decision. RAP 13.4(b)(1)-(2). Contrary to Mr. Petterson's arguments, the Court of Appeals decision is entirely consistent with previous case law. Mr. Petterson's interpretation of statute and case law is not.

1. The Court of Appeals Properly Decided the Only Issue Before It: Whether the Superior Court Can Eliminate A Mandatory Condition of Community Custody

Mr. Petterson argues the Court of Appeals decision is in conflict with this Court's decisions because the SSOSA statute "specifically and carefully delineates that the trial court may modify conditions." *See* Petition at 13. Thus Mr. Petterson argues, the Court of Appeals wrongly relied on this Court's decisions in *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989) and *State v. Harkness*, 145 Wn. App. 678, 186 P.3d 1182 (2008). In making this argument Mr. Petterson mischaracterizes the Court of Appeals decision, the Department's arguments, and prior case law.

The crux of the Court of Appeals decision was this Court's prior holdings that *absent explicit authorization*, the superior court lacks jurisdiction to modify an offender's sentence. *See* Slip Op. at 6. Mr. Petterson acknowledges that the superior court is limited to that which is

"specific and carefully delineated" but then proceeds to ignore the explicit limitations in the SSOSA statute regarding modification of conditions. *See* Petition at 16-17.

As discussed by the Court of Appeals, at the time Mr. Petterson committed his offense, the SSOSA statute specifically delineated *one* instance in which the superior court could modify conditions of community custody: at the treatment termination hearing. *See* Slip Op. at 5, (citing RCW 9.94A.670(8)(2001)). The statute has since been amended but even now the court's authority to modify conditions is limited to the treatment termination hearing and annual reviews "on the offender's progress in treatment." RCW 9.94A.670(8)(9). Mr. Petterson attempts to persuade this Court, as he did with the Court of Appeals, that the treatment termination hearing lasted three years across six hearings to justify the trial court's modifications. *See* Petition at 15. The treatment termination hearing did not last for three years. Treatment was terminated on October 4, 2005. CP 20-21. On March 9, 2007, the Court corrected the previous error where it terminated community custody and reinstated community custody. CP 22-23. Treatment was never reinstated. As Mr. Petterson acknowledged in his motion to terminate custody following this order, Mr. Petterson did well in treatment and graduated in the fall of 2005. CP. 28. On May 30, 2008, the trial court entered an order modifying conditions of

community custody to just two conditions: obey all laws and update the Department of Corrections with any change of address. CP 40. Mr. Petterson was no longer required to follow Department imposed conditions. Treatment was never reinstated. Finally, on August 9, 2013, the trial court entered an order denying community custody violations and again modified conditions. CP 52-53. Mr. Petterson was still not required to comply with any Department imposed conditions nor was treatment reinstated. Thus, while several hearings occurred in which Mr. Petterson's legal requirement to remain on community custody was discussed, treatment was never at issue following the treatment termination hearing.

Mr. Petterson's example supporting his arguments that the superior court can modify conditions at any time is irrelevant to the issue presented to the Court of Appeals. Whether a particular condition contravenes a court imposed condition is irrelevant to whether the superior court has authority to modify or eliminate the Department's authority to impose conditions.

Moreover, Mr. Petterson's example of a DUI during his community custody and his suggestion that the trial court could impose alcohol related conditions is simply wrong. It is well understood that the trial court is limited to *crime related* conditions. Crime related conditions are defined as an order of the court prohibiting conduct that "directly

relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court *may be required by the department*." *See* RCW 9.94A.030(10)(2001) (emphasis added). The definition of crime related conditions has remained virtually unchanged [for how long, or since when?]. *See* RCW 9.94A.030(10)(2016).

It is undisputed that alcohol did not play a role in Mr. Petterson's molestation of his daughter. Mr. Petterson argues it was not the intent of the legislature that the court would be unable to impose alcohol conditions. In actuality that is exactly what the Legislature intended. At the time Mr. Petterson committed his offense, the definition of community custody stated that this is the portion of the offender's sentence subject to the controls of the Department and requires the Department to "assess the offender's risk of re-offense and may establish and modify additional conditions of community custody . . . based upon the risk to community safety." RCW 9.94A.030(5)(2001). The current definition states that the offender is subject to the controls placed on the offender's movement and activities by the Department. RCW 9.94A.030(5). Thus, if Mr. Petterson

receives a DUI during his community custody, it would be the Department and not the Court which would impose conditions related to alcohol.

Mr. Petterson's argument that the Court must be able to modify conditions at any time because it has the authority to revoke a SSOSA at any time is likewise unavailing. The SSOSA statute specifically authorizes the trial court to revoke a SSOSA at any time. It does not authorize modification of conditions at any time. *See State v. Ibanez*, 62 Wn. App. 628, 632, 815 P.2d 788 (1991) (citing *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989)) (while the trial court retains jurisdiction to take action, the actions permitted are limited).

Mr. Petterson's suggested statutory interpretation runs counter to this Court's prior holdings that a sentencing court has discretion "only where the SRA so authorizes." *State v. Shove*, 113 Wn.2d at 89. The Court of Appeals ruling is entirely consistent with existing law.

B. Mr. Petterson's Disagreement with the Court of Appeals' Analysis Does Not Create an Issue of Substantial Public Interest

Mr. Petterson argues the importance of providing judicial review of Department imposed conditions is what supports the prong of substantial public interest justifying review. Again, the specific conditions imposed by the Department were not before the Court of Appeals and were not an issue decided by the Court of Appeals. More importantly,

RCW 9.94A.704(7)(b) allows Mr. Petterson to request administrative review of any condition imposed by the Department, and RAP 16.4 allows him to file a personal restraint petition. Mr. Petterson has never sought administrative review of his conditions or filed a personal restraint petition.

Finally, RAP 12.3(3)(d), pertaining to motions to publish lists as one criteria that the matter is of *general* public interest. This is different criteria than RAP 13.4(b)(4), which allows review for matters of *substantial* public interest necessitating review by the Supreme Court. Certainly the Court of Appeals decision is of general public interest in that it provides general guidance to trial courts when faced with motions by SSOSA offenders seeking to escape their community custody sentences. Nevertheless, the Court of Appeals decision is ultimately consistent with this Court's prior holdings and it does not conflict with any published Court of Appeals decision. Thus, while the decision is helpful to providing guidance regarding various motions at the trial court level, it is not of substantial public important necessitating this Court's review.

V. CONCLUSION

Petterson's Petition for Discretionary Review does not meet the criteria of RAP 13.4(b). Therefore, Respondent respectfully requests that this Court deny Petterson's Petition.

RESPECTFULLY SUBMITTED this 30th day of May, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Mandy L. Rose
MANDY L. ROSE, WSBA #38506
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
MandyR@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the ANSWER TO MOTION FOR DISCRETIONARY REVIEW with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

THOMAS E. WEAVER
P.O. BOX 1056
BREMERTON, WA 98337

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

EXECUTED this 30th day of May, 2017 at Olympia, Washington.

s/ Amy Jones
AMY JONES
Legal Assistant
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
AmyJ@atg.wa.gov

CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

May 30, 2017 - 1:53 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94439-3
Appellate Court Case Title:	State of Washington v. Erik G. Petterson
Superior Court Case Number:	01-1-01509-3

The following documents have been uploaded:

- 944393_Answer_Reply_20170530135157SC705889_6126.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was PostSGO Review Answer MDR Petterson.pdf

A copy of the uploaded files will be sent to:

- mandyr@atg.wa.gov
- tweaver@tomweaverlaw.com

Comments:

Sender Name: Amy Jones - Email: amyj@atg.wa.gov
Filing on Behalf of: Mandy Lynn Rose - Email: mandyr@atg.wa.gov (Alternate Email:)

Address:
Corrections Division
PO Box 40116
Olympia, WA, 98104-0116
Phone: (360) 586-1445

Note: The Filing Id is 20170530135157SC705889