No. 97291-5
COA No. 77816-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

TYLOR SEAN DONNELLY, Petitioner

PETITION FOR REVIEW

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PETITION

A. IDENTITY OF PETITIONER

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

B. COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of Appeals entered May 6, 2019, affirming the trial court's decision denying in part Mr. Donnelly's motion, filed November 27, 2017, to amend the Warrant of Commitment in this matter. A copy of the opinion of the Court of Appeals is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Does the State have a duty to remove all impediments within the State's exclusive control to an offender's ability to serve his sentence?

2. If the State does not have an *a priori* duty to remove all impediments within the State's exclusive control to an offender's ability to serve his sentence, does the offender have a duty to compel the State to do so?

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3. Can a work crew program terminate an inmate from the program for failure to report to a work crew assignment due to an impediment within the State's exclusive control?

4. When an offender, who is in the custody and control of the State after beginning his work crew sentence, is unable to report to work crew due to an impediment within the State's exclusive control, can the State temporarily release the offender, toll his sentence, and require him to report back after the State has removed the impediment?

5. Is an offender entitled to equitable relief when the State temporarily releases the offender because the offender cannot serve his sentence due to the State's failure to remove an impediment?

D. STATEMENT OF THE CASE

The unique facts of this case raise important questions regarding the responsibilities of the State and of an offender to remove impediments to the offender's ability to serve his sentence. Mr. Donnelly, a Canadian citizen and resident, was unable to complete his sentence as ordered by the trial court because the State failed to obtain the necessary parole permit from the United States, a permit that only the State could apply for and only the State could possess. Mr. Donnelly is entitled to equitable relief

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due to this failure under the principles announced by this Court in *Personal Restraint of Roach*, 150 Wn.2d 29, 74 P.3d 134 (2003).

On April 28, 2017, Mr. Donnelly pled guilty to the "substantial pain" prong of Assault in the Third Degree. CP 31 (citing RCW 9A.36.031(1)(f)). This guilty plea was the result of extensive negotiations with the prosecution on a joint sentencing recommendation that would allow Mr. Donnelly to serve his sentence while honoring his financial responsibilities to the victim, to the employees of his business in Canada, and to his family. CP 44–45. Of particular importance was the timing of the sentence to avoid the summer and holiday tourist seasons in San Juan County since Mr. Donnelly would have to rent a residence in San Juan County to complete the work crew portion of his sentence. CP 45. The parties agreed to a work crew sentence to be completed in the Fall of 2017. *Id.* The trial court accepted the joint sentencing recommendation including the timing of Mr. Donnelly's work crew obligation. CP 33.

Mr. Donnelly started his work crew commitment on October 3, 2017. CP 46. Mr. Donnelly signed documents that told him that he was in the custody and control of the San Juan County Sheriff's Office, which administers the work crew program. CP 93–95. On the proper form, Mr. Donnelly informed the Sheriff's Office of the San Juan County residence that Mr. Donnelly had rented for the stay. CP 90. Mr. Donnelly's

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expectation was that he would be detained at this residence throughout his work crew sentence when he was not at his work crew assignment. CP 46.

However, after Mr. Donnelly began his work crew sentence, the Sheriff's Office offered to allow Mr. Donnelly to go to his Canadian home on the weekends. CP 46, 55. Mr. Donnelly was required to bring his electronic monitoring equipment with him and abide by the same rules as if he was staying in his temporary San Juan County residence. CP 46. The Sheriff's Office told Mr. Donnelly that this was an accommodation offered to all of the work crew participants. CP 46, 55. Mr. Donnelly abided by the work crew program requirements while in Canada. CP 46.

On October 23, after Mr. Donnelly's third weekend in Canada, the United States Border Patrol denied Mr. Donnelly entry into the United States to report back to work crew. CP 46. The Border Patrol told Mr. Donnelly that the prosecuting attorney was responsible for obtaining a parole permit to enter the country to serve his sentence. *Id.*

Mr. Donnelly returned to his Canadian residence and contacted the San Juan County Sheriff's Office to report what had happened. *Id.* The Sheriff told him to keep his electronic monitoring bracelet on and to follow the house arrest rules. *Id.* The Sheriff also told him that he was still serving his sentence while on house arrest in Canada. *Id.*

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About nine days later, the Sheriff told Mr. Donnelly that he had been terminated from the work crew program and that he had stopped serving his sentence as of October 24 when he failed to report for work crew. CP 46. Nevertheless, for several days, Mr. Donnelly did not cut off his bracelet, continued to follow the house arrest rules, and, through his attorney, attempted to convince the Sheriff to not release him. CP 47, 49, 52.

At some point in November, the prosecuting attorney contacted the Department of Homeland Security and determined how to apply for a waiver to allow Mr. Donnelly to reenter the country. CP 65. The prosecuting attorney determined that only law enforcement could apply for this waiver. *Id.*; *see also* 9 FAM 202.3-3(B)(2)(c) (found in CP 62[1]). Mr. Donnelly could not apply for this waiver, nor could he even possess the paperwork granting an application for a waiver. 9 FAM 202.3-3(B)(2)(c); CP 66.

On November 14, the prosecuting attorney informed Mr. Donnelly that she had obtained a parole permit for Mr. Donnelly and that he was expected to cross the border into the United States on December 5 to complete his sentence. CP 47; *see also* CP 66 (prosecutor stating that

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[1] This exhibit contains portions of the Foreign Affairs Manual issued by the Department of State.

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waiver was obtained on November 14). The date that the prosecutor proposed to continue the work crew commitment was after Mr. Donnelly's originally scheduled release date. Completing the sentence as demanded by the State would have required Mr. Donnelly to rent a residence during the winter tourist season in San Juan County, impairing Mr. Donnelly's ability to meet his financial obligations to the victim in this matter and Mr. Donnelly's employees and family. *See* CP 47–48 (describing financial impact).

On November 27, 2017, Mr. Donnelly filed a motion to amend the warrant of commitment to recognize that he had completed the work crew portion of his sentence. CP 33–43. By letter dated December 4, 2017, the trial court granted the motion in part and denied the motion in part.[2] CP 102. It concluded that Mr. Donnelly continued to serve his sentence until November 1, 2017, when the Sheriff informed him that he was being terminated from the work crew program. CP 102. However, it also concluded that Mr. Donnelly was properly terminated from the work crew program and still owed the rest of his sentence. *Id.*

On December 12, 2017, the court stayed Mr. Donnelly's sentence pending appeal. CP 131–32.

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[2] The trial court concluded that Mr. Donnelly properly sought relief under CrR 7.8(b)(5).

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E. ARGUMENT

This case presents a question of substantial public interest. *See* RAP 13.4(b)(4). While the facts of this case are unique, they raise important issues regarding the responsibility of the State and of an offender to remove any impediments to the offender's sentence. Despite the fact that only the State could obtain the permit necessary for Mr. Donnelly to complete his sentence, the State and the Court of Appeals blame Mr. Donnelly for this failure. This position does not comport with the equitable principles held by this Court.

1. Mr. Donnelly is entitled to equitable relief from the remainder of his sentence.

Mr. Donnelly was prevented from completing his sentence because the State failed to obtain the parole permit necessary for Mr. Donnelly to do so. If Mr. Donnelly is required to complete his sentence, then he and others who depend on him will suffer financial harm. Mr. Donnelly seeks equitable relief from his sentence.

This Court announced the equitable principle upon which Mr. Donnelly bases his claim in *Personal Restraint of Roach*, 150 Wn.2d 29, 74 P.3d 134 (2003). In *Roach*, the offender received concurrent sentences of 13 months and 31 months in two different cases. *Id.* at 31. However, the Department of Corrections released the offender after he completed the 13-month sentence and before he completed the remaining 18 months of

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his sentence. *Id.* 10 days later, the DOC realized its mistake and issued a warrant for the offender's arrest. *Id.* The DOC was unable to find the offender because he had moved to another state. *Id.* Almost three years later, the offender was arrested on the warrant in Indiana and was extradited back to Washington. *Id.* at 32.

After extensive review of out-of-state cases, including from the Ninth Circuit, the Washington Supreme Court adopted a rule new to the state:

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

Id. at 37. The Court further held that the offender in that case "did not contribute to his release in any way." *Id.*

The Court of Appeals applied this equitable principle in a different context. In *State v. Dalseg*, offenders were sentenced to the Nisqually Tribal Jail work release program. 132 Wn. App. 854, 857, 134 P.3d 261 (2006). After having served 11 months of their 12 month sentences, the State learned that the program did not comply with statutory requirements. *Id.* The trial court resentenced the men, denying them credit for the 11 months they had served. *Id.*

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The Court of Appeals reversed, holding that equity entitled the offenders "to credit for time spent in some lesser form of restraint than the punishment actually imposed." *Id.* at 865.

> Thus, we hold that a convicted person is entitled to credit against his sentence for time spent in a statutorily noncompliant work release program due to the State's negligence, provided that the convicted person has not contributed to the error, has not absconded legal obligations while in the program, and has had no further criminal convictions.

Id. The court observed, "That Nisqually corrections officers, specifically authorized by the trial court to execute [the offenders'] sentences, enrolled [the offenders] in a day reporting program rather than a program of partial confinement is not their fault." *Id.* at 867.

In Mr. Donnelly's case, the State committed two errors that resulted in prejudice to Mr. Donnelly. First, the State failed to obtain the necessary parole permit that would allow Mr. Donnelly to serve his sentence; and second, as a result, the State illegally released Mr. Donnelly temporarily to allow the State to obtain the permit.

2. The State was responsible for obtaining the parole permit to allow Mr. Donnelly to serve his sentence.

The parties do not dispute, and the Court of Appeals agrees, that (1) in order for Mr. Donnelly to serve his sentence legally, the State had to obtain a parole permit from the United States, that (2) under United States regulations, only the State could obtain and possess the necessary permit,

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that (3) the State was fully aware of the facts giving rise to the need for the permit, and (4) that the State did not apply for the permit until after Mr. Donnelly was denied entry into the United States. Despite these undisputed facts, the Court of Appeals agrees with the State that Mr. Donnelly was responsible for his failure to report to work crew. This conclusion is not logical.

There are two issues regarding responsibility to obtain a permit for Mr. Donnelly: (1) Does the State have an enforceable duty to obtain the permit? And (2) what remedies do the State and Mr. Donnelly have available to them should no permit be obtained?

The Court of Appeals concludes, as did the trial court, that the State has no enforceable duty to apply for the permit. Opinion at 6–7. While the court acknowledges that only the State could obtain the permit, it holds that this fact does not create a duty for the State to do so. *Id.* at 7. Mr. Donnelly could find no authority in Washington on the State's duty to "open the jail doors" for an offender. It may be that there is no such duty owed to the offender.

However, the lack of a duty on the part of a jail to remove impediments within its control does not imply a duty on the part of the offender to remove those impediments, as the Court of Appeals suggests. *See id.* at 7. In Mr. Donnelly's case, the Court of Appeals makes two

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suggestions on what Mr. Donnelly should have done to avail himself of the San Juan County work crew program.

First, the Court of Appeals suggests that Mr. Donnelly should have obtained a court order requiring the State to obtain the permit. Opinion at 7–8. This remarkable suggestion—requiring an offender to obtain additional court orders to allow him to serve his sentence—is without precedent. The court makes no suggestion on the procedural basis for such a request. The court's suggestion implies that the Warrant of Commitment, which states that Mr. Donnelly may serve his sentence on work crew, is insufficient authority to compel the State to obtain the necessary permit to fulfill the dictates in the warrant.

The second suggestion is that Mr. Donnelly is responsible for notifying the State of the need for the permit even though he was powerless to obtain it. While both the State and Mr. Donnelly were aware of the facts giving rise to the need for the permit, Mr. Donnelly was not aware of the law requiring the permit in his case. The Court of Appeals faults Mr. Donnelly for not researching the issue. Opinion at 8.

If an offender's ability to research the State's mistake and point it out disqualified the offender for equitable relief, then neither the *Roach* nor *Dalseg* courts would have granted such relief. *See Roach*, 150 Wn.2d at 29 (inmate released early held not responsible despite his ability to

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determine that he had not served his entire sentence); *Dalseg*, 132 Wn. App. at 854 (offenders in non-compliant work release program held not responsible despite ability to research compliance of program); *see also Ex parte Cavitt*, 170 Wash. 84, 15 P.2d 276 (1932) (inmate allowed by Sheriff to work outside of jail in non-compliance with his sentence held not responsible despite his ability to research conditions of his sentence). An offender's ability to research what requirements the State must meet to allow the offender to serve his sentence does not shift the burden of those requirements to the offender.

Thus, Mr. Donnelly did not have a duty to compel the State to obtain the parole permit that only it could obtain. Shifting the burden to Mr. Donnelly to compel the State to enable him to serve his sentence is not equitable.

To determine the State's duty here, the State and the Court of Appeals focus on civil negligence theory. Under that theory, someone must pay for the loss at issue. In Mr. Donnelly's context, this focus on civil negligence theory is misplaced. While the undersigned could find no Washington cases on-point, logic suggests that neither the State nor Mr. Donnelly had an enforceable duty to remove the impediment to Mr. Donnelly's sentence that was entirely within the State's control. Certainly, if the State had timely removed the impediment, Mr. Donnelly

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had a duty to serve his sentence. If, however, the State's choice is to not remove the impediment, the question then becomes one of remedy.

If the State fails to remove an impediment entirely with the State's control that prevents an offender from serving his sentence, the offender should have an equitable remedy. *See Roach*, 150 Wn.2d at 37 (providing equitable remedy when inmate negligently released early even though inmate did not resist attempts to be released). For example, if a jail refused to open its doors to an offender, perhaps due to overcrowding or safety concerns, then the offender should have equitable relief. While the State may not have had a duty to obtain a parole permit for Mr. Donnelly, Mr. Donnelly is entitled to equitable relief under the *Roach* doctrine due to the State's failure to do so.

3. The State negligently released Mr. Donnelly after he was denied entry into the United States.

In a complication of the facts of this case, Mr. Donnelly was able to begin his work crew sentence and was denied entry into the United States in the middle of his sentence. It is undisputed that, at this point, Mr. Donnelly was in the custody and control of the San Juan County Sheriff's Office. The Sheriff's Office negligently released Mr. Donnelly, albeit temporarily, when Mr. Donnelly could not reenter the United States due to the State's failure to obtain the parole permit.

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The State's arguments and the Court of Appeals' opinion confuse the meaning of the term "release" in this context. No one suggests that the Sheriff's Office told Mr. Donnelly that he was permanently relieved from serving his sentence; The parties agree that the State's intent was always to require Mr. Donnelly to return to San Juan County once the proper parole permit was obtained.[3] In addition, it is undisputed that, prior to this "release," Mr. Donnelly was in "partial confinement" as that term is defined in the Sentence Reform Act. *See* RCW 9.94A.030(36) (defining "partial confinement"). It is undisputed that he was no longer in "partial confinement" after the Sheriff's Office temporarily "released" him. Therefore, it is undisputed that Mr. Donnelly was temporarily released from confinement and that he was temporarily not serving his sentence. This temporary release from partial confinement was illegal.

Upon conviction for a felony, a court may impose all or a portion of a sentence of less than one year on "work crew." RCW 9.94A.190(1). "Work crew" is a form of "confinement." *See* RCW 9.94A.030(8) (defining "confinement" to include "partial confinement"); RCW 9.94A.030(36) (defining "partial confinement" to include "work crew").

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[3] The Court of Appeals states, "Donnelly argues that the use of the term 'release' carries the implication that the sheriff told Donnelly that his sentence had been completed." Opinion at 9–10. Mr. Donnelly has never stated or argued this.

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Confinement of more than 30 days must be served on consecutive days. RCW 9.94A.505(3).

Sentences may not be modified by county officials and can only be modified by a sentencing judge. *State v. Dana*, 59 Wn. App. 667, 671, 800 P.2d 836 (1990). Any modifications to a sentence can be made "only if they meet the requirements of the SRA provisions relating directly to the modification of sentences." *State v. Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989). The only provisions allowing for early release of an offender are for early release time, an authorized furlough, or an extraordinary medical placement. RCW 9.94A.728. The State does not argue that Mr. Donnelly was furloughed.

Consequently, the Sheriff's Office did not have the legal authority to suspend Mr. Donnelly's confinement. Its release of Mr. Donnelly, albeit temporary, was at least negligent.

The real crux of the State's argument, with which the Court of Appeals agrees, is that the Sheriff's Office properly terminated Mr. Donnelly from the work crew program because he failed to comply with the program's terms. *See* Opinion at 9–10. However, reaching this conclusion requires two erroneous assertions.

First, it requires asserting that Mr. Donnelly was responsible for reporting to work crew even though this was physically impossible for a

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reason entirely within the control of the State. If, for whatever reason, the San Juan County Sheriff's Office had blocked the only road on which Mr. Donnelly would have had to travel to report to his work crew assignment, could the Sheriff's Office have terminated him from the work crew program because he failed to report? *Cf State v. Carlson*, 143 Wn. App. 507, 178 P.3d 371 (2008) (work release inmate held responsible for failure to report when arrested for illegal activity).

Second, reaching the conclusion that the Sheriff's Office had properly terminated Mr. Donnelly from the work crew program ignores the fact that Mr. Donnelly was entirely within the custody and control of the Sheriff's Office and was complying with its movement restrictions. It was the Sheriff's Office that suggested that Mr. Donnelly spend weekends in Canada.[4] The Sheriff's Office restricted Mr. Donnelly's movements to and from his Canadian residence and his movements while there. It would not be equitable to terminate Mr. Donnelly from the work crew program when he followed every instruction of the Sheriff's Office that was

[4] In a footnote, the Court of Appeals disputes that Mr. Donnelly was in the Sheriff's custody and control while in Canada. Opinion at 14 n.3. "It goes without saying that the San Juan County Sheriff could not have simply travelled to Chilliwack, arrested Donnelly, and returned him to Friday Harbor." *Id.* The Sheriff also could not have traveled to Oregon for that same purpose, and could not arrest an absconding inmate in Washington until that inmate was found. Yet, these inmates are in the custody and control of the Sheriff while they comply with movement restrictions and are monitored for compliance.

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physically possible for him to follow. *See Cavitt*, 170 Wash. at 87 (relieving inmate for responsibility for work release in violation of his sentence in part because he was in the custody and control of the sheriff).

The State argues, and the Court of Appeals holds, that Mr. Donnelly's sentence was tolled under RCW 9.94A.171(1) after he was terminated from the work crew program.[5] However, Mr. Donnelly cannot be found to have "absented himself" from confinement if he followed all directions from the Sheriff's Office except when doing so was not physically possible due to a circumstance outside of his control. Thus, even if the Sheriff's Office could terminate Mr. Donnelly from the work crew program, his sentence was not tolled.

What the San Juan County Sheriff should have done was to continue Mr. Donnelly's house arrest until the parole permit could be obtained. *See Dalseg*, 132 Wn. App. at 865 ("If equity entitles a convicted person to day-for-day credit for time spent at liberty due to the State's mistake, equity should entitle him to credit for time spent in some lesser form of restraint than the punishment actually imposed."). Releasing him because of the Sheriff's failure to obtain the permit creates the harm

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[5] "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." RCW 9.94A.171(1).

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addressed by cases reviewed by the *Roach* court. *See Roach*, 150 Wn.2d at 34 (“ ‘A prisoner has some rights. . . . [H]e cannot be required to serve [a sentence] in installments.’ ”) (quoting *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930)).

Mr. Donnelly is entitled to equitable relief of day-for-day credit following his “release” by the San Juan County Sheriff on November 1, 2017.

F. CONCLUSION

Mr. Donnelly carefully negotiated the joint sentencing recommendation so that he could serve his sentence while meeting his considerable financial obligations. These obligations included those to the victim to whom Mr. Donnelly was making payments in a civil settlement as well in the form of restitution arising out of the criminal case. Those careful plans were thwarted when the State failed to obtain the parole permit necessary for Mr. Donnelly to enter the United States to serve his sentence.

The State and the Court of Appeals claim that the State has no responsibility for this failure. It is true that Mr. Donnelly was responsible for getting himself to the work crew assignment. However, it is not equitable to require Mr. Donnelly to remove impediments to him doing so that are entirely with the State’s control. If the State had closed a road

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necessary for Mr. Donnelly to report for work crew, is it equitable for Mr. Donnelly to be required to get a court order to open the road to avoid termination from work crew? If he had reported to the San Juan County Sheriff for work crew only to be turned away because of a staffing issue, does he have to get a court order compelling the Sheriff to open its doors in order to avoid being terminated from work crew? Why is the parole permit requirement any different?

Ultimately, this case is about duties and consequences. It is reasonable for this court to hold that the State has no enforceable duty to remove impediments within its control. It is reasonable that, as the trial court held, the State cannot be compelled to apply for the necessary parole permit. However, if the State fails to remove an impediment, it is also reasonable that the offender be entitled to equitable relief from his sentence.

This principle is perhaps more important when the impediment arises after an inmate is serving his sentence. The Sheriff had the option of keeping Mr. Donnelly in partial confinement while it worked out the permit issue. The Sheriff could not terminate Mr. Donnelly from the work crew program due to the Sheriff's own mistake, and it could not suspend Mr. Donnelly's sentence otherwise.

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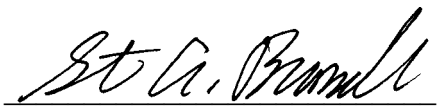
The State and the Court of Appeals has shoehorned a result into the law by treating the State's failure to obtain the parole permit as Mr. Donnelly's responsibility even though he was powerless to obtain it himself. This treatment of these facts creates precedent that makes offenders responsible for removing impediments to their sentences that are within the State's control.

The Supreme Court should reverse the decisions of the Court of Appeals and the trial court.

Respectfully submitted,

BRANDLI LAW PLLC

Dated: June 4, 2019

By: 

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON , Respondent, v. TYLOR SEAN DONNELLY, Appellant.	DIVISION ONE No. 77816-1-I UNPUBLISHED OPINION FILED: May 6, 2019

DWYER, J. — Following a plea of guilty to assault in the third degree, Tylor Donnelly was sentenced to serve two months on a work crew assignment, in addition to one month of community service. His failure to appear for work crew resulted in his termination from San Juan County's work crew program. He appeals from the trial court's denial of his motion to amend the warrant of commitment to award him credit for days during which he was unable to report for work crew. Donnelly's absence from work crew was due to his own mistake in failing to address an issue of which he had notice. As he does not meet the requirements to merit application of the equitable doctrine of credit for time spent at liberty, we affirm.

I

Tylor Donnelly is a Canadian citizen and resident who lives with his family

in Chilliwack, British Columbia. While visiting San Juan County in 2016, Donnelly criminally assaulted and seriously injured David Boyle. Donnelly was charged with assault in the third degree, a class C felony, with the aggravating factor of the infliction of substantial pain.

Pending trial, Donnelly was allowed to return to Canada. He traveled into the United States by automobile to attend court hearings. Donnelly would present his court paperwork to United States Customs and Border Protection personnel each time he crossed the international boundary. In these interactions, Donnelly did not experience any impediments to his desire to cross the border.

Donnelly engaged in plea bargaining negotiations with the San Juan County prosecuting attorney, seeking a sentencing option of minimal inconvenience to himself. The agreement eventually reached by the parties provided for Donnelly to serve his sentence through the San Juan County Sheriff's work crew program during the fall of 2017. Pursuant to this agreement, Donnelly pled guilty to the charge of assault in the third degree. In his statement on plea of guilty, executed April 28, 2017, Donnelly acknowledged that:

> If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, *exclusion from admission to the United States*, or denial of naturalization pursuant to the laws of the United States.

(Emphasis added.)

The superior court accepted the sentence recommendation agreed upon by the parties and, that same day, imposed a three-month sentence on Donnelly. One month of that sentence was to be served through community service, while

two months were to be served on work crew. Donnelly was ordered to begin the work crew service no later than October 10, 2017. He reported to work crew on October 3 after arranging a house rental in the county for the duration of the work crew portion of his sentence. This was more than five months after the entry of his guilty plea.

Donnelly also reviewed and executed documents in which he agreed to abide by the terms of the work crew program. These documents memorialized Donnelly's "custody status" while in the program and imposed restrictions on Donnelly's freedom of movement, including the requirement that he stay at his designated residence when not at work. His work crew agreement stated:

> [I] WILL ARRIVE AT THE WORK SITE OR DESIGNATED PICK UP POINT AT THE SCHEDULED TIME. . . .
>
> I AGREE TO ABIDE BY ALL THESE RULES WITH THE UNDERSTANDING THAT IF I VIOLATE ANY OF THESE TERMS, I MAY BE RETURNED TO JAIL TO SERVE MY SENTENCE.

Donnelly also agreed that:

> I understand that I must strictly adhere to the schedule programmed for me. I further understand that I must receive permission, in advance, to change anything about my schedule for any reason and that I may be required to provide written proof of any emergency I claim. . . . I further understand that I must remain at my residence during all unscheduled periods. . . .
>
> I agree to travel directly to and from each scheduled point including work and that I may not stop for any reason while in-route unless I have obtained prior permission to do so.

To monitor his compliance with these restrictions, Donnelly was required to wear an electronic monitoring device on his ankle at all times during his commitment. He also consented to random searches of his person, vehicle, or

residence. The documents also made clear the potential consequences of failure to comply with the program's rules, including a charge of escape, a charge of probation violation, or the imposition of jail time for the remainder of his sentence. On these documents, Donnelly designated his rented house in Friday Harbor, San Juan County, as his place of residence.

Not long after he began serving his sentence, Donnelly's supervisor, corrections officer Dan Seaton, presented him with the opportunity to return home on weekends to visit his family. Although Donnelly had not inquired as to this possibility, other work crew members were being allowed to return home on weekends at their supervisor's discretion. Donnelly asserts that Seaton told him that allowing Donnelly to travel to Canada would be no different. Neither Seaton, nor members of the San Juan County Sheriff's Office, nor Donnelly, were aware of restrictions that affected Donnelly's ability to cross the international border.

Donnelly traveled into and returned from Canada twice while in the program. During his visits into Canada, Donnelly continued to wear his ankle monitor. On Monday, October 23, when attempting to enter the United States after his third visit home, Donnelly was denied entry. Although he had previously been allowed across the border, on this occasion he was informed that a prosecuting attorney would have to apply for and obtain a parole permit to allow Donnelly to enter the United States. Donnelly returned to his Canadian residence, where he telephoned the San Juan County Sheriff's Office to report the difficulty. He was told to retain his monitoring bracelet and to continue to abide by house arrest rules while the issue was resolved.

Nine days later, the sheriff informed Donnelly that he had been terminated from the work crew program and that his failure to report on October 24 had the effect of tolling his sentence. Donnelly continued to wear his ankle monitor and abide by house arrest rules until November 3.

Meanwhile, San Juan County Deputy Prosecutor Teresa Barnett contacted a United States Customs and Border Protection official and learned that law enforcement officials had the ability to apply for a parole permit to allow Donnelly to re-enter the United States. Barnett learned, furthermore, that *only* law enforcement personnel were authorized to apply for this permit. She successfully requested that the sheriff's office apply for such a permit for Donnelly. On November 14, the Department of Homeland Security approved the application, permitting Donnelly to enter the United States on December 5 to finish his sentence.

This timing was undesirable for Donnelly due to interference with his holiday plans and his job responsibilities. On November 27, he moved the superior court to amend the warrant of commitment and award him credit for time served while he was unable to enter the United States. In a December 1 hearing on this motion, Donnelly's attorney argued that his sentence had not tolled until his "release" by the sheriff from work crew, and that, because this "release" was made without legal authority, he continued to serve the rest of his sentence while at liberty in Canada. In a decision letter issued on December 4, the trial court granted the motion in part and denied it in part. Donnelly was awarded credit for time served up to the day of his "release" from the work crew program. He did

not receive credit for the remaining period during which he was at liberty in Canada. Donnelly appeals from this decision.[1]

II

Donnelly's appeal relies on the assumption that the San Juan County Sheriff's office had a duty to apply for a parole permit to benefit Donnelly and that the sheriff's failure to do so amounted to negligence. This is so, he avers, because only law enforcement agencies are allowed to apply for this type of permit—indeed, only law enforcement officials may possess the application materials for a parole permit. The State counters that no such duty existed at the time Donnelly began serving his sentence. The State has the better argument.

"To show actionable negligence, a plaintiff must establish (1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) a resulting injury, and (4) that the claimed breach was the proximate cause of the injury. Duty in a negligence action is a threshold question. A duty may be predicated 'on violation of statute or of common law principles of negligence.'" Jackson v. City of Seattle, 158 Wn. App. 647, 651-52, 244 P.3d 425 (2010) (citation omitted) (quoting Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 804, 43 P.3d 526 (2002)).

The United States Attorney General has the authority to parole a person into the United States temporarily "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Parole is "an extraordinary measure"

[1] His sentence has been stayed pending resolution of the appeal.

and is "sparingly utilized." 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 202.3-2(A)(b) (rev. Sept. 2018). Requests for parole for an alien outside of the United States for a "significant public benefit" must be made by a U.S. government agency, such as the Department of Justice. 9 F.A.M. 202.3-3(B)(1)(c)(4). In cases involving "an alien whose presence is necessary in connection with legal cases or investigations," including at the state and local level, a local law enforcement agency makes the request "through Department of Justice channels." 9 F.A.M. 202.3-3(B)(2)(c).

Federal immigration law is clear that the local law enforcement agency must be the applicant for a parole permit, and that the defendant or convicted person cannot make the application. See 9 F.A.M. 202.3-3(B)(2). Donnelly was, in fact, not allowed to possess the paperwork required to prepare an application.

Yet these restrictions did not and do not, in themselves, create an affirmative duty on the part of law enforcement to apply for and obtain a parole permit. Notably, Donnelly has not cited any binding or persuasive authority, either in statutes or in our case law, indicating that such a duty exists. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Nor has Donnelly shown that such a duty would have existed, even had the sheriff's office known of the situation. The sheriff would have had an enforceable obligation to apply for a parole permit only if the superior court had

ordered the sheriff to do so. Donnelly could have requested that the superior court issue such an order in the five-month period between the superior court's imposition of his sentence and the day he began serving the sentence. He did not.

Moreover, the superior court discharged its duty to provide Donnelly notice of potential immigration issues due to his alien status in the statement on plea of guilty, which he signed after consultation with his lawyer and which plea was accepted by the court upon Donnelly's request. Indeed, Donnelly specifically acknowledged that his guilty plea was a ground for exclusion from the United States. He executed his statement on plea of guilty on April 28, 2017 and was not required to begin his sentence until October 10, 2017. Thus, he had over five months to inform himself of, or consult with his attorney regarding, any restriction on his ability to enter the United States, and to facilitate the resolution of any difficulties that were identified.

Donnelly notes that, in theory, without a parole permit, he should not have been able to enter the country to begin serving his sentence in the first instance.[2] However, this observation is of no moment, as regarding the obligation of the sheriff. Donnelly had an affirmative duty to ensure that he would be able to report for work crew. The agreements executed by Donnelly before his sentence began memorialized this responsibility. Neither the prosecutor nor the sheriff had

[2] Donnelly also avers that, in the absence of a duty, the sheriff could have refused to apply for a parole permit when asked, leaving Donnelly in a perpetual limbo. This argument ignores the authority of the superior court, resort to which would be available in such circumstance. Furthermore, the speed with which San Juan County law enforcement acted, once alerted to the need for a permit, renders spurious the likelihood of this counterfactual scenario.

the responsibility to study Donnelly's life circumstances and resolve any foreseeable immigration difficulties. The duty was Donnelly's, and Donnelly's alone, to ensure that he would be able to appear as required at the work crew facility to serve his sentence.

Because Donnelly has established no duty on the part of the sheriff, he necessarily fails to establish negligence. See Burg, 110 Wn. App. at 804.

III

In addition to alleging the sheriff's negligence in not, unprompted, researching the need for and applying for a parole permit, Donnelly also avers that his termination from work crew on November 1 was an illegal release made without authority of law. In response, the State does not contend that the sheriff had authority to release Donnelly. Rather, its position is that the trial court correctly concluded that this termination was not a release. We agree.

In its ruling on Donnelly's motion, the trial court stated:

> When the Defendant called the Sheriff on the day he was denied entry, he was instructed to continue complying with the requirements of the work crew program and he did so until the Sheriff told him, about nine days later (November 1st), that he was being "released." The Court views that communication as being intended to notify the Defendant that, as of that date, he was being terminated from the work crew program due to having violated its requirements. The Court is not persuaded that that communication constituted a "negligent release" by the Sheriff, as the Defendant argues. A participant in a work crew program who fails to report for work as scheduled can be terminated from the program. If that participant calls the Sheriff several days after failing to appear as scheduled and is told that they have been terminated, that person is not released from custody, nor relieved of their obligation to serve the full sentence imposed upon them. The Sheriff's use of the word "released" in this case does not alter that fact.

Donnelly argues that the use of the term "release" carries the implication

that the sheriff told Donnelly that his sentence had been completed. This was not the nature of the November 1 communication with Donnelly. Rather, the sheriff's employee stated that Donnelly had ceased serving his sentence due to his failure to comply with the work crew program requirements that he had acknowledged and agreed to.

The sheriff's action was consistent with RCW 9.94A.731(2), which states:

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

Nothing suggests any belief, on the part of the sheriff, that he had the authority to unilaterally relieve Donnelly of the obligation to serve his sentence or the intent to do so. It is not reasonable to conclude that the communication with Donnelly served this purpose. To the contrary, the sheriff did have the authority to terminate Donnelly for failing to appear as required. Donnelly acknowledged this authority when he executed his work crew agreement. Further, as stated above, it was Donnelly's duty to ensure that he would be able to appear, and he knew that failure to do so was not only grounds for termination but also for a potential charge of escape pursuant to RCW 9A.76.110(1). The trial court correctly ruled that Donnelly was terminated from the program. The trial court also correctly ruled that Donnelly was not released from his obligation to serve the sentence imposed on him by the superior court.

IV

The crux of Donnelly's request is that he be awarded credit for time served

at liberty during the balance of his work crew sentence, due to the alleged negligence of (and his allegedly unauthorized release by) the sheriff. However, for the reasons discussed above, Donnelly does not meet the requirements to be granted this equitable remedy. Thus, the trial court was correct in denying, in part, the motion to amend the warrant of commitment.

RCW 9.94A.171(1) provides that:

> 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.

Donnelly relies on In re Pers. Restraint of Roach, 150 Wn.2d 29, 74 P.3d 134 (2003), in which our Supreme Court adopted the equitable remedy of credit for time served at liberty and set forth the conditions under which such relief may be granted. In Roach, an inmate was released from custody 18 months before the completion of his sentence due to a Department of Corrections error. 150 Wn.2d at 31. The released person then lived in Indiana for nearly three years before being arrested and extradited to Washington to serve the remainder of his sentence. Roach, 150 Wn.2d at 31-32. Under the circumstances, the Supreme Court held that equitable considerations demanded that the person be given credit for the time he had spent at liberty. Roach, 150 Wn.2d at 37-38.

After determining that no Washington statute to the contrary accounted for the situation before it, the court enumerated the following conditions that an applicant must meet to be afforded this remedy:

> We, therefore, hold that a convicted person is entitled to credit against his sentence for time spent erroneously at liberty due to the

> State's negligence, provided that the convicted person has *not contributed to his release*, has *not absconded legal obligations while at liberty*, and has had *no further criminal convictions*.

Roach, 150 Wn.2d at 37 (emphasis added).

Donnelly also cites to State v. Dalseg, 132 Wn. App. 854, 134 P.3d 261 (2006), in support of his claim. Therein, two defendants, Dalseg and Cestnik, were sentenced in Mason County to serve 12 months in a work release program. Because Mason County had no such program, they were referred to the Nisqually Tribe's program. Dalseg, 132 Wn. App. at 857-58. After the two men had served more than 11 months of their respective sentences in this program, the Mason County prosecutor learned of the program's noncompliance with the relevant statute governing work release programs and asked the trial court to enforce the judgment and sentence. Dalseg, 132 Wn. App. at 859. The trial court denied the men credit for time served and ordered them to serve their sentence as originally imposed. The Court of Appeals reversed, holding that the men were entitled to equitable relief. Dalseg, 132 Wn. App. at 865.

Contrary to Donnelly's assertions, the decisions in Roach and Dalseg do not mandate that he receive the relief he requests. As discussed above, Donnelly's predicament was not the result of negligence by the State. To the contrary, he executed a guilty plea statement in which he acknowledged that he understood the possibility that his conviction could render him excludable from the United States. Nevertheless, he exercised no diligence in discerning whether he would be able to enter the United States, when necessary to do so to comply with the requirements of his sentence. He also acknowledged that he had the

duty of reporting to work crew. It was his failure to do so that caused his termination from the program.

In addition, unlike in Roach, herein a contrary statute does apply. RCW 9.94A.171(1), quoted above, provides for the tolling of a sentence when a work crew member absents himself without prior approval. The Roach court held that this statute could not be applied in Roach's situation because Roach did not absent himself without prior approval: he was released by authorities acting on their own accord. 150 Wn.2d at 36. Similarly, in Dalseg, the defendants had no input on the specific work release program into which they were placed, being instead subject to the State's referral to the Nisqually Tribe's program. 132 Wn. App. at 858. Here, the sheriff's act of allowing Donnelly—at his option—to return home for the weekend was not a release. It was simply a courtesy of a type routinely extended to other participants in the program. It was plainly not an authorization to never return.

As discussed above, Donnelly's termination from the work crew program was also not a release. This is in stark contrast with Roach, in which the prison guards literally opened the door for Roach to leave without any further obligation. 150 Wn.2d at 31. In contrast, Donnelly was terminated when, while serving his sentence on an intermittent schedule, he failed to return after a weekend break. At no time was Donnelly told that he was free from the obligation to serve his sentence. Donnelly's absence, and any prejudice that he asserts he may suffer

as a result, resulted from his own lack of diligence.[3]

Affirmed.

We concur:

[3] In large part, Donnelly argues from the premise that he remained in the custody and control of the sheriff's office while in Canada due to the use of his ankle monitor. The record, however, does not reflect that the sheriff had any control over Donnelly while Donnelly was in a foreign country. It goes without saying that the San Juan County Sheriff could not have simply travelled to Chilliwack, arrested Donnelly, and returned him to Friday Harbor.

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