Case No. 96223-5

Court of Appeals No. 49928-2-II

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

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS

Petitioner,

v.

M. GWYN MYLES, individually and as Personal Representative of the Estate of WILLIAM LLOYD MYLES, deceased.

Respondent.

CLARK COUNTY CAUSE NO. 09-2-00347-9

PETITION FOR REVIEW

RONALD W. GREENEN, WSB#6334
Attorneys for Appellant
GREENEN & GREENEN, PLLC
1104 Main Street, Suite 400
Vancouver, WA 98660
Telephone: (360) 694-1571

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutory Authority

Rules of Appellate Procedure

Civil Rules

Senate Bill Report

I. IDENTITY OF PETITIONER

This Petition is filed on behalf of Petitioner, M. Gwyn Myles ("Myles"), individually and as Personal Representative of the Estate of William Lloyd Myles and asks for the relief sought in Part II.

II. CITATION TO APPELLATE COURT DECISION

Myles seeks review of the opinion entered by Division Two of the Court of Appeals on July 24, 2018. (Appendix A)

III. SUMMARY OF APPEAL

Myles appeals the opinion of the Court of Appeals pursuant to RAP 13.4(b)(1) and (2) as the court's decision conflicts with the decisions of the Court of Appeals and Supreme Court of this state.

Myles further appeals the opinion of the Court of Appeals under RAP 13.4 (b)(a) as the Petition for Review involves an issue of substantial public interest that should be determined by the Supreme Court in relation to the responsibilities required of and assumed by the Department of Corrections (DOC).

//
//
//
//
//

IV. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals improperly granted discretionary review of the denial of the DOC motion which conflicts with prior decisions of the Supreme Court of this state.

2. The Court of Appeals improperly applied former RCW 9.94A.501 (2003) as to DOC's supervision of Carlos Villanueva-Villa's felony conviction, which conflicts with other statutes in effect at the time.

3. The Court of Appeals improperly applied former RCW 9.94A.501 (2005) as to DOC's supervision of Carlos Villanueva-Villa's misdemeanor conviction, which conflicts with other statutes in effect at the time.

4. The Court of Appeals failed to address the fact that DOC was actively supervising Villanueva-Villa and that a "take charge" relationship did exist between DOC and Villanueva-Villa at the time Myles was killed.

V. STATEMENT OF THE CASE

A. Factual Background

On August 14, 2001, Carlos Villanueva-Villa ("Villanueva-Villa") was charged in Clark County Superior Court with Theft - 2nd Degree and Vehicle Prowl - 2nd Degree. (CP 312-313) After failing to appear for trial

on April 9, 2002, a warrant was issued and felony bail jump was added. (CP 314-316)

On April 14, 2003, Villanueva-Villa plead guilty to Vehicle Prowl 2 and Bail Jump. Villanueva-Villa's sentence on the Vehicle Prowl 2 charge was 365 days jail time, 304 days suspended with 12 months of probation. His conditions of probation included that he shall not violate any federal, state or local criminal laws and he shall not be in the company of any person known by him to be violating such laws; that he not commit any like offenses; that he notify his community corrections officer within forty-eight (48) hours of any arrest or citation; that he shall be under the supervision of a Community Corrections Officer of the Department of Corrections and shall follow the conditions in this order and the rules imposed by the probation officer/Department of Corrections; that he shall not move from his present address unless given prior permission by the court or the Community Corrections Officer; that he shall personally obtain written permission from his Community Corrections Officer prior to leaving the county permanently. (CP 317-324)

On the Bail Jump charge, Villanueva-Villa was sentenced to 61 days confinement and 12 months of community supervision. Conditions of community supervision included that he remain in prescribed geographic boundaries specified by the community corrections officer; that he notify

the community corrections officer of any change in defendant's address or employment; that he shall not violate any federal, state or local criminal laws, and shall not be in the company of any person known by him to be violating such laws; that he shall not commit any like offenses; that other conditions may be imposed by the Court or the Department of Corrections during community custody, or as otherwise set forth in the sentencing order; that he shall notify his community corrections officer within forty-eight (48) hours of any arrest or citation; that he shall submit to affirmative acts necessary to monitor compliance with the orders of the court as required by the Department of Corrections. (CP 325-336)

On January 15, 2004, DOC filed a Notice of Violation on the Vehicle Prowl 2 charge as Villanueva-Villa had violated three (3) conditions of his supervision, specifically:

1. Failure to provide change of address on 5/21/2003 and 11/18/2003;

2. Failing to pay legal financial obligations since July 2003.

3. Failing to pay court orders costs of supervision fees since sentencing on 4/14/2003. (CP 337-339)

DOC recommended the court sanction Villanueva-Villa to 10 days jail for each violation (30 days) to be served consecutively. A hearing was set for the March 4, 2004 Violations Docket and again, Villanueva-Villa

failed to appear and a warrant was authorized. (CP 347-349, CP 350-351, CP 355)

On May 6, 2004, DOC filed a 5990 Supervision Closure on the felony Bail Jump case and a Court–Special Report stating DOC was also closing its interest in the misdemeanor case. (CP 442, CP 357) (See also CP 267) No tolling was applied to either case despite Villanueva-Villa's noncompliance and abscond status.

On May 24, 2004, the Prosecuting Attorney filed a Motion to Revoke Judgment and Sentence on the Bail Jump and Vehicle Prowl 2 cases and requested a warrant on both charges, using CCO Mullins's report in support of the motion. A no bail bench warrant was issued. (CP 347-349, CP 350-351, CP 355)

On August 12, 2004, DOC filed a request to cancel the 5990 closure of April 6, 2004 stating DOC "failed to toll Villanueva-Villa's abscond status" and requested the case be reopened. The notice states the offender has approximately 3 months remaining on supervision. (CP 267 and CP 357)

On October 10, 2005, Villanueva-Villa was arrested on the May 24, 2004 warrant and the next day on October 11, 2005, Villanueva-Villa was sentenced by Clark County Superior Court to 30 days jail time for the felony Bail Jump violations with release contingent upon payment of

$300.00 on his financial obligations. He was ordered to appear for payment review on January 12, 2006. (CP 358-361)

October 21, 2005, a DOC Hearing & Confinement Order was filed with the Court on the felony Bail Jump case. (CP 362-366) The negotiated sanction agreement set the following conditions:

1. Credit for time served.
2. Report to DOC within 1 business day of release.
3. 30 days of day reporting.
4. Provide valid address to DOC immediately (get name on mailbox).
5. The tolling date for supervision was set to end 3/5/2006.

Villanueva-Villa's day reporting to DOC began November 1, 2005 and was scheduled to end December 15, 2005 dependent upon his compliance. This reporting period would be extended by the days he failed to report, which he ultimately did.

On November 26, 2005, while day reporting to DOC, Villanueva-Villa was arrested for DUI with an arraignment date of December 5, 2005. Villanueva-Villa failed to appear and a warrant was issued for his arrest. (CP 366-369)

On December 23, 2005, while day reporting to DOC, Villanueva-Villa was arrested again for DUI with an arraignment date of December 29, 2005. Villanueva-Villa failed to appear and a second warrant was issued for his arrest. (CP 371–374)

From November 26, 2005 when the first DUI arrest occurred, Villanueva-Villa reported to DOC and/or a DRC officer on 23 separate occasions, which included the dates of both DUI arrests and after the issuance of both warrants. (CP 244-250)

Villanueva-Villa stopped reporting to DOC on December 30, 2005 in violation of his sanction agreement.

On January 20, 2006, DOC filed a 5990/5256 Supervision Closure notice with the court stating Villanueva-Villa did not meet the criteria for continued supervision per RCW 9.94A and/or RCW 9.95.210 with no mention of his new arrests, failures to appear, warrant status, probation violations, or that the tolling date supervision expired March 5, 2006. (CP 377-381)

On January 27, 2006, Villanueva-Villa was again driving under the influence of alcohol and killed William Lloyd Myles.

On February 15, 2006, the Prosecuting Attorney filed a Motion for Order Modifying and/or Revoking the Judgment and Sentence on both the Bail Jump (felony) and Vehicle Prowl 2 (misdemeanor) charges. A third warrant was authorized. (CP 398-403)

On February 16, 2006, the Court ordered Villanueva-Villa to serve another 30 days jail time on the Bail Jump (felony) charge. (CP 404-405)

B. Procedural Background

On January 20, 2009, Plaintiff filed a Complaint against DOC for negligent supervision of Villanueva-Villa. (CP 3-28) Clark County and the Washington State Patrol were also named as defendants in the action.

On December 30, 2016, the trial court denied the Motion for Summary Judgment filed by Defendant Department of Corrections. (CP 679-681)

On February 13, 2017, the Department of Corrections filed a Petition for Review of the Order denying their Motion for Summary Judgment on February 13, 2017 (Cause No. 49928-2).

On June 20, 2017, the court granted discretionary review of the trial court's order denying the Department of Corrections Motion for Summary Judgment.

On July 24, 2018, the court reversed the trial court's denial of the Department of Corrections Motion for Summary Judgment and remanded the matter back to the trial court for an order dismissing the Department of Corrections. (App. A)

//

//

//

//

VI. ARGUMENT

A. Myles is entitled to review pursuant to RAP 13.4(b)(1) and (2)

1. The Court of Appeals improperly granted discretionary review of the trial court's denial of DOC's Motion for Summary Judgment which is in conflict with the decisions of the Court of Appeals and the Supreme Court of this state.

Denial of a summary judgment motion is usually not an appealable order under RAP 2.2(a). However, it may be granted where "the Superior Court has committed an obvious error which would render further proceedings useless, Douchette v. Bethel Sch. Dist. 403, 117 Wash.2d 805, 808, 818 P.2d 1362 (1991) citing RAP 2.3(b)(1); Sea-Pac Co., Inc. v. United Food and Comm. Workers Local Union 44, 103 Wash.2d 800, 802, 699 P.2d 217 (1985). The denial of a summary judgment motion is not a final order and has no preclusive effect on further proceedings. An order denying summary judgment is essentially interlocutory. It does not end the proceedings, but rather permits them to proceed. The denial of a summary judgment motion is not a final order that can be appealed. In re the Estates of Harvey L. Jones and Mildred L. Jones, 170 Wn.App 594, 287 P.3d 610 (2012) citing Zimny v. Lovric, 59 Wash.App. 737, 739, 801 P.2d 259 (1990) and Roth v. Bell, 24 Wash. App. 92, 104, 600 P.2d 602 (1979). Only final judgments are appealable. See RAP 2.2 (a). A ruling that is not appealable is not a final judgment. Zimny at 739.

Under CR 54(a)(1), a judgment is defined as "the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies." Zimny at 740. There has been no final determination of DOC's rights in this case by the entry of the order denying DOC's Motion for Summary Judgment.

Discretionary review may be granted where the trial court "has committed an obvious error which would render further proceedings useless", RAP 2.3(b)(1), or to avoid a useless trial. Hartley v. State, 103 Wash.2d 768, 774, 698 P.2d 77 (1985). Neither of these standards apply in this case. The trial court's ruling does not render further proceedings useless. The court found merit in Myles's claim and made the decision to proceed to trial. The rights of DOC were not affected by the trial court's decision, nor is the ruling the end of the line for DOC as an appeal as a matter of right is available to DOC in the event of an unfavorable decision at trial. Under prior decisions of this court, the denial of DOC's motion for summary judgment was not a final order and it did not render further proceeding useless. Therefore, the trial court's order denying DOC's Motion for Summary Judgment entered on December 30, 2016 was not subject to discretionary review by the Court of Appeals and review should have been denied.

B. Myles is entitled to review pursuant to RAP 13.4(b)(4).

RAP 13.4(b)(4) states that a Petition for Review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. There is substantial public interest in this case as it concerns the protection of innocent third parties from suffering harm or injury due to the negligent acts of government agencies charged the duty of controlling criminal offenders. There are many cases in the state of Washington involving DOC's failure to properly supervise defendants who later harm innocent third parties. There is a long line of lawsuits against DOC for failure to supervise offenders, including Joyce v. Dept. of Corrections, 116 Wn.app 569, 75 P.3d 548 (2003), review granted 105 Wash.2d 1032, 84 P.3d 1229 (2004), Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections, 122 Wash.App 277, 95 P.3d 764 (2004), Hungerford v. State Dept. of Corrections, 135 Wn.App 240, 139 P.3d 1131 (2006), Husted v. State, 187 Wn.App 579, 348 P.3d 776 (2015), Smith v. Department of Corrections, 189 Wn.App 839, 359 P.3d 867 (2015), review denied 185 Wn.2d 1004, 366 P.3d 1244 (2016), and several other cases involving similar governmental agencies or offices that provide probation or parole supervision to offenders in Washington.

It is very likely that these types of cases will continue to increase in the future due to the lack of resources Washington State provides to DOC and other state agencies charged with supervising offenders.

Further, the decision of the Court of Appeals places limitations on the discretion of the trial courts to order sanctions and conditions against criminal offenders. In this case, the court allowed DOC to use the agency's lack of statutory authority to usurp a superior court's direct order upon a defendant. If the court lacks discretion to impose sanctions upon a criminal defendant on a case by case basis, then any court order imposing sanctions or extending supervision outside DOC's statutory authority is essentially useless. This is of great public concern as it reduces the ability of the judiciary to punish and control criminal defendants for their failure to comply with court ordered conditions.

Finally, there must be some clarification as to what statutes apply in the present case. The Court of Appeals has based its decision entirely on one statute that controls DOC's authority to supervise an offender while other statutes concerning sentencing conditions and tolling appear to be in conflict with the court's analysis.

//

//

//

1. The Court of Appeals improperly applied former RCW 9.94A.501 (2003) as to DOC supervision of Villanueva-Villa's Felony Conviction.

The Court of Appeals found that DOC had no duty to prevent Villanueva-Villa from harming Myles because DOC lacked the authority to supervise Villaneuva-Villa on his felony conviction under former RCW 9.9A.501(2003). (Slip op. at 2, 9, 15, 19) (App. A)

Villanueva-Villa was sentenced on April 14, 2003. (CP 325-326). RCW 9.94A.501 became effective on July 1, 2003. (App. B013). DOC claims the passage of this statute rendered supervision not applicable to Villaneuva-Villa. However, during the years of 2003, 2004 and 2005, DOC continued to supervise Villaneuva-Villa by making several attempts to contact him and issuing a warrant for his arrest. On August 12, 2004, DOC requested that the prosecutor reopen his supervision due because DOC failed to toll his sentence due to his abscond status. (CP 267 and CP 357) According to DOC, these acts were all done in error.

On October 10, 2005, the court modified Villanueva-Villa's sentence to include 30 day jail sanction at the request of DOC. DOC subsequently entered into a sanction agreement with Villaneuva-Villa following a DOC hearing held on October 20, 2015. That agreement was entered with the court on October 21, 2015. According to DOC, the court ordered sanctions, the DOC hearing, and the subsequent negotiated

sanction agreement were all done in error because of its lack of authority under former RCW 9.94A.501 (2003). (App. B013)

The Court of Appeals was not persuaded by Myles's argument that the laws in effect at the time of Villanueva-Villa's conviction are the laws applicable to his sentencing conditions. Villanueva-Villa was originally sentenced on April 14, 2003. (CP 325-336) Prior court opinions state that the laws effective on the date of sentencing apply in this case not the laws of July 1, 2003. State v. McClinton, 186 Wn.App 826, 347 P.3d 889 (2015). In McClinton, the court said that the terms of a defendant's sentence are governed by the version of the Sentencing Reform Act in effect when the crime was committed, citing State v. Medina, 180 Wash.2d 282, 287, 324 P.3d 682 (2014). The Medina Court said that under the Sentencing Reform Act of 1981 (SRA), a defendant must be sentenced in accordance with the law in effect at the time of his or her offense. RCW 9.94A.345, Timing (laws of 2002, App. B008) (laws of 2005, App. B017), which was applicable when the sanction order was entered states:

> Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

The SRA was not revised until two (2) months after Villanueva-Villa's sentence was imposed. According to other court decisions, the

SRA in effect in April 2003 applies to this case. State v. McClinton, 186 Wn.App 826, 347 P.3d 889 (2015) and State v. Medina, 180 Wash.2d 282, 287, 324 P.3d 682 (2014). An offenders sentencing conditions did not simply disappear when RCW 9.94A.501 (2003) and (2005) were amended.

The Court of Appeals also applied RCW 9.94A.501 (2003) (App. B013, B015) to the tolling of Villanueva-Villa's sentencing conditions. (Slip op. 2)(App. A). The tolling statute in effect when Villaneuva-Villa was initially convicted in 2003 states that his sentence "shall" be tolled. RCW 9.94A.625(2)(2002) (recodified under RCW 9.94A.171 in 2008) states:

> ... (2) Any term of community custody, community placement or community supervision shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed... (App. B009)

Based on the tolling date of March 5, 2006 as set forth in the October 2005 sanction order, the closure of Villanueva-Villa's supervision by DOC in January 2006 was both premature and made upon false statements of compliance to the court. DOC had a duty to supervise Villanueva-Villa under the court's direction until March 5, 2006. (CP 362-366) The Court of Appeals found that tolling does not apply to in this case because the amendment to RCW 9.94A.501 in 2003 automatically

closed supervision of the felony conviction. (Slip op at 9, 15) (App.A) However, the conditions of Villanueva-Villa's sentence were not extinguished with the passing of the amendment in 2003 and were tolled while he was on abscond status. RCW 9.94A.625 (App. B013). A warrant was issued on May 24, 2004 and Villanueva-Villa was arrested on October 10, 2015. His conditions were tolled during this time.

It is also important to note that the prosecuting attorney filed another Motion to Revoke the Judgment and Sentence on February 15, 2006 and another warrant was issued for Villanueva-Villa's arrest while incarcerated for killing Mr. Myles. On February 16, 2016, the court ordered Villanueva-Villa to serve 30 days jail on the Bail Jump charge furthering Myles's argument that the court maintained jurisdiction and his conditions were tolled and enforceable in 2005 and on January 27, 2006 when Myles was killed. (CP 398-405)

2. The Court of Appeals improperly applied former RCW 9.94A.501 (2005) to DOC's supervision of Villanueva-Villa's Misdemeanor Conviction.

Former RCW 9.94A.501 (2003) was further amended in 2005 to include misdemeanor supervision and took effect on May 10, 2005. (App. B018) The Court of Appeals found DOC had no authority to supervise Villanueva-Villa on the misdemeanor charge based on the 2005 amendment and that his conditions expired one year after his sentence date

regardless of his compliance. (Slip op. at 9) (App. A) If this is the proper analysis, offenders who abscond from misdemeanor probation or community supervision will not face any penalty as long as they are not caught within one (1) year of sentencing. The same argument made in the preceding paragraphs applies to the misdemeanor charge. DOC still maintained jurisdiction over the conditions of his probation on both convictions. Both sentences should have been tolled due to Villanueva-Villa's abscond status and the sanction order of October 2005. (CP 244-250). The sanction order specifically tolled his supervision to March 5, 2006. These former statutes did not wipe out the tolling statutes or any other statutes concerning the conditions and violations of an offender's sentence. Former RCW 9.94A.501 (2003) and (2005) only controlled DOC with respect to its active supervision of low risk offenders. The conditions of Villanueva-Villa's charges remained in place at all times and this is evidenced by the prosecutor's actions and the court's order of additional jail time in February 2006 after Myles was killed. (CP 398-405).

The legislature did not intend for DOC to completely absolve themselves from jurisdiction or from supervision of a low-risk offender when they passed ESSB 5990. (App. B0019) The intent of the legislature in passing ESSB 5990 was to preserve DOC resources for higher risk

offenders. The Final Bill Report for ESSB 5990 specifically states that offenders like Carlos who are "classified as "D" are actively supervised only if a violation of a release condition is brought the attention of the department". (App. B019 at B020) DOC did not have authority to completely wash their hands of Villanueva-Villa due to his low risk offender status.

3. The Court of Appeals failed to address the fact that DOC was actively supervising Villaneuva-Villa under the October 20, 2015 Sanction Agreement.

In order to impose a duty on DOC, Myles must show that a take charge relationship existed. Estate of Bordon ex rel. Anderson v. State, Dept. of Corrections, 122 Wn. App. 277 at 235-36, 95 P.3 764 (2004) and Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992), 118 Wn.2d at 218-19). The Court of Appeals found that DOC had no duty to Myles because no "take charge" relationship existed with the Defendant, Villanueva-Villa. (Slip op. at 9, 17) (App. A) The court stated that even if the court extended Villanueva-Villa's sentencing conditions, DOC still had no authority to supervise Villanueva-Villa under RCW 9.94A.501 (2003). (Slip op. at 19). The court does not address the fact that despite DOC's lack of statutory authority, DOC was indeed supervising Villanueva-Villa under the sanction order entered by the court in October 2015. (CP 244-250) Villanueva-Villa was under the direct control and supervision of

DOC regardless of any statutory authority. DOC actively supervised Villanueva under this court order and while under such direct control and supervision, DOC failed to arrest Villanueva-Villa on two DUI warrants. If RCW 9.94A.501 regarding DOC's authority to supervise applies as a complete defense in this case, that statute renders court orders extending probation or supervision useless and unenforceable.

The fact remains that DOC was actively supervising Villanueva-Villa under the agreed sanction order from October 21, 2005 through March 5, 2006, which was the "tolling end date" set by DOC. Myles was killed on January 27, 2006. DOC took charge of Villanueva-Villa and as such had a "take charge relationship" with him regardless if they did so voluntarily or under statutory authority. Requiring an offender to report daily is a act of take-charge "supervision" by DOC and DOC failed to properly supervise Villanueva-Villa during that take charge relationship for conditions they imposed. When the new violations occurred, Villanueva-Villa was in consistent contact with DOC. He had a total of 23 contacts with DOC from November 26, 2005 to December 30, 2005 when he completely stopped reporting. DOC not only failed to arrest Villanueva-Villa but failed to report his condition violations for the two new arrests. At the very least, Villanueva-Villa was in violation of the court's sanction order of October 10, 2015. (CP 244-250)

VII. CONCLUSION

The Court of Appeals has dismissed all other relevant statutes in this case in favor of former RCW 9.94A.501(2003) and (2005). This issue must be addressed in order to clarify the trial court's authority to impose and extend sentence conditions and to prevent further conflicts from arising as a result of one court making a ruling in favor of one statute that is in conflict with the provisions of other statutes that are in effect at the same and apply to the same matter. The issue of whether the Court of Appeal's granting review of the trial court's denial of DOC's Motion for Summary Judgment was proper must also be addressed.

For the reasons set forth above, Myles respectfully requests that her Petition for Review be granted.

RESPECTFULLY SUBMITTED this 23rd day of August, 2018.

GREENEN & GREENEN, PLLC

By: _____

RONALD W. GREENEN, WSB #6334
of Attorneys for Petitioner Myles
1104 Main Street, Suite 400
Vancouver, WA 98660
(360) 694-1571
OID No. OC706422

CERTIFICATE OF MAILING

I hereby certify that on August 23, 2018, I served the foregoing Petition for Review upon the following:

Patricia C. Fetterly
Assistant Attorney General
7141 Cleanwater Drive, SW
PO Box 40126
Olympia, WA 98504-0126
PatriciaF1@ATG.WA.GOV

John R. Nicholson
Freimund Jackson & Tardif, PLLC
Columbia Center
701 Fifth Avenue, Suite 3545
Seattle, WA 98104
JohnN@fjtlaw.com

by electronic mail and also by mailing a copy thereof certified by me as such, contained in a sealed envelope, with postage paid, addressed to said court/attorneys at their regular office addresses as noted above and deposited in the post office at Vancouver, Washington. Between said post office and the addresses to which said copies were mailed, there is a regular communication by US. Mail.

Dated this 23rd day of August, 2018.

KAREN M. MANKER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

M. GWYN MYLES, individually and as Personal Representative of the Estate of WILLIAM LOYD MILES, deceased, Respondent, v. STATE OF WASHINGTON, a governmental entity; JOHN DOE EMPLOYEE(S) and JANE DOE EMPLOYEE(S), employees of the State of Washington, Appellants, CLARK COUNTY, a municipality; JOHN DOE EMPLOYEE(S) and JANE DOE EMPLOYEE(S), employees of Clark County; CARLOS VILLANUEVA-VILLA and JANE DOE VILLANUEVA-VILLA, husband and wife, and the marital community composed thereof; and R.H. BRUSSEAU and JANE DOE BRUSSEAU, husband and wife, and the marital community composed thereof, Defendants.	No. 49928-2-II UNPUBLISHED OPINION

JOHANSON, J. — M. Gwyn Myles, individually and as the personal representative of her husband William Myles's estate, sued the Washington State Department of Corrections (DOC) for the wrongful death of her husband, William Myles, in a vehicle accident caused by Carlos

Villanueva-Villa in January 2006. Myles alleged that the DOC's negligent supervision of Villanueva-Villa led to her husband's death. The superior court denied the DOC's summary judgment motion. We granted the DOC's motion for discretionary review.[1]

Because the DOC lacked the authority (1) to supervise Villanueva-Villa on his felony conviction under former RCW 9.94A.501 (2003), (2) to toll Villanueva-Villa's misdemeanor probation, and (3) to supervise him on his misdemeanor conviction after May 10, 2005 under former RCW 9.94A.501 (2005), Myles fails to establish that the DOC had a duty to prevent Villanueva-Villa from harming William Myles.[2] Accordingly, we reverse the superior court's order denying the DOC's motion for summary judgment and remand for the superior court to dismiss the DOC from this case.

FACTS

I. BACKGROUND

A. 2003 CONVICTIONS AND SENTENCES

In April 2003, nearly three years before Villanueva-Villa was involved in an accident that caused William Myles's death, Villanueva-Villa pleaded guilty to misdemeanor second degree vehicle prowling and felony bail jumping.[3] The superior court sentenced him on April 14, 2003.

---

[1] *See* Ruling Granting Review, *Myles v. State*, No. 49928-2-II (Wash. Ct. App. June 20, 2017).

[2] The DOC also argues that there was no question of fact as to proximate cause. Because we hold that there was no duty, we do not address proximate cause.

[3] Villanueva-Villa committed the misdemeanor offense on August 8, 2001, and the felony offense on April 1, 2002.

On the felony conviction, the superior court imposed a sentence of 61 days in custody, with credit for 61 days served, and 12 months of community custody under DOC supervision. Among other conditions, Villanueva-Villa's community custody for the felony conviction required him to not violate any laws and to notify his community corrections officer (CCO) of any change in address. The superior court also imposed legal financial obligations (LFOs).

On the misdemeanor conviction, the superior court imposed a sentence of 365 days in jail, with credit for 61 days and 304 days suspended, and 12 months of probation supervised by the DOC. The conditions of his misdemeanor probation required him to report regularly, to not violate any laws, to notify the DOC within 48 hours of any arrest or citation, and to obtain permission to move.

B. POST-SENTENCE ACTIVITY AND STATUTORY CHANGES

1. 2003

At his May 5, 2003 DOC intake, the DOC classified Villanueva-Villa "as an 'RM-D' offender." Clerk's Papers (CP) at 46, 257. RM-D offenders are at the lowest risk to reoffend. Villanueva-Villa also successfully reported at a reporting kiosk.

On May 21, DOC's mail to Villanueva-Villa was returned as undeliverable. On June 17, the DOC attempted a "skip trace" and contacted Villanueva-Villa's brother, who informed them Villanueva-Villa was in the process of moving. CP at 257 (capitalization omitted).

On July 1, former RCW 9.94A.501 (2003) came into effect. LAWS OF 2003, ch. 379, § 3. This statute limited the DOC's authority to supervise felony offenders to *only* those offenders who (1) were assessed "in one of the two highest risk categories," (2) had current or prior convictions for one of several enumerated offenses, (3) were subject to chemical dependency treatment as a

condition of community custody, placement, or supervision, (4) were sentenced under a first-time offender waiver or special sex offender sentencing alternative, or (5) were subject to supervision under the interstate compact for adult offender supervision (RCW 9.94A.745). Former RCW 9.94A.501(2), (3) (2003). Villanueva-Villa did not qualify for supervision under any of these categories.

On November 18, the DOC again attempted to contact Villanueva-Villa about his LFOs by mail and the mail was returned. On December 29, prompted by Villanueva-Villa's failure to notify the DOC that his address had changed, Villanueva-Villa's CCO filed a violation notice related to the misdemeanor sentence and informed Villanueva-Villa that "any violations will be addressed by the Court on the misdemeanor portion" of his case.[4] CP at 338. The violation notice also stated that the misdemeanor sentence would expire April 13, 2004, after which the DOC would "no longer have an interest in this Cause." CP at 339. The DOC recommended a sanction of 10 days incarceration for each of the three violations, to be served consecutively. It also noted a violation hearing for March 4, 2004.

2. 2004

In late January 2004, the DOC again tried to contact Villanueva-Villa by mail and the mail was returned as undeliverable. When Villanueva-Villa failed to appear for the March 4 violation hearing, the superior court issued a bench warrant.

On April 29, the DOC closed supervision on the felony sentence because Villanueva-Villa did "not meet the criteria for continued supervision by the [DOC]" under former RCW 9.94A.501

[4] These violations included (1) failure to report an address change, (2) failure to pay LFOs, and (3) failure to pay the costs of supervision.

(2003). CP at 342. On April 30, the DOC closed supervision on the misdemeanor sentence because that sentence expired on April 13, 2004, and the DOC determined that the existence of the warrant did not toll the closure of the misdemeanor supervision. These closure reports were filed with the superior court on May 6.

On May 24, the Clark County Prosecutor filed a motion for an order modifying or revoking "the Judgment and Sentence previously imposed" on the misdemeanor and felony offenses.[5] CP at 347. The prosecutor also requested a bench warrant for Villanueva-Villa's arrest. That same day, the superior court issued a bench warrant to secure Villanueva-Villa's presence for a hearing on the State's motion to modify or revoke the felony and misdemeanor sentences.

According to the DOC's chronology notes, on July 30, the DOC reopened supervision of the felony sentence and requested a "Secretary's warrant," apparently because the DOC believed that the felony supervision had been tolled while Villanueva-Villa was not reporting.[6] CP at 48. The DOC alleged that Villanueva-Villa had failed to report a change of address in January 2004 and had failed to pay LFOs. The DOC recommended that Villanueva-Villa be required to report "by kiosk" for 30 days and serve 30 days on a state work crew. CP at 241. A "secretary's warrant" was entered August 3.

---

[5] The prosecutor's motion listed four violations that occurred between April 14, 2003 and March 4, 2004: (1) failure to provide a change of address, (2) failure to pay LFOs, (3) failure to pay cost of supervision, and (4) failure to appear at the March 4, 2004 hearing.

[6] In his declaration supporting the DOC's motion for summary judgment, Robert Story, a former community corrections supervisor for the DOC who had worked with Villanueva-Villa's case, opined that this rescission was in error and that the DOC lost the authority to supervise Villanueva-Villa on July 1, 2003, when former RCW 9.94A.501 (2003) became effective.

On August 12, the DOC filed a report in Clark County Superior Court on Villanueva-Villa's felony conviction.[7] In this report, the DOC requested that supervision be reopened, apparently because the DOC failed to toll Villanueva-Villa's felony supervision due to his abscond status.

3. 2005

In 2005, the legislature amended the criteria for DOC supervision, former RCW 9.94A.501 (2003), to include misdemeanors. LAWS OF 2005, ch. 362, § 1. The 2005 amendment took effect May 10, 2005. LAWS OF 2005, ch. 362, § 5.

On October 10, 2005, Villanueva-Villa was arrested for driving a vehicle with expired tags and without insurance and was held on the outstanding warrants. On October 11, the superior court issued an order modifying Villanueva-Villa's sentence, which imposed a 30-day sanction.[8] The order did not specify whether it was addressing the felony or the misdemeanor, but the memorandum of disposition issued the same day lists only the felony conviction. The DOC noted in its chronology that Villanueva-Villa's sentence had been tolled from November 18, 2003 (the date the DOC's second letter to Villanueva-Villa was returned) through October 10, 2005 (the date of his arrest).

The DOC held a negotiated sanction hearing with Villanueva-Villa on October 20. On October 21, the negotiated sanction requiring Villanueva-Villa to report to the DOC for 30 days

[7] It is not clear why the DOC's chronology notes state that the DOC had reopened supervision on July 30, but the report was not filed in the superior court until August 12.

[8] The order lists four violations: (1) failing to provide a change of address between May 21, 2003 and November 18, 2003, (2) failing to pay LFOs, (3) failing to pay the cost of supervision, and (4) failing to appear for the March 4, 2004 hearing.

and to provide a valid address immediately was entered in the superior court. The negotiated sanction form noted that the supervision on the felony offense would end March 5, 2006 due to tolling. The negotiated sanction form lists only the felony offense.

Villanueva-Villa was released on bail on October 21, and reported to the DOC as directed. From October 21 until the end of December, he substantially complied with the negotiated sanctions, although he occasionally missed a day of reporting. The DOC advised Villanueva-Villa that he would not get reporting credit for the days he missed. During this reporting period, Villanueva-Villa also failed to advise the DOC before he moved.

Meanwhile, on November 26, Villanueva-Villa was arrested for driving under the influence (DUI) in Clark County. When he failed to appear for the December 5 hearing on this matter, an arrest warrant was issued. But on December 6, unaware of the November 26 DUI, the DOC completed a "review checklist" and noted that Villanueva-Villa was in compliance with his conditions and that he had not committed any new law violations. CP at 259 (capitalization omitted).

On December 23, Villanueva-Villa was arrested for a second DUI in Clark County. When he failed to appear for the December 29 hearing on this matter, another arrest warrant was issued.

4. 2006

Villanueva-Villa did not report to the DOC the week ending January 6, 2006. When the DOC attempted to contact him on January 8, his roommate said that Villanueva-Villa had moved.

On January 13, the DOC requested a warrant because Villanueva-Villa had failed to report a change of address and had failed to report daily. This led to a file review of Villanueva-Villa's case, and the DOC determined that Villanueva-Villa's supervision for the felony should have been

closed July 1, 2003, the effective date of former RCW 9.94A.501 (2003). Once this was discovered, the DOC requested that the warrant request be cancelled and terminated DOC supervision as of January 13.

On January 27, 2006, Villanueva-Villa caused the accident that killed William Myles. Following this accident, Villanueva-Villa was again cited for driving under the influence, and the State charged him with vehicular homicide. Villanueva-Villa pleaded guilty to vehicular homicide and hit and run (death).

II. PROCEDURE

On January 20, 2009, Myles filed a wrongful death action against the DOC and other defendants. Myles alleged that the DOC's negligence in failing to adequately monitor or supervise Villanueva-Villa while he was on "community custody" led to William Myles's death. CP at 19.

The DOC moved for summary judgment. The DOC argued that it did not owe a duty to William Myles or to his estate and that Myles had failed to establish proximate cause. In support of its summary judgment motion, the DOC presented a declaration from former community corrections supervisor Story.

Story stated that Villanueva-Villa had been classified as an RM-D offender, the lowest risk level the DOC assigned. According to Story, the "[s]upervision of 'RM-D' offenders was essentially administrative supervision to monitor whether or not the offender was current in payments on [legal financial obligations (LFOs)]." CP at 43.

Story also stated that from 2003 to 2006, the "DOC did not receive reports from law enforcement agencies for contact that 'RM-D' offenders may have had with law enforcement." CP at 43. Thus, the DOC did not have knowledge of any new offenses unless the new crime was

discovered during the quarterly reviews that occurred before the scheduled closure date or the offender self-reported contact with law enforcement.

Myles responded to the DOC's summary judgment motion. Myles asserted that (1) the DOC had the authority to supervise Villanueva-Villa on the misdemeanor conviction until May 10, 2005 due to tolling and because the negotiated sanction agreement created a special relationship between the DOC and Villanueva-Villa and (2) DOC still had the responsibility to report violations even if it was not "'actively'" monitoring Villanueva-Villa. CP at 294. Nothing in Myles's response contradicted Story's affidavit.

The trial court denied the DOC's motion for summary judgment.

The DOC moved for discretionary review of the order denying summary judgment. We accepted discretionary review. *See* Ruling Granting Review, *Myles v. State*, No. 49928-2-II (Wash. Ct. App. June 20, 2017).

ANALYSIS

The DOC argues that Myles did not establish that the DOC had a duty to prevent Villanueva-Villa from harming William Myles under the special relationship doctrine because Myles failed to show that the DOC had a take-charge relationship with Villanueva-Villa. Specifically, the DOC argues that there was no take-charge relationship because (1) the DOC had no authority to supervise Villanueva-Villa on the felony conviction after July 1, 2003, the effective date of former RCW 9.94A.501 (2003), (2) the DOC's ability to supervise Villanueva-Villa on the misdemeanor conviction ended when the one-year probationary period expired on April 13, 2004 and was not subject to tolling by the DOC, and (3) the DOC had no authority to supervise

Villanueva-Villa on the misdemeanor conviction after May 10, 2005 under former RCW 9.94A.501 (2005). We agree.

I. General Legal Principles

We review summary judgment orders de novo, performing the same inquiry as the superior court. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). "Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Vallandingham*, 154 Wn.2d at 26 (quoting CR 56(c)). When reviewing a summary judgment, we consider all facts and reasonable inferences from them in the light most favorable to the nonmoving party. *Vallandingham*, 154 Wn.2d at 26.

To establish the elements of negligence, Myles must show (1) the existence of a duty, (2) breach of that duty, (3) a resulting injury, and (4) causation. *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 563, 54 P.3d 197 (2002). Whether a legal duty exists is a question of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

II. Special Relationship Doctrine and Take-Charge Relationship

"In general, an actor 'has no duty to prevent a third person from causing physical injury to another.'" *Couch*, 113 Wn. App. at 564 (quoting *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992)). One exception to this rule is when there is "'a special relationship' between the actor and the third person.'" *Couch*, 113 Wn. App. at 564 (quoting *Taggart*, 118 Wn.2d at 218). "Such a relationship must be 'definite, established[,] and continuing,' but it need not be custodial." *Couch*, 113 Wn. App. at 564 (quoting *Hertog*, 138 Wn.2d at 276-77, 288; citing *Bishop v. Miche*,

137 Wn.2d 518, 524, 973 P.2d 465 (1999); *Taggart*, 118 Wn.2d at 219; *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)).

One form of special relationship that can result in a duty is a "take-charge" relationship between a parole officer and a parolee. *Taggart*, 118 Wn.2d at 218-20. In *Joyce v. Department of Corrections*, 155 Wn.2d 306, 315-16, 119 P.3d 825 (2005), our Supreme Court extended the special relationship doctrine to CCOs who have a take-charge relationship with a convicted person.

> To determine whether a supervising officer has "taken charge" of [a convicted person] within the meaning of *Taggart* and Restatement [of Torts] §§ 315 and 319, a court must examine "the nature of the relationship" between the officer and that person, including all of that relationship's "[v]arious features[.]" In most cases, *two of the most important features,* though not necessarily the only ones, *will be the court order that put the [convicted person] on the supervising officer's caseload and the statutes that describe and circumscribe the officer's power to act. A community corrections officer must have a court order before he or she can "take charge" of [a convicted person]; and even when he or she has such an order, he or she can only enforce it according to its terms and applicable statutes.*

Couch, 113 Wn. App. at 565 (some alterations in original) (footnotes omitted) (emphasis added) (quoting *Bishop*, 137 Wn.2d at 527; *Taggart*, 118 Wn.2d at 219).

III. Felony Supervision

The DOC contends that after July 1, 2003, just two months after Villanueva-Villa's initial intake and two and a half years before William Myles's death, it could not have formed a take-charge relationship with Villanueva-Villa based on the felony conviction because under former RCW 9.94A.501 (2003), the DOC lacked the authority to supervise Villanueva-Villa. We agree.

Former RCW 9.94A.501 (2003), which took effect July 1, 2003, required the DOC to perform a risk assessment of the felony offender and to "classify the offender into one of at least four risk categories." Former RCW 9.94A.501(1) (2003). It further required the DOC to supervise

a felony offender sentenced to terms of community custody if the offender's risk assessment was in one of the two highest risk categories, or, regardless of the offender's risk category, if

> (1) the offender had a current or prior conviction for a sex offense, a violent offense, a crime against a person, a felony domestic violence offense, residential burglary, or one of several drug offenses;
> (2) the offender's community custody included chemical dependency treatment;
> (3) the offender was sentenced under a first-time offender waiver or a special sex offender sentencing alterative; or
> (4) the offender was subject to supervision under the interstate compact for adult offender supervision.

Former RCW 9.94A.501(2) (2003). But most importantly for this case, former RCW 9.94A.501(3) (2003) provided that "[t]he [DOC] is not authorized to, and may not, supervise any offender sentenced to a term of community custody, community placement, or community supervision unless the offender is one for whom supervision is required under subsection (2) of this section."

In May 2003, the DOC determined that Villanueva-Villa's risk classification was RM-D, the lowest risk to reoffend. And Villanueva-Villa did not fall under any of the categories specifically enumerated in former RCW 9.94A.501(2) (2003). Thus, after July 1, 2003, former RCW 9.94A.501(3) (2003) expressly precluded the DOC from supervising Villanueva-Villa on his felony conviction.

As we acknowledged in *Couch*, among the "most important features" establishing a take-charge relationship are "the statutes that describe and circumscribe the [supervising] officer's power to act." 113 Wn. App. at 565. Even if there is a court order placing a defendant on the supervisor's case load, the CCO "can only enforce [the order] according to [the order's] terms and applicable statutes." *Couch*, 113 Wn. App. at 565; *see also Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 28, 84 P.3d 899 (2004) ("[I]n cases where there is no underlying statutory

authority to control or [to] take charge of the offender's behavior, no special relationship has been imposed."). Thus, after July 1, 2003, two and a half years before the accident that killed William Myles, the DOC had no authority to control Villanueva-Villa and, therefore, no take-charge relationship with respect to Villanueva-Villa under the felony conviction. Because Myles does not establish a take-charge relationship, Myles cannot establish that the DOC had a duty to prevent Villanueva-Villa from harming William Myles based on a failure to supervise Villanueva-Villa on his felony conviction.[9]

Myles argues that under RCW 9.94A.345, former RCW 9.94A.501 (2003) does not apply because the superior court must apply the sentencing statutes in effect at the time of the crime. We disagree.

RCW 9.94A.345 provides that defendants must be sentenced under the law in effect at the time the crime was committed. According to the statutory note accompanying RCW 9.94A.345, the legislature intended RCW 9.94A.345 to cure any ambiguity as to what law to use when calculating a convicted defendant's offender score for purposes of sentencing and "to clarify the

---

[9] Myles asserts that "[i]f it was the intent of the legislature to make conditions of an offender's sentence contingent upon DOC's risk assessment findings, the statute would specifically state such contingency -- but it does not." Resp't's Opening Br. at 17. But that is precisely what former RCW 9.94A.501 (2003) states in relation to the DOC's role in supervising a felony offender's community custody. Former RCW 9.94A.501 (2003) did not, however, eliminate the court's ability to enforce sentencing conditions.

Myles also appears to assert that because the legislature failed to pass a prior bill that would have allowed the DOC to "eliminate" or "terminate" community custody in 2002, the elimination or termination of community custody was not the legislature's intent in 2003. Resp't's Opening Br. at 18. But whether the legislature passed a different bill a year earlier is irrelevant. Also, the 2003 amendment did not allow the DOC to *eliminate* or *terminate* community custody, it just limited the DOC's ability to enforce community custody from 2003 until the statute expired in 2010. Even if the DOC could not enforce community custody, the superior court could.

applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives." LAWS OF 2000, ch. 26, § 1. RCW 9.94A.345 was not intended to limit the legislature's ability to define the scope of the DOC's authority. Additionally, former RCW 9.94A.510 (2003) did not prevent the superior court from *sentencing* Villanueva-Villa under the statutes in effect when the crimes were committed, it merely determined who had the authority to enforce the sentence.

Myles further argues that *State v. McClinton*, 186 Wn. App. 826, 347 P.3d 889 (2015), and *State v. Medina*, 180 Wn.2d 282, 324 P.3d 682 (2014), demonstrate that former RCW 9.94A.501 (2003) does not apply to sentences imposed before July 1, 2003. But these cases are not persuasive.

McClinton addressed whether the DOC could "use GPS (global positioning system) monitoring to keep track of a sex offender who [was] serving the community portion of a sentence" when the statutes in effect at the time of the offense "did not specifically provide the [DOC] with authority to use GPS monitoring." *McClinton*, 186 Wn. App. at 828. Division One of this court recognized that "[t]he terms of a defendant's sentence are governed by the version of the Sentencing Reform Act [of 1981, ch. 9.94A RCW] in effect when the crime was committed." *McClinton*, 186 Wn. App. at 829. But *McClinton* addressed whether the DOC had the authority to use a new method of monitoring the offender that was not statutorily authorized rather than the DOC's authority to enforce community custody conditions generally. Unlike here, where the change in the law related only to the DOC's enforcement authority, requiring the offender to wear a new monitoring system not expressly authorized changed the nature of the punishment imposed.

In *Medina*, our Supreme Court addressed whether an offender should receive credit for time served in programs that he participated in as a condition of release after his original conviction

was vacated but before he was reconvicted. 180 Wn.2d at 284-87. After stating that a "defendant must be sentenced in accordance with the law in effect at the time of his or her offense," the court examined the law in effect at the time of the offense to determine if Medina was entitled to credit for time served. *Medina*, 180 Wn.2d at 287. Again, *Medina* addressed a matter that related to the severity of the punishment because it could increase or decrease the offender's time in custody, rather than the DOC's general authority to enforce community custody conditions.

Myles asserts that the final bill report for engrossed substitute senate bill 5990, the bill that enacted former RCW 9.94A.501 (2003), establishes that the DOC had some remaining active supervisory duty of Villanueva-Villa. *Final B. Rep. on Engrossed Substitute S.B. 5990*, 58th Leg., Reg. Sess. (Wash. 2003). As Myles notes, the bill report states that offenders with low risk classifications "are actively supervised only if a violation of a release condition is brought to the attention of the [DOC]." FINAL B. REPORT, *supra*, at 2. But that section of the bill report describes the *background* of the bill—in other words, what the statute formerly required—not what the amended statute required. FINAL B. REPORT, *supra*, at 2. In fact, the bill report expressly states that under former RCW 9.94A.501 (2003), the DOC did *not* have the authority to actively supervise someone unless that person fell into the specific categories described in the statute. FINAL B. REPORT, *supra*, at 2-3. Thus, the bill report does not support the conclusion that the DOC had an active supervisory duty after the 2003 amendment. Accordingly, this argument is not persuasive.

Finally, Myles also asserts that the felony conditions should have been tolled. Even if the conditions should have been tolled, the DOC lacked the authority to enforce them after July 1, 2003 under former RCW 9.94A.501(3) (2003).

Because the DOC did not have the authority to supervise Villanueva-Villa on his felony conviction after July 1, 2003, Myles fails to establish that the DOC had a take-charge relationship with Villanueva-Villa under the felony sentence. Thus, Myles fails to establish that the DOC had a duty under the felony sentence to prevent Villanueva-Villa from harming William Myles.

IV. MISDEMEANOR PROBATION

We next turn to whether Myles has established that the DOC had a duty to prevent Villanueva-Villa from harming William Myles under the misdemeanor conviction. The DOC argues that it did not have any duty under the misdemeanor conviction because (1) its authority expired on April 14, 2004, when Villanueva-Villa's one-year probationary supervision ended and the DOC had no authority to toll the probationary period, and (2) it had no authority to supervise Villanueva-Villa after May 10, 2005, under former RCW 9.94A.501(3) (2005). We agree.

A. NO TOLLING

When Villanueva-Villa's misdemeanor probation period ended on April 13, 2004, DOC policy prohibited the DOC from tolling misdemeanor supervision unless specifically ordered by the trial court. DOC Policy 320.160.[10] Although there was statutory authority permitting the DOC to toll felony supervision,[11] the statutes addressing misdemeanor probation did not give the DOC the authority to toll a misdemeanor probation period. Instead, RCW 9.95.230 provided that *the*

[10] *Available at* http://www.doc.wa.gov/information/policies/defaults.aspx?show=300.

[11] *See* former RCW 9.94A.545 (2003). Former RCW 9.94A.545 (2003) applied only to "offenders," which at that time included those convicted of only felony offenses. Former RCW 9.94A.030(30) (2002). The definition of "offender" was not amended to include misdemeanor or gross misdemeanor probationers until 2009. LAWS OF 2009, ch. 375, § 4.

court had the authority any time before the entry of an order terminating probation to modify an order suspending the defendant's sentence.

Because the DOC did not have the authority to toll Villanueva-Villa's misdemeanor probation, its relationship with Villanueva-Villa based on the misdemeanor conviction ended on April 13, 2004, barring any extension by the superior court.[12] Without any authority over Villanueva-Villa, there was no "'definite, established[,] and continuing,'" relationship between the DOC and Villanueva-Villa, and therefore no "'special relationship'" based on the misdemeanor conviction that resulted in any duty to protect William Myles.[13] *Couch*, 113 Wn. App. at 564 (quoting *Hertog*, 138 Wn.2d at 276, 288).

---

[12] To the extent Myles is arguing that the DOC's failure to supervise Villanueva-Villa *before* April 13, 2004, was negligent, we note that the DOC reported Villanueva-Villa's pre-April 13, 2004 violations to the superior court and a bench warrant was issued for Villanueva-Villa's arrest before the DOC closed the misdemeanor case. The issuance of the warrant terminated any special relationship that may have resulted under the misdemeanor conviction up to that point. *See Smith v. Dep't of Corr.*, 189 Wn. App. 839, 849, 359 P.3d 867 (2015) (special relationship between the DOC and defendant terminates after the defendant has absconded and an arrest warrant was issued), *review denied*, 185 Wn.2d 1004 (2016).

[13] Myles also argues that even if there was no statutory authority allowing the DOC to toll a misdemeanor probation sentence, common law allows for tolling. But Myles does not direct us to any cases that allow *the DOC* to toll a misdemeanor probation sentence—the cases he cites all address *the court's* tolling authority. *See City of Spokane v. Marquette*, 146 Wn.2d 124, 134, 43 P.3d 502 (2002) (examining tolling of suspended sentence by municipal court); *State v. V.J.*, 132 Wn. App. 380, 384, 132 P.3d 763 (2006) (examining tolling of community supervision by juvenile court); *State v. Haugen*, 22 Wn. App. 785, 787-88, 591 P.2d 1218 (1979) (examining tolling of probation by trial court); *State v. Frazier*, 20 Wn. App. 332, 333, 579 P.2d 1357 (1978) (examining tolling of probation by trial court); *Gillespie v. State*, 17 Wn. App. 363, 366-67, 563 P.2d 1272 (1977) (examining tolling of probation by superior court).

Myles further asserts that if the DOC could not toll a probationary period "then offenders who abscond from probation or community supervision will not face any penalties as long as they don't get caught within one (1) year of sentencing." Resp't's Opening Br. at 12. But this overstates the consequences because the court still had the authority to extend the probationary period. RCW 9.95.230.

B. FORMER RCW 9.94A.501 (2005)

Furthermore, even if the misdemeanor probation was tolled, the 2005 amendments to former RCW 9.94A.501 (2003) prevented the DOC from supervising Villanueva-Villa after May 10, 2005, more than eight months before Villanueva-Villa caused the fatal accident.

In 2005, the legislature amended former RCW 9.94A.501 (2003), which had previously applied to only felony offenders on community custody, placement, or supervision, to include "every misdemeanor and gross misdemeanor probationer ordered by a superior court to probation under the supervision of the [DOC]." Former RCW 9.94A.501(2) (2005); LAWS OF 2005, ch. 362, § 1. This amendment took effect May 10, 2005. Under former RCW 9.94A.501 (2005), Villanueva-Villa's risk level was too low to trigger supervision and he did not fall into any of the specific categories of offenders that expressly required supervision,[14] and thus the DOC lacked the authority to supervise Villanueva-Villa on his misdemeanor conviction as well as the felony conviction after May 10, 2005, more than eight months before the fatal accident. As discussed above in section III, without the authority to supervise Villanueva-Villa, Myles cannot establish a take-charge relationship. And because Myles does not establish a take-charge relationship, Myles cannot establish that the DOC had a duty to prevent Villanueva-Villa from harming William Myles based on a failure to supervise Villanueva-Villa under the misdemeanor conviction.

V. OCTOBER 2005 AMENDED SENTENCE AND NEGOTIATED SANCTION

As noted above, on October 11, 2005, after Villanueva-Villa had been arrested and held on outstanding warrants, the superior court issued an order modifying Villanueva-Villa's sentence,

[14] *See* former RCW 9.94A.501(2) (2005).

which imposed a 30-day sanction. The DOC held a negotiated sanction hearing with Villanueva-Villa on October 20. On October 21, the negotiated sanction requiring Villanueva-Villa to report to the DOC for 30 days and to provide a valid address immediately was entered in the superior court. The negotiated sanction stated that supervision would end March 5, 2006. Myles argues that the superior court's October 11, 2005 order, the resulting October 21 negotiated sanctions, and the DOC's subsequent monitoring of Villanueva-Villa reestablished a take-charge relationship.[15]

Even if the trial court's October 11, 2005 order extended Villanueva-Villa's community custody or misdemeanor probation and DOC was monitoring Myles after October 21, the DOC had no authority to supervise Villanueva-Villa on his felony or misdemeanor convictions. As discussed above in section III, as of July 1, 2003, the DOC was no longer authorized to supervise Villanueva-Villa on his felony conviction. The DOC recognized they lacked authority to supervise Villanueva-Villa and actually terminated DOC supervision as of January 13, 2006.[16] And as of May 10, 2005, the DOC was no longer authorized to supervise Villanueva-Villa on his misdemeanor conviction. Because the DOC had no authority to supervise the felony community custody or misdemeanor probation there was no take-charge relationship and no duty to prevent Villanueva-Villa from harming William Myles.

Myles fails to establish a take-charge relationship under either the felony or misdemeanor convictions. Without such a relationship, the DOC had no duty to prevent Villanueva-Villa from

---

[15] We note that Myles does not argue that a duty to protect William Myles arose under the voluntary assumption of duty doctrine.

[16] We are not presented with the question and we do not decide what would have been the result had DOC not terminated supervision.

harming William Myles, and the trial court erred when it denied the DOC's motion for summary judgment. Accordingly, we reverse the trial court and remand for the trial court to enter an order dismissing the DOC.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

JOHANSON, J.

We concur:

MAXA, C.J.

SUTTON, J.

APPENDIX B

STATUTORY APPENDIX

INDEX

REVISED CODE of WASHINGTON

Containing all laws of a general and permanent nature enacted through the 2000 Legislative Session.

This 2000 RCW is current through October 7, 2000, containing changes made by the Washington State legislature in the 2000 regular, 1st and 2nd special sessions.

Although considerable care has been used in the production of this code, within the limits of available time and facilities it is inevitable that in so large a work that there will be errors, both mechanical and of judgment. As such errors are detected or are believed to exist in particular sections by those who use this code, it is requested that a note citing the section involved and the nature of the error be mailed to: Code Reviser, PO Box 40551, Olympia, WA 98504-0551, so that correction may be made in a subsequent publication.

A Disclaimer

(1) Neither the State of Washington nor any agency, officer, or employee of the State of Washington warrants the accuracy, reliability, or timeliness of any information in this CD-ROM and is not liable for any losses caused by reliance on the accuracy, reliability, or timeliness of that information. Portions of the information may be incorrect or not current. Person or entities who rely on this information do so at their own risk.

(2) A user intending to obtain the Revised Code of Washington or the Washington Administrative Code for the purpose of selling it should contact the Washington State Statute Law Committee, which claims copyright for both codes, at (360) 786-6777.

(3) The Revised Code of Washington and the Washington Administrative Code are the official versions, as of the respective dates of publication, produced by the Office of the Code Reviser and Statute Law Committee. Each are current as noted on the face of the CD-ROM.

(4) The Court Reports are an unofficial version. Although considerable care has been taken in the production of the court reports, we do not warrant that they are entirely accurate, complete, or error free, and it is the users responsibility to evaluate the accuracy, completeness, and usefulness of all data. A scanning process was utilized to capture court decisions, and although highly accurate, occasionally letters in words are misread. The court reports consist of all the appellate court cases and the supreme court cases of the Washington second series only, each, respectively current as noted on the face of the

34.05 RCW and shall take effect on the date prescribed by the commission. The legislature shall approve or modify the commission's revision or amendment at the next legislative session after the revision or amendment takes effect. Failure of the legislature to act shall be deemed as approval of the revision or amendment;

(2) Call the clemency and pardons board into an emergency meeting for the purpose of recommending whether the governor's commutation or pardon power should be exercised to meet the present emergency.

[1999 c 143 § 13; 1984 c 246 § 1; 1983 c 163 § 4; 1981 c 137 § 16.]

Notes:

Severability--1984 c 246: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1984 c 246 § 12.]

Effective date--1983 c 163: See note following RCW 9.94A.120.

Effective date--1981 c 137: See RCW 9.94A.905.

RCW 9.94A.165 Emergency in county jails population exceeding capacity.

If the governor finds that an emergency exists in that the populations of county jails exceed their reasonable, maximum capacity in a significant manner as a result of increases in the sentenced felon population due to implementation of chapter 9.94A RCW, the governor may do any one or more of the following:

(1) Call the sentencing guidelines commission into an emergency meeting for the purpose of evaluating the standard ranges and other standards. The commission may adopt any revision or amendment to the standard ranges or other standards that it believes appropriate to deal with the emergency situation. The revision or amendment shall be adopted in conformity with chapter 34.05 RCW and shall take effect on the date prescribed by the commission. The legislature shall approve or modify the commission's revision or amendment at the next legislative session after the revision or amendment takes effect. Failure of the legislature to act shall be deemed as approval of the revision or amendment. The commission shall also analyze how alternatives to total confinement are being provided and used and may recommend other emergency measures that may relieve the overcrowding.

(2) Call the clemency and pardons board into an emergency meeting for the purpose of recommending whether the governor's commutation or pardon power should be exercised to meet the present emergency.

[1984 c 209 § 9.]

Notes:

Effective dates--1984 c 209: See note following RCW 9.94A.030.

RCW 9.94A.170 Tolling of term of confinement, supervision.

(1) A term of confinement ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented himself or herself from confinement without the prior approval of the entity in whose custody the offender has been placed. A term of

partial confinement shall be tolled during any period of time spent in total confinement pursuant to a new conviction or pursuant to sanctions for violation of sentence conditions on a separate felony conviction.

(2) Any term of community custody, community placement, or community supervision shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed.

(3) Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason. However, if an offender is detained pursuant to RCW 9.94A.207 or 9.94A.195 and is later found not to have violated a condition or requirement of community custody, community placement, or community supervision, time spent in confinement due to such detention shall not toll the period of community custody, community placement, or community supervision.

(4) For terms of confinement or community custody, community placement, or community supervision, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision.

[2000 c 226 § 5. Prior: 1999 c 196 § 7; 1999 c 143 § 14; 1993 c 31 § 2; 1988 c 153 § 9; 1981 c 137 § 17.]

Notes:

Effective date--2000 c 226 § 5: "Section 5 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 30, 2000]." [2000 c 226 § 7.]

Finding--Intent--Severability--2000 c 226: See notes following RCW 9.94A.120.

Construction--Short title--1999 c 196: See RCW 72.09.904 and 72.09.905.

Severability--1999 c 196: See note following RCW 9.94A.010.

Effective date--Application of increased sanctions--1988 c 153: See notes following RCW 9.94A.030.

Effective date--1981 c 137: See RCW 9.94A.905.

RCW 9.94A.175 Postrelease supervision--Violations--Expenses.

If the offender violates any condition of postrelease supervision, a hearing may be conducted in the same manner as provided in RCW 9.94A.200. Jurisdiction shall be with the court of the county in which the offender was sentenced. However, the court may order a change of venue to the offender's county of residence or where the violation occurred, for the purpose of holding a violation hearing.

After the hearing, the court may order the offender to be confined for up to sixty days per violation in the county jail. Reimbursement to a city or county for the care of offenders who are detained solely for violating a condition of postrelease supervision shall be under RCW 70.48.440. A county shall be reimbursed for indigent defense costs for offenders who are detained solely for violating a condition of postrelease supervision in accordance with regulations to be promulgated by the office of financial management. An offender may be held in jail at state expense pending the hearing, and any time served while awaiting the hearing shall be credited against confinement imposed for a violation. The court shall retain jurisdiction for the purpose of holding the violation hearing and imposing a sanction.

[1988 c 153 § 8.]

Notes:

Effective date--Application of increased sanctions--1988 c 153: See notes following RCW 9.94A.030.

RCW 9.94A.180 Term of partial confinement, work release, home detention. ***(Effective until July 1, 2001.)***

(1) An offender sentenced to a term of partial confinement shall be confined in the facility for at least eight hours per day or, if serving a work crew sentence shall comply with the conditions of that sentence as set forth in RCW *9.94A.030(26) and 9.94A.135. The offender shall be required as a condition of partial confinement to report to the facility at designated times. An offender may be required to comply with crime-related prohibitions during the period of partial confinement.

(2) An offender in a county jail ordered to serve all or part of a term of less than one year in work release, work crew, or a program of home detention who violates the rules of the work release facility, work crew, or program of home detention or fails to remain employed or enrolled in school may be transferred to the appropriate county detention facility without further court order but shall, upon request, be notified of the right to request an administrative hearing on the issue of whether or not the offender failed to comply with the order and relevant conditions. Pending such hearing, or in the absence of a request for the hearing, the offender shall serve the remainder of the term of confinement as total confinement. This subsection shall not affect transfer or placement of offenders committed to the state department of corrections.

[1999 c 143 § 15; 1991 c 181 § 4; 1988 c 154 § 4; 1987 c 456 § 3; 1981 c 137 § 18.]

Notes:

***Reviser's note:** RCW 9.94A.030 was amended by 1999 c 196 § 2, changing subsection (26) to subsection (28).

Effective date--1981 c 137: See RCW 9.94A.905.

RCW 9.94A.180 Term of partial confinement, work release, home detention. ***(Effective July 1, 2001.)***

(1) An offender sentenced to a term of partial confinement shall be confined in the facility for at least eight hours per day or, if serving a work crew sentence shall comply with the conditions of that sentence as set forth in RCW 9.94A.030(30) and 9.94A.135. The offender shall be required as a condition of partial confinement to report to the facility at designated times. During the period of partial confinement, an offender may be required to comply with crime-related prohibitions and affirmative conditions imposed by the court or the department pursuant to this chapter.

(2) An offender in a county jail ordered to serve all or part of a term of less than one year in work release, work crew, or a program of home detention who violates the rules of the work release facility, work crew, or program of home detention or fails to remain employed or enrolled in school may be transferred to the appropriate county detention facility without further court order but shall, upon request, be notified of the right to request an administrative hearing on the

REVISED CODE of WASHINGTON

Containing all laws of a general and permanent nature enacted through the 2001 Legislative Session.

Click here for Licensing Agreement

This 2001 RCW is current through September 29, 2001, containing changes made by the Washington State legislature in the 2001 regular, 1st, 2nd, and 3rd special sessions.

Although considerable care has been used in the production of this code, within the limits of available time and facilities it is inevitable that in so large a work that there will be errors, both mechanical and of judgment. As such errors are detected or are believed to exist in particular sections by those who use this code, it is requested that a note citing the section involved and the nature of the error be mailed to: Code Reviser, PO Box 40551, Olympia, WA 98504-0551, so that correction may be made in a subsequent publication.

A Disclaimer

(1) Neither the State of Washington nor any agency, officer, or employee of the State of Washington warrants the accuracy, reliability, or timeliness of any information in this CD-ROM and is not liable for any losses caused by reliance on the accuracy, reliability, or timeliness of that information. Portions of the information may be incorrect or not current. Person or entities who rely on this information do so at their own risk.

(2) A user intending to obtain the Revised Code of Washington or the Washington Administrative Code for the purpose of selling it should contact the Washington State Statute Law Committee, which claims copyright for both codes, at (360) 786-6777.

(3) The Revised Code of Washington and the Washington Administrative Code are the official versions, as of the respective dates of publication, produced by the Office of the Code Reviser and Statute Law Committee. Each are current as noted on the face of the CD-ROM.

(4) The Court Reports are an unofficial version. Although considerable care has been taken in the production of the court reports, we do not warrant that they are entirely accurate, complete, or error free, and it is the users responsibility to evaluate the accuracy, completeness, and usefulness of all data. A scanning process was utilized to capture court decisions, and although highly accurate, occasionally letters in words are misread. The court reports consist of all the appellate court cases and the supreme court cases of the Washington second series only, each, respectively current as noted on the face of the

NOTES:

***Reviser's note:** This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

RCW 9.94A.620 Prisoner escape, release, or furlough--Consequences of failure to notify.

Civil liability shall not result from failure to provide notice required under RCW *9.94A.612 through 9.94A.618, 9.94A.030, and 43.43.745 unless the failure is the result of gross negligence.

[1985 c 346 § 7. Formerly RCW 9.94A.159.]

NOTES:

***Reviser's note:** These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

RCW 9.94A.625 Tolling of term of confinement, supervision.

(1) A term of confinement ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented himself or herself from confinement without the prior approval of the entity in whose custody the offender has been placed. A term of partial confinement shall be tolled during any period of time spent in total confinement pursuant to a new conviction or pursuant to sanctions for violation of sentence conditions on a separate felony conviction.

(2) Any term of community custody, community placement, or community supervision shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed.

(3) Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason. However, if an offender is detained pursuant to *RCW 9.94A.740 or 9.94A.631 and is later found not to have violated a condition or requirement of community custody, community placement, or community supervision, time spent in confinement due to such detention shall not toll the period of community custody, community placement, or community supervision.

(4) For terms of confinement or community custody, community placement, or community supervision, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision.

[2000 c 226 § 5. Prior: 1999 c 196 § 7; 1999 c 143 § 14; 1993 c 31 § 2; 1988 c 153 § 9; 1981 c 137 § 17. Formerly RCW 9.94A.170.]

NOTES:

***Reviser's note:** These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

Effective date--2000 c 226 § 5: "Section 5 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 30, 2000]." [2000 c 226 § 7.]

VOLUME 1

Titles 1 through 17

2002

REVISED CODE OF WASHINGTON

Published under the authority of chapter 1.08 RCW.

Containing all laws of a general and permanent nature through the 2002 regular session, which adjourned sine die March 14, 2002.

the state for the use of the facility as provided in this subsection. The office of financial management shall set the rate of reimbursement based upon the average per diem cost per offender in the facility. The office of financial management shall determine to what extent, if any, reimbursement shall be reduced or eliminated because of funds provided by the legislature to the department for the purpose of covering the cost of county use of state partial confinement facilities. The office of financial management shall reestablish reimbursement rates each even-numbered year.

(3) A person who is sentenced for a felony to a term of not more than one year, and who is committed or returned to incarceration in a state facility on another felony conviction, either under the indeterminate sentencing laws, chapter 9.95 RCW, or under this chapter shall serve all terms of confinement, including a sentence of not more than one year, in a facility or institution operated, or utilized under contract, by the state, consistent with the provisions of *RCW 9.94A.589.

(4) Notwithstanding any other provision of this section, a sentence imposed pursuant to RCW 9.94A.660 which has a standard sentence range of over one year, regardless of length, shall be served in a facility or institution operated, or utilized under contract, by the state.

(5) Sentences imposed pursuant to RCW 9.94A.712 shall be served in a facility or institution operated, or utilized under contract, by the state. [2001 2nd sp.s. c 12 § 313; 2000 c 28 § 4; 1995 c 108 § 4; 1991 c 181 § 5; 1988 c 154 § 5; 1986 c 257 § 21; 1984 c 209 § 10; 1981 c 137 § 19.]

*Reviser's note: This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

Intent—Severability—Effective dates—2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application—2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

Technical correction bill—2000 c 28: See note following RCW 9.94A.015.

Effective date—1995 c 108: See note following RCW 9.94A.030.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17-35: See note following RCW 9.94A.030.

Effective dates—1984 c 209: See note following RCW 9.94A.030.

Effective date—1981 c 137: See RCW 9.94A.905.

9.94A.340 Equal application. The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant. [1983 c 115 § 5.]

9.94A.345 Timing. Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed. [2000 c 26 § 2.]

Intent—2000 c 26: "RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington supreme court's decision in *State v. Cruz*, Cause No. 67147-8 (October 7, 1999). A decision as to whether a prior conviction shall be included in an individual's offender score should be determined by the law in effect on the day the current offense was committed. RCW 9.94A.345 is also intended to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives." [2000 c 26 § 1.]

9.94A.401 Introduction. These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state. [1983 c 115 § 14. Formerly RCW 9.94A.430.]

9.94A.411 Evidentiary sufficiency. (1) Decision not to prosecute.

STANDARD: A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

GUIDELINE/COMMENTARY:

Examples

The following are examples of reasons not to prosecute which could satisfy the standard.

(a) Contrary to Legislative Intent - It may be proper to decline to charge where the application of criminal sanctions would be clearly contrary to the intent of the legislature in enacting the particular statute.

(b) Antiquated Statute - It may be proper to decline to charge where the statute in question is antiquated in that:

(i) It has not been enforced for many years; and

(ii) Most members of society act as if it were no longer in existence; and

(iii) It serves no deterrent or protective purpose in today's society; and

(iv) The statute has not been recently reconsidered by the legislature.

This reason is not to be construed as the basis for declining cases because the law in question is unpopular or because it is difficult to enforce.

(c) De Minimis Violation - It may be proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution.

(d) Confinement on Other Charges - It may be proper to decline to charge because the accused has been sentenced on another charge to a lengthy period of confinement; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iii) Conviction of the new offense would not serve any significant deterrent purpose.

(e) Pending Conviction on Another Charge - It may be proper to decline to charge because the accused is facing a pending prosecution in the same or another county; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) Conviction in the pending prosecution is imminent;

(iii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iv) Conviction of the new offense would not serve any significant deterrent purpose.

(f) High Disproportionate Cost of Prosecution - It may be proper to decline to charge where the cost of locating or transporting, or the burden on, prosecution witnesses is

result from failure to provide notice required under RCW *9.94A.612 through 9.94A.618, 9.94A.030, and 43.43.745 unless the failure is the result of gross negligence. [1985 c 346 § 7. Formerly RCW 9.94A.159.]

*Reviser's note: These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

9.94A.625 Tolling of term of confinement, supervision. (1) A term of confinement ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented himself or herself from confinement without the prior approval of the entity in whose custody the offender has been placed. A term of partial confinement shall be tolled during any period of time spent in total confinement pursuant to a new conviction or pursuant to sanctions for violation of sentence conditions on a separate felony conviction.

(2) Any term of community custody, community placement, or community supervision shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed.

(3) Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason. However, if an offender is detained pursuant to *RCW 9.94A.740 or 9.94A.631 and is later found not to have violated a condition or requirement of community custody, community placement, or community supervision, time spent in confinement due to such detention shall not toll the period of community custody, community placement, or community supervision.

(4) For terms of confinement or community custody, community placement, or community supervision, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision. [2000 c 226 § 5. Prior: 1999 c 196 § 7; 1999 c 143 § 14; 1993 c 31 § 2; 1988 c 153 § 9; 1981 c 137 § 17. Formerly RCW 9.94A.170.]

*Reviser's note: These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

Effective date—2000 c 226 § 5: "Section 5 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 30, 2000]." [2000 c 226 § 7.]

Finding—Intent—Severability—2000 c 226: See notes following RCW 9.94A.505.

Construction—Short title—1999 c 196: See RCW 72.09.904 and 72.09.905.

Severability—1999 c 196: See note following RCW 9.94A.010.

Effective date—Application of increased sanctions—1988 c 153: See notes following RCW 9.94A.030.

Effective date—1981 c 137: See RCW 9.94A.905.

9.94A.628 Postrelease supervision—Violations—Expenses. If the offender violates any condition of postrelease supervision, a hearing may be conducted in the same manner as provided in *RCW 9.94A.634. Jurisdiction shall be with the court of the county in which the offender was sentenced. However, the court may order a change of venue to the offender's county of residence or where the violation occurred, for the purpose of holding a violation hearing.

After the hearing, the court may order the offender to be confined for up to sixty days per violation in the county jail. Reimbursement to a city or county for the care of offenders who are detained solely for violating a condition of postrelease supervision shall be under RCW 70.48.440. A county shall be reimbursed for indigent defense costs for offenders who are detained solely for violating a condition of postrelease supervision in accordance with regulations to be promulgated by the office of financial management. An offender may be held in jail at state expense pending the hearing, and any time served while awaiting the hearing shall be credited against confinement imposed for a violation. The court shall retain jurisdiction for the purpose of holding the violation hearing and imposing a sanction. [1988 c 153 § 8. Formerly RCW 9.94A.175.]

*Reviser's note: This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

Effective date—Application of increased sanctions—1988 c 153: See notes following RCW 9.94A.030.

9.94A.631 Violation of condition or requirement of sentence—Arrest by community corrections officer—Confinement in county jail. If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property. A community corrections officer may also arrest an offender for any crime committed in his or her presence. The facts and circumstances of the conduct of the offender shall be reported by the community corrections officer, with recommendations, to the court.

If a community corrections officer arrests or causes the arrest of an offender under this section, the offender shall be confined and detained in the county jail of the county in which the offender was taken into custody, and the sheriff of that county shall receive and keep in the county jail, where room is available, all prisoners delivered to the jail by the community corrections officer, and such offenders shall not be released from custody on bail or personal recognizance, except upon approval of the court, pursuant to a written order. [1984 c 209 § 11. Formerly RCW 9.94A.195.]

Effective dates—1984 c 209: See note following RCW 9.94A.030.

9.94A.634 Noncompliance with condition or requirement of sentence—Procedure—Penalty. (1) If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.

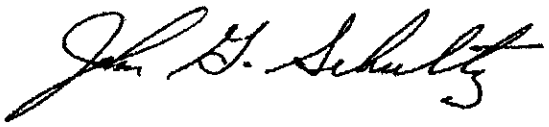
(2) In cases where conditions from a second or later sentence of community supervision begin prior to the term of the second or later sentence, the court shall treat a violation of such conditions as a violation of the sentence of community supervision currently being served.

REVISED CODE OF WASHINGTON

2003 Supplement

CERTIFICATE

This 2003 supplement of the 2002 edition of the Revised Code of Washington, published officially by the Statute Law Committee, is, in accordance with RCW 1.08.037, certified to comply with the current specifications of the committee.



JOHN G. SCHULTZ, Chair
STATUTE LAW COMMITTEE

VOLUME 9

2003 RCW SUPPLEMENT

2002
REVISED CODE OF WASHINGTON

Published under the authority of chapter 1.08 RCW.

I. SCOPE OF SUPPLEMENT

This volume supplements the 2002 edition of The Revised Code of Washington by adding the following materials:

1. All laws of a general and permanent nature enacted in the 2003 regular session (adjourned sine die April 27, 2003), 2003 first special session (adjourned sine die June 10, 2003), and the 2003 second special session (adjourned June 11, 2003) of the fifty-eighth legislature.
2. All constitutional amendments adopted in November 2002.
3. Appropriate supplementation of the various tables and the general index.

II. TABLE OF CONTENTS

Title 1
GENERAL PROVISIONS

Chapters

Chapter 1.16 RCW
GENERAL DEFINITIONS

Sections

1.16.050 "Legal holidays and legislatively recognized days." The following are legal holidays: Sunday; the first day of January, commonly called New Year's Day; the third Monday of January, being celebrated as the anniversary of the birth of Martin Luther King, Jr.; the third Monday of February to be known as Presidents' Day and to be celebrated as the anniversary of the births of Abraham Lincoln and George Washington; the last Monday of May, commonly known as Memorial Day; the fourth day of July, being the anniversary of the Declaration of Independence; the first Monday in September, to be known as Labor Day; the eleventh day of November, to be known as Veterans' Day; the fourth Thursday in November, to be known as Thanksgiving Day; the day immediately following Thanksgiving Day; and the twenty-fifth day of December, commonly called Christmas Day.

Employees of the state and its political subdivisions, except employees of school districts and except those nonclassified employees of institutions of higher education who hold appointments or are employed under contracts to perform services for periods of less than twelve consecutive months, shall be entitled to one paid holiday per calendar year in addition to those specified in this section. Each employee of the state or its political subdivisions may select the day on which the employee desires to take the additional holiday provided for herein after consultation with the employer pursuant to guidelines to be promulgated by rule of the appropriate personnel authority, or in the case of local government by ordinance or resolution of the legislative authority.

If any of the above specified state legal holidays are also federal legal holidays but observed on different dates, only the state legal holidays shall be recognized as a paid legal holiday for employees of the state and its political subdivisions except that for port districts and the law enforcement and public transit employees of municipal corporations, either the federal or the state legal holiday, but in no case both, may be recognized as a paid legal holiday for employees.

Whenever any legal holiday, other than Sunday, falls upon a Sunday, the following Monday shall be the legal holiday.

Whenever any legal holiday falls upon a Saturday, the preceding Friday shall be the legal holiday.

Nothing in this section shall be construed to have the effect of adding or deleting the number of paid holidays provided for in an agreement between employees and employers of political subdivisions of the state or as established by ordinance or resolution of the local government legislative authority.

The legislature declares that the twelfth day of October shall be recognized as Columbus Day but shall not be considered a legal holiday for any purposes.

The legislature declares that the ninth day of April shall be recognized as former prisoner of war recognition day but shall not be considered a legal holiday for any purposes.

The legislature declares that the twenty-sixth day of January shall be recognized as Washington army and air national guard day but shall not be considered a legal holiday for any purposes.

The legislature declares that the seventh day of August shall be recognized as purple heart recipient recognition day but shall not be considered a legal holiday for any purposes.

The legislature declares that the second Sunday in October be recognized as Washington state children's day but shall not be considered a legal holiday for any purposes.

The legislature declares that the sixteenth day of April shall be recognized as Mother Joseph day and the fourth day of September as Marcus Whitman day, but neither shall be considered legal holidays for any purpose.

The legislature declares that the seventh day of December be recognized as Pearl Harbor remembrance day but shall not be considered a legal holiday for any purpose.

The legislature declares that the nineteenth day of February be recognized as civil liberties day of remembrance but shall not be considered a legal holiday for any purpose. [2003 c 68 § 2; 2000 c 60 § 1; 1999 c 26 § 1; 1993 c 129 § 2; 1991 sp.s. c 20 § 1; 1991 c 57 § 2; 1989 c 128 § 1; 1985 c 189 § 1; 1979 c 77 § 1; 1977 ex.s. c 111 § 1; 1975-'76 2nd ex.s. c 24 § 1; 1975 1st ex.s. c 194 § 1; 1973 2nd ex.s. c 1 § 1; 1969 c 11 § 1; 1955 c 20 § 1; 1927 c 51 § 1; RRS § 61. Prior: 1895 c 3 § 1; 1891 c 41 § 1; 1888 p 107 § 1.]

Finding—1993 c 129: "The legislature finds that Washington's children are one of our most valuable assets, representing hope for the future. Children today are at risk for many things, including drug and alcohol abuse, child abuse, suicide, peer pressure, and the economic and educational challenges of a changing world. It is increasingly important for families, schools, health professionals, caregivers, and workers at state agencies charged with the protection and help of children to listen to them, to support and encourage them, and to help them build their dreams for the future.

To increase recognition of children's issues, a national children's day is celebrated in October, with ceremonies and activities devoted to children. Washington state focuses special attention on its children by establishing a Washington state children's day." [1993 c 129 § 1.]

Finding—Declaration—1991 c 57: "The legislature finds that the Washington army and air national guard comprise almost nine thousand dedicated men and women who serve the state and nation on a voluntary basis. The legislature also finds that the state of Washington benefits from that dedication by immediate access to well-prepared resources in time of natural disasters and public emergency. The national guard has consistently and frequently responded to state and local emergencies with people and equipment to provide enforcement assistance, medical services, and overall support to emergency management services.

The legislature further declares that an annual day of commemoration should be observed in honor of the achievements, sacrifices, and dedication of the men and women of the Washington army and air national guard." [1991 c 57 § 1.]

Court business on legal holidays: RCW 2.28.100, 2.28.110.

School holidays: RCW 28A.150.050.

1.16.090 Legislative declaration for civil liberties day of remembrance. The legislature recognizes that on February 19, 1942, the President of the United States issued Exec-

Severability—1989 c 252: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1989 c 252 § 31.]

Application—1988 c 157: "This act applies to crimes committed after July 1, 1988." [1988 c 157 § 7.]

Effective date—1988 c 153: "This act shall take effect July 1, 1988." [1988 c 153 § 16.]

Application of increased sanctions—1988 c 153: "Increased sanctions authorized by this act are applicable only to those persons committing offenses after July 1, 1988." [1988 c 153 § 15.]

Effective date—Savings—Application—1988 c 145: See notes following RCW 9A.44.010.

Severability—1987 c 458: See note following RCW 48.21.160.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17-35: "Sections 17 through 35 of this act shall take effect July 1, 1986." [1986 c 257 § 38.]

Effective dates—1984 c 209: See note following RCW 9.92.150.

Effective date—1983 c 163: See note following RCW 9.94A.505.

9.94A.501 Risk assessment—Risk categories—Department must supervise specified offenders. ***(Expires July 1, 2010.)*** (1) When the department performs a risk assessment pursuant to RCW 9.94A.500, or to determine a person's conditions of supervision, the risk assessment shall classify the offender into one of at least four risk categories.

(2) The department shall supervise every offender sentenced to a term of community custody, community placement, or community supervision:

(a) Whose risk assessment places that offender in one of the two highest risk categories; or

(b) Regardless of the offender's risk category if:

(i) The offender's current conviction is for:

(A) A sex offense;

(B) A violent offense;

(C) A crime against persons as defined in RCW 9.94A.411;

(D) A felony that is domestic violence as defined in RCW 10.99.020;

(E) A violation of RCW 9A.52.025 (residential burglary);

(F) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.401 by manufacture or delivery or possession with intent to deliver methamphetamine; or

(G) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.406 (delivery of a controlled substance to a minor);

(ii) The offender has a prior conviction for:

(A) A sex offense;

(B) A violent offense;

(C) A crime against persons as defined in RCW 9.94A.411;

(D) A felony that is domestic violence as defined in RCW 10.99.020;

(E) A violation of RCW 9A.52.025 (residential burglary);

(F) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.401 by manufacture or delivery or possession with intent to deliver methamphetamine; or

(G) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.406 (delivery of a controlled substance to a minor);

(iii) The conditions of the offender's community custody, community placement, or community supervision include chemical dependency treatment;

(iv) The offender was sentenced under RCW 9.94A.650 or 9.94A.670; or

(v) The offender is subject to supervision pursuant to RCW 9.94A.745.

(3) The department is not authorized to, and may not, supervise any offender sentenced to a term of community custody, community placement, or community supervision unless the offender is one for whom supervision is required under subsection (2) of this section.

(4) This section expires July 1, 2010. [2003 c 379 § 3.]

Severability—Effective dates—2003 c 379: See notes following RCW 9.94A.728.

9.94A.515 Table 2—Crimes included within each seriousness level. ***(Expires July 1, 2004.)***

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XVI	Aggravated Murder 1 (RCW 10.95.020)
XV	Homicide by abuse (RCW 9A.32.055)
	Malicious explosion 1 (RCW 70.74.280(1))
	Murder 1 (RCW 9A.32.030)
XIV	Murder 2 (RCW 9A.32.050)
	Trafficking 1 (RCW 9A.40.100(1))
XIII	Malicious explosion 2 (RCW 70.74.280(2))
	Malicious placement of an explosive 1 (RCW 70.74.270(1))
XII	Assault 1 (RCW 9A.36.011)
	Assault of a Child 1 (RCW 9A.36.120)
	Malicious placement of an imitation device 1 (RCW 70.74.272(1)(a))
	Rape 1 (RCW 9A.44.040)
	Rape of a Child 1 (RCW 9A.44.073)
	Trafficking 2 (RCW 9A.40.100(2))
XI	Manslaughter 1 (RCW 9A.32.060)
	Rape 2 (RCW 9A.44.050)
	Rape of a Child 2 (RCW 9A.44.076)
X	Child Molestation 1 (RCW 9A.44.083)
	Indecent Liberties (with forcible compulsion) (RCW 9A.44.100(1)(a))
	Kidnapping 1 (RCW 9A.40.020)
	Leading Organized Crime (RCW 9A.82.060(1)(a))
	Malicious explosion 3 (RCW 70.74.280(3))
	Manufacture of methamphetamine (RCW 69.50.401(a)(1)(ii))

VOLUME 9

2005 RCW SUPPLEMENT

2004
REVISED CODE OF WASHINGTON

Published under the authority of chapter 1.08 RCW.

I. SCOPE OF SUPPLEMENT

This volume supplements the 2004 edition of The Revised Code of Washington by adding the following materials:

1. All laws of a general and permanent nature enacted in the 2005 regular session (adjourned sine die April 24, 2005) of the fifty-ninth legislature.
2. Appropriate supplementation of the various tables and the general index.

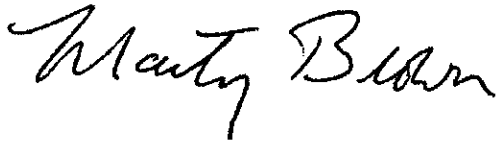
II. TABLE OF CONTENTS

REVISED CODE OF WASHINGTON

2005 Supplement

CERTIFICATE

This 2005 supplement of the 2004 edition of the Revised Code of Washington, published officially by the Statute Law Committee, is, in accordance with RCW 1.08.037, certified to comply with the current specifications of the committee.



MARTY BROWN, Chair
STATUTE LAW COMMITTEE

Title 1

GENERAL PROVISIONS

Chapters

Chapter 1.08 RCW

STATUTE LAW COMMITTEE (CODE REVISER)

Sections

1.08.001 Statute law committee created—Membership. There is created a permanent statute law committee consisting of eleven members as follows:

(1) The secretary of the senate, ex officio;

(2) Two members of the senate, one from each of the two largest caucuses in the senate, appointed by the president of the senate;

(3) The chief clerk of the house of representatives, ex officio;

(4) Two members of the house of representatives, one from each of the two largest caucuses in the house of representatives, appointed by the speaker of the house of representatives;

(5) The staff director of the nonpartisan professional committee staff of the senate, ex officio;

(6) The staff director of the nonpartisan professional committee staff of the house of representatives, ex officio;

(7) A lawyer admitted to practice in this state, appointed by the board of governors of the Washington State Bar Association;

(8) A judge of the supreme court or a lawyer who has been admitted to practice in this state, appointed by the chief justice of the supreme court; and

(9) A lawyer staff member of the governor's office or a state agency, appointed by the governor.

All such initial appointments shall be made within thirty days of May 11, 2005. [2005 c 409 § 1; 1967 ex.s. c 124 § 1; 1959 c 95 § 1; 1955 c 235 § 1; 1953 c 257 § 1; 1951 c 157 § 1.]

Effective date—2005 c 409: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 11, 2005]." [2005 c 409 § 5.]

Severability—1955 c 235: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1955 c 235 § 10.]

1.08.003 Terms of members—Filling vacancies. The term of the member of the committee appointed by the State Bar Association, shall be for two years.

The term of any ex officio member expires upon expiration of tenure of the position by virtue of which he or she is a member of the committee. The remaining members of the committee shall serve at the pleasure of the appointing authority. Vacancies shall be filled by designation, appointment, or ex officio in the same manner as for the member so vacating, and if a vacancy results other than from expiration of a term, the vacancy shall be filled for the unexpired term. [2005 c 409 § 2; 1959 c 95 § 2; 1955 c 235 § 2; 1953 c 257 § 2; 1951 c 157 § 2.]

Effective date—2005 c 409: See note following RCW 1.08.001.

1.08.007 Committee meetings. The committee shall from time to time elect a chairman from among its members and adopt rules to govern its procedures. Four members of the committee shall constitute a quorum for the transaction of any business but no proceeding of the committee shall be valid unless carried by the vote of a majority of the members present. The code reviser or a member of his or her staff shall act as secretary of the committee. [2005 c 409 § 3; 1953 c 257 § 3; 1951 c 157 § 4.]

Effective date—2005 c 409: See note following RCW 1.08.001.

1.08.011 Employment of code reviser and staff. The committee shall employ on behalf of the state and from time to time fix the compensation of a competent code reviser, with power to terminate any such employment at any time. The committee shall also employ on behalf of the state and fix the compensation of such additional legal and clerical assistance to the code reviser as may reasonably be required under this chapter. The committee shall have general supervision and control over the functions and performance of the code reviser. [2005 c 409 § 4; 1951 c 157 § 5.]

Effective date—2005 c 409: See note following RCW 1.08.001.

Chapter 1.12 RCW

RULES OF CONSTRUCTION

Sections

1.12.070 Reports, claims, tax returns, remittances, etc.—Filing. Except as otherwise specifically provided by law hereafter:

(1) Any report, claim, tax return, statement or other document required to be filed with, or any payment made to the state or to any political subdivision thereof, which is (a) transmitted through the United States mail or private third-party delivery service, shall be deemed filed and received by the state or political subdivision on the date shown by the post office or private third-party delivery service cancellation mark or shipping date stamped or affixed upon the envelope or other appropriate wrapper containing it; or (b) mailed via United States mail or sent by a private third-party delivery service but not received by the state or political subdivision, or where received and the cancellation mark or shipping date is illegible, erroneous, or omitted, shall be deemed filed and received on the date it was mailed if the sender establishes by competent evidence that the report, claim, tax return, statement, remittance, or other document was deposited with a private third-party delivery service or in the United States mail on or before the date due for filing; and in cases of such

years or more, but less than twenty years, such felony shall be treated as a class B felony for purposes of this chapter;

(3) If the maximum sentence of imprisonment authorized by law upon a first conviction of such felony is less than eight years, such felony shall be treated as a class C felony for purposes of this chapter. [1996 c 44 § 1.]

9.94A.190 Terms of more than one year or less than one year—Where served—Reimbursement of costs. (1) A sentence that includes a term or terms of confinement totaling more than one year shall be served in a facility or institution operated, or utilized under contract, by the state. Except as provided in subsection (3) or (5) of this section, a sentence of not more than one year of confinement shall be served in a facility operated, licensed, or utilized under contract, by the county, or if home detention or work crew has been ordered by the court, in the residence of either the offender or a member of the offender's immediate family.

(2) If a county uses a state partial confinement facility for the partial confinement of a person sentenced to confinement for not more than one year, the county shall reimburse the state for the use of the facility as provided in this subsection. The office of financial management shall set the rate of reimbursement based upon the average per diem cost per offender in the facility. The office of financial management shall determine to what extent, if any, reimbursement shall be reduced or eliminated because of funds provided by the legislature to the department for the purpose of covering the cost of county use of state partial confinement facilities. The office of financial management shall reestablish reimbursement rates each even-numbered year.

(3) A person who is sentenced for a felony to a term of not more than one year, and who is committed or returned to incarceration in a state facility on another felony conviction, either under the indeterminate sentencing laws, chapter 9.95 RCW, or under this chapter shall serve all terms of confinement, including a sentence of not more than one year, in a facility or institution operated, or utilized under contract, by the state, consistent with the provisions of RCW 9.94A.589.

(4) Notwithstanding any other provision of this section, a sentence imposed pursuant to RCW 9.94A.660 which has a standard sentence range of over one year, regardless of length, shall be served in a facility or institution operated, or utilized under contract, by the state.

(5) Sentences imposed pursuant to RCW 9.94A.712 shall be served in a facility or institution operated, or utilized under contract, by the state. [2001 2nd sp.s. c 12 § 313; 2000 c 28 § 4; 1995 c 108 § 4; 1991 c 181 § 5; 1988 c 154 § 5; 1986 c 257 § 21; 1984 c 209 § 10; 1981 c 137 § 19.]

Intent—Severability—Effective dates—2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application—2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

Technical correction bill—2000 c 28: See note following RCW 9.94A.015.

Effective date—1995 c 108: See note following RCW 9.94A.030.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17-35: See note following RCW 9.94A.030.

Effective dates—1984 c 209: See note following RCW 9.94A.030.

Effective date—1981 c 137: See RCW 9.94A.905.

9.94A.340 Equal application. The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant. [1983 c 115 § 5.]

9.94A.345 Timing. Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed. [2000 c 26 § 2.]

Intent—2000 c 26: "RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington supreme court's decision in *State v. Cruz*, Cause No. 67147-8 (October 7, 1999). A decision as to whether a prior conviction shall be included in an individual's offender score should be determined by the law in effect on the day the current offense was committed. RCW 9.94A.345 is also intended to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives." [2000 c 26 § 1.]

9.94A.401 Introduction. These standards are intended solely for the guidance of prosecutors in the state of Washington. They are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state. [1983 c 115 § 14. Formerly RCW 9.94A.430.]

9.94A.411 Evidentiary sufficiency. (1) Decision not to prosecute.

STANDARD: A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

GUIDELINE/COMMENTARY:

Examples

The following are examples of reasons not to prosecute which could satisfy the standard.

(a) Contrary to Legislative Intent - It may be proper to decline to charge where the application of criminal sanctions would be clearly contrary to the intent of the legislature in enacting the particular statute.

(b) Antiquated Statute - It may be proper to decline to charge where the statute in question is antiquated in that:

(i) It has not been enforced for many years; and

(ii) Most members of society act as if it were no longer in existence; and

(iii) It serves no deterrent or protective purpose in today's society; and

(iv) The statute has not been recently reconsidered by the legislature.

This reason is not to be construed as the basis for declining cases because the law in question is unpopular or because it is difficult to enforce.

(c) De Minimis Violation - It may be proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution.

(d) Confinement on Other Charges - It may be proper to decline to charge because the accused has been sentenced on another charge to a lengthy period of confinement; and

ual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior." [1989 c 252 § 1.]

Prospective application—1989 c 252: "Except for sections 18, 22, 23, and 24 of this act, this act applies prospectively only and not retrospectively. It applies only to offenses committed on or after the effective date of this act." [1989 c 252 § 27.]

Effective dates—1989 c 252: "(1) Sections 1 through 17, 19 through 21, 25, 26, and 28 of this act shall take effect July 1, 1990 unless otherwise directed by law.

(2) Sections 18, 22, 23, and 24 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1989." [1989 c 252 § 30.]

Severability—1989 c 252: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1989 c 252 § 31.]

Application—1988 c 157: "This act applies to crimes committed after July 1, 1988." [1988 c 157 § 7.]

Effective date—1988 c 153: "This act shall take effect July 1, 1988." [1988 c 153 § 16.]

Application of increased sanctions—1988 c 153: "Increased sanctions authorized by this act are applicable only to those persons committing offenses after July 1, 1988." [1988 c 153 § 15.]

Effective date—Savings—Application—1988 c 145: See notes following RCW 9A.44.010.

Severability—1987 c 458: See note following RCW 48.21.160.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17-35: "Sections 17 through 35 of this act shall take effect July 1, 1986." [1986 c 257 § 38.]

Effective dates—1984 c 209: See note following RCW 9.92.150.

Effective date—1983 c 163: See note following RCW 9.94A.505.

9.94A.501 Risk assessment—Risk categories—Department must supervise specified offenders. ***(Expires July 1, 2010.)*** (1) When the department performs a risk assessment pursuant to RCW 9.94A.500, or to determine a person's conditions of supervision, the risk assessment shall classify the offender or a probationer sentenced in superior court into one of at least four risk categories.

(2) The department shall supervise every offender sentenced to a term of community custody, community placement, or community supervision and every misdemeanor and gross misdemeanor probationer ordered by a superior court to probation under the supervision of the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210:

(a) Whose risk assessment places that offender or probationer in one of the two highest risk categories; or

(b) Regardless of the offender's or probationer's risk category if:

(i) The offender's or probationer's current conviction is for:

(A) A sex offense;

(B) A violent offense;

(C) A crime against persons as defined in RCW 9.94A.411;

(D) A felony that is domestic violence as defined in RCW 10.99.020;

(E) A violation of RCW 9A.52.025 (residential burglary);

(F) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.401 by manufacture or delivery or possession with intent to deliver methamphetamine; or

(G) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.406 (delivery of a controlled substance to a minor);

(ii) The offender or probationer has a prior conviction for:

(A) A sex offense;

(B) A violent offense;

(C) A crime against persons as defined in RCW 9.94A.411;

(D) A felony that is domestic violence as defined in RCW 10.99.020;

(E) A violation of RCW 9A.52.025 (residential burglary);

(F) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.401 by manufacture or delivery or possession with intent to deliver methamphetamine; or

(G) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.406 (delivery of a controlled substance to a minor);

(iii) The conditions of the offender's community custody, community placement, or community supervision or the probationer's supervision include chemical dependency treatment;

(iv) The offender was sentenced under RCW 9.94A.650 or 9.94A.670; or

(v) The offender is subject to supervision pursuant to RCW 9.94A.745.

(3) The department is not authorized to, and may not, supervise any offender sentenced to a term of community custody, community placement, or community supervision or any probationer unless the offender or probationer is one for whom supervision is required under subsection (2) of this section.

(4) This section expires July 1, 2010. [2005 c 362 § 1; 2003 c 379 § 3.]

Effective date—2005 c 362: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 10, 2005]." [2005 c 362 § 5.]

Severability—Effective dates—2003 c 379: See notes following RCW 9.94A.728.

Conditions of probation: RCW 9.95.210.

Misdemeanant probation services—County supervision: RCW 9.95.204.

Suspending sentences: RCW 9.92.060.

9.94A.515 Table 2—Crimes included within each seriousness level.

TABLE 2

CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

XVI	Aggravated Murder 1 (RCW 10.95.020)
XV	Homicide by abuse (RCW 9A.32.055)
	Malicious explosion 1 (RCW 70.74.280(1))
	Murder 1 (RCW 9A.32.030)
XIV	Murder 2 (RCW 9A.32.050)
	Trafficking 1 (RCW 9A.40.100(1))

FINAL BILL REPORT
ESSB 5990

C 379 L 03
Synopsis as Enacted

Brief Description: Changing times and supervision standards for release of offenders.

Sponsors: Senate Committee on Children & Family Services & Corrections (originally sponsored by Senators Hargrove, Stevens, McAuliffe, Carlson, Regala, Parlette, Rasmussen and Winsley).

Senate Committee on Children & Family Services & Corrections
House Committee on Appropriations

Background: "Earned release" means the amount of time by which an offender can reduce the amount of time he or she is confined. It is earned by successful participation in required work, education, treatment, and other programming and by appropriate behavior. It can be lost in a disciplinary hearing for infractions or by a refusal to participate in required programming. Earned release time is not discretionary for the Department of Corrections (DOC). Maximum amounts of earned release are set in statute. Under current law, offenders convicted of a serious violent offense or a sex offense that is a class A felony are eligible for a maximum of 15 percent earned release time. All other offenders are eligible for a maximum of 33 percent earned release time.

Community custody, community placement, and community supervision are terms to describe different kinds of supervision in the community. Whether a sentence includes a requirement for supervision in the community depends on the crime. In 1999, the Offender Accountability Act (OAA) expanded the list of crimes subject to supervision in the community to all sex offenses, violent offenses, crimes against persons, and drug offenses. Offenders convicted of other crimes are not supervised after release from prison. The OAA also eliminated the use of community placement and community supervision for crimes committed after July 1, 2000. Community custody applies to these crimes. Under community custody, DOC has the opportunity to require conditions of supervision in addition to those required by the court.

In the case of felony offenders sentenced to jail, the current law permits the court to add a term of community custody up to one year onto any sentence, including those that would not be eligible for community custody if the offender were sentenced to prison.

The OAA also required DOC to use a validated risk assessment tool and to move from a policy of trying to spread supervision resources equally over all offenders to a policy of focusing resources on the offenders in the highest risk management categories. The current practice sorts offenders into four risk management categories from "A" (greatest risk) to "D" (least risk). Under the OAA, most DOC supervision resources go to offenders in risk management categories "A" and "B," who may also have an interdisciplinary team. Offenders in risk management categories "C" and "D" usually check in with their community corrections officer electronically. Those offenders classified as "C" or "D" who are

sentenced to court-ordered treatment under the special sex offender sentencing alternative, the drug offender sentencing alternative, and the drug sentencing reform act of 2001 are supervised with regard to their court ordered treatment. Otherwise, offenders classified as "D" are actively supervised only if a violation of a release condition is brought to the attention of the department.

No changes to the maximum terms of earned release or to which offenders will be supervised in the community may be made without statutory change by the Legislature.

Under current law, DOC both bills offenders with outstanding legal financial obligations and engages in collections efforts related to those obligations. Some county clerks have engaged in active collections efforts with a significant degree of success, resulting in increased victim restitution payments and in increases in the funds to both state and counties. During the Legal Financial Obligations Work Group in the 2002 interim, the county clerks raised the possibility of taking a more comprehensive role in collections of legal financial obligations.

Summary: Offenders convicted of serious violent offenses or sex offenses that are class A felonies committed after July 1, 2003 are able to earn a maximum of 10 percent earned release time.

Offenders convicted of offenses that are not subject to supervision in the community and offenders convicted of drug offenses may earn a maximum of 50 percent earned release time if they are classified in one of the two lowest risk categories. This increase does not apply to any offender with any conviction for any of the following:

- sex offense;
- violent offense;
- crime against persons;
- residential burglary;
- felony domestic violence;
- methamphetamine manufacture, delivery or possession with intent to deliver;
- delivering a controlled substance to a minor.

The increase to a maximum of 50 percent earned release applies retroactively and prospectively and expires July 1, 2010. No offender convicted after July 1, 2003 has a reasonable expectation or enforceable interest in his or her earned release time under the due process clause and the Legislature retains the right to change the maximum amount of earned release for which offenders are eligible.

For offenders sentenced to less than one year (a jail sentence), courts may impose a term of community custody up to one year only if the crime for which the offender is convicted is a sex offense, violent offense, crime against a person, a drug offense, or if the offender was sentenced under the first time offender waiver.

DOC must perform a risk assessment on offenders with sentences to community custody, community placement, or community supervision and classify the offender into one of four risk management classifications, from highest to lowest. DOC must supervise those offenders classified in the two highest risk management classifications and is not authorized to supervise

those offenders in the other risk management classifications unless the offender has any conviction for any of the following:

- sex offense;
- violent offense;
- crime against persons;
- residential burglary;
- felony domestic violence;
- methamphetamine manufacture, delivery or possession with intent to deliver; or
- delivering a controlled substance to a minor.

Or the offender:

- is required to participate in drug treatment or sex offender treatment;
- has been transferred to Washington under the Interstate Compact for Adult Offender Supervision; or
- was sentenced under the first time offender waiver.

The change to which offenders are supervised applies retroactively and prospectively and expires July 1, 2010.

The Washington State Institute for Public Policy must study whether the changes to earned release impact the rate of recidivism or the types of crimes committed and report to the Legislature by December 1, 2009.

The Drug Sentence Reform Act is implemented July 1, 2003.

The county clerk is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. DOC must collect or arrange for the collection of legal financial obligations while an offender is incarcerated, while the department is authorized to supervise the offender in the community, or if a county clerk does not engage in collections. When the offender completes his or her term of supervision, or if the offender is not subject to a supervision order in the community, DOC must notify the Administrative Office of the Courts (AOC) of the termination of the offender's supervision and provide information to enable the county clerk to collect the remaining legal financial obligations. AOC will provide the billing services and maintain its existing statewide database of offender payments.

When an offender with outstanding legal financial obligations has completed the non-financial requirements of his or her sentence, DOC will provide the county clerk with a notice that the offender has completed all the non-financial requirements of the sentence. When the offender completes payment of the legal financial obligations, the county clerk will notify the court, including the notice from DOC. The court then issues a certificate of discharge for the offense to the offender.

The Washington Association of County Officials, in consultation with the county clerks, will determine a funding formula for allocation of moneys appropriated for the purposes of collecting legal financial obligations and will report to the appropriate committee of the Legislature and the Administrative Office of the Courts by September 1, 2003. The

association also reports annually beginning December 1, 2004, to the appropriate committee of the Legislature on the amounts of legal financial obligations collected by the county clerks.

The Administrative Office of the Courts shall distribute the funds appropriated to the counties for purpose of the county clerk collection budgets by October 1, 2003 without deducting any portion for administrative costs. The Administrative Office of the Courts may expend those funds appropriated by the Legislature for legal financial obligation billing.

The state, DOC, the counties, and their employees are not liable for the acts of an offender who is not under supervision by DOC, but remains under the jurisdiction of the court for payment of legal financial obligations.

DOC may make mandatory deductions for legal financial obligations, including victims compensation, restitution, and cost of incarceration from any worker's compensation benefit an offender receives. Monthly payment schedules are not a limit on civil collections.

Votes on Final Passage:

Senate	41	8	
House	84	13	(House amended)
Senate	43	4	(Senate concurred)

Effective: July 1, 2003 (Sections 1-12, 20 and 28)
October 1, 2003 (Sections 13-19 and 21-27)

GREENEN & GREENEN, PLLC

August 23, 2018 - 2:59 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49928-2
Appellate Court Case Title:	M. Gwyn Myles, Respondent, v. Department of Corrections, Appellant
Superior Court Case Number:	09-2-00347-9

The following documents have been uploaded:

- 499282_Petition_for_Review_20180823145047D2033787_4488.pdf
  This File Contains:
  Petition for Review
  The Original File Name was D2-49928-2 - State of WA DOC v Myles - Petition for Review.pdf

A copy of the uploaded files will be sent to:

- allysonz@atg.wa.gov
- johnn@fjtlaw.com
- patriciaf1@atg.wa.gov

Comments:

Sender Name: Karen Manker - Email: karen@greenenpllc.com
Filing on Behalf of: Ronald W. Greenen - Email: ron@greenenpllc.com (Alternate Email:)

Address:
1104 Main Street
Suit 400
Vancouver, WA, 98660
Phone: (360) 694-1751

Note: The Filing Id is 20180823145047D2033787