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COURT OF APPEALS  
DIVISION II

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No. 37008-5-II

STATE OF WASHINGTON  
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SAMUEL DONAGHE,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge  
Cause No. 90-1-00151-6

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BRIEF OF RESPONDENT

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## A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Whether the court correctly applied the statute that was in place at the time the crime was committed in holding that Donaghe is not entitled to a certificate of discharge.

2. Whether, under either statute, Donaghe is entitled to a certificate of discharge.

## B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

## C. ARGUMENT.

1. The court, in denying Donaghe a certificate of discharge, properly applied the tolling statute as it existed in 1989.

Donaghe argued in the trial court that the court should apply the tolling statute that was in effect in 1991, when he was sentenced [CP11-14], which gave the court authority to the determine tolling periods under the SRA. [CP 57] On appeal he argues that he is entitled to a certificate of discharge because the Department of Corrections (DOC) has terminated his supervision, and under the current tolling statute, DOC determines tolling issues. The statutes which should apply are those in effect in 1989, when the crimes were committed. [CP 10] State v. Bader, 125 Wn. App. 501, 503, 105 P.3d 439 (2005). See also State v. Taylor, 111 Wn. App. 519, 523, 45 P.3d 1112 (2002) ("Mr. Taylor is, of course, entitled to be sentenced under the law as it existed in 1996.); In re

Pers. Restraint of Albritton, 143 Wn. App. 584, 591 fn. 4, 180 P.3d 790 (2008) (“Because Albritton committed the crimes of theft and malicious mischief in April of 2003, former RCW 9.94A.660 (202) applies.”)

RCW 9.94A.170 was the same in both 1989 and 1991.

In 1989, the tolling provisions were codified as RCW 9.94A.170, and read as follows:

9.94A.170 Tolling of term of confinement.

(1) A term of confinement, including community custody, ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented him 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) A term of supervision, including postrelease supervision 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 supervision without prior approval of the entity under whose supervision the offender has been placed.

(3) Any period of 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 supervision, time spent in confinement due to such detention shall not toll the period of supervision.

(4) For confinement sentences, the date for the tolling of the sentence shall be established by the entity responsible for the confinement. For sentences involving supervision, the date for the tolling of the sentence shall be established by the court, based on reports from the entity responsible for the supervision.

Amended by chapter 153, § 9, LAWS OF 1988.

This statute has been recodified and amended over the years, and is now codified as RCW 9.94A.625. Section (1) reads essentially the same, with some difference in wording, but that section is not pertinent to the issues here. The remainder of the current statute reads as follows:

9.94A.625 (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.

Donaghe argues that RCW 9.94A.625 is remedial and thus must be applied retroactively. The general rule is that statutes apply prospectively unless the legislature indicates a different intent. There is an exception for remedial statutes where retroactive application would further the remedial purpose. Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). It is not clear how the remedial purpose would be furthered by applying the current statute. The effect of the change in RCW 9.94A.625(4) was to shift the responsibility for tolling decisions from the court to DOC, but DOC has already terminated its supervision of Donaghe, and thus will not be making any decisions about his sentence.

Donaghe disagrees with the trial court's reasoning that "[t]he civil commitment does not result in a period time in the community, which is contemplated by community custody, a time that the department of corrections can supervise an individual and ensure that their transition back into civil society is appropriate and such that the community is kept safe." [11/19/07 RP, 9-10]. He argues that the civil commitment statute provides for the same supervision. However, the judgment and sentence in this matter requires twelve months of community supervision, which has not occurred. If

Donaghe is ever released to a less restrictive alternative, DOC might take the position that it substitutes for the community supervision to which he was sentenced. Since that hasn't happened, tolling is appropriate. He has not completed the requirements of his sentence.

We believe that, in the absence of statutory language indicating otherwise, a sentencing court has jurisdiction to enforce the requirements of a sentence imposed until those requirements are met and/or a certificate of discharge is provided to the offender upon completion of his or her sentence under RCW 9.94A.220.

State v. Johnson, 54 Wn. App. 489, 491, 774 P.2d 526 (1989).

In any event, Donaghe's argument ignores RCW 9.94A.345:

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

Whether Donaghe's community custody has been tolled concerns his sentence, and the 1989 statute should be applied. The court determines if and when community custody is tolled. "Interpretation of the SRA is a question of law which we review de novo." Bader, *supra*, at 503.

2. Donaghe's community supervision is tolled because he has been in confinement since he finished serving the prison portion of his sentence.

Donaghe argues that the legislature intended that tolling occur only when the offender voluntarily absents himself or herself from supervision, and cites to State v. Flores-Serpas, 89 Wn. App. 521, 949 P.2d 843 (1998). However, that case interpreted a different subsection of RCW 9.94A.170, under much different facts. Flores-Serpas failed to complete his community supervision because he had been deported when he still had about three months of supervision left. When he returned to the United States and was convicted of another crime, the three months had expired, and the court found that his offender score should not include a point for being on community supervision because the supervision had not tolled. Applying RCW 9.94A.170(2), the court held that he had not voluntarily absented himself, and thus tolling was not triggered.

Donaghe is in a much different circumstance, and RCW 9.94A.170(3) applies to him. He has been in confinement, and subsection (3) applies to confinement "for any reason." Subsection (1) addresses offenders who fail to serve their confinement, including community custody, because they either absconded or were incarcerated to serve a sentence for a new conviction or violation of the sentence conditions of that new conviction.

Subsection (2) tolls supervision when an offender who is not confined absconds. Neither of these apply to Donaghe. Subsection (3) does. He is "confined for any reason."

Both RCW 9.94A.170 and 9.94A.625 use different language in the different sections. Subsections (1) and (2) refer to a "term" of confinement or community supervision, while subsection (3) refers to a "period" of community custody, placement, or supervision. Cases such as Flores-Serpas, *supra*, use the designations interchangeably. Others, such as State v. Anderson, 88 Wn. App. 541, 945 P.2d 1147 (1997), use the word "term" to mean a requirement or condition: "The terms of supervision included a prohibition against possessing or consuming any controlled substance with Anderson subject to urinalysis upon demand of her community corrections officer." *Id.*, at 542; and State v. Crider, 78 Wn. App. 849, 852, 899 P.2d (1995) (" . . . Mr. Crider violated the terms of his supervision on several occasions by consorting with teenage girls . . ."). The most commonsense reading of 9.94A.170 and 9.94A.625 leads to the conclusion that both "term" and "period" refer to time. There can be no question that "period" refers to a division of time. Since Donaghe's situation comes under subsection

(4), there can likewise be no question but that his community supervision was tolled when he entered SCC.

3. Donaghe is not entitled to a discharge just because the Department of Corrections terminated his supervision.

The statute governing discharge upon completion of the sentence was codified as RCW 9.94A.220 in 1989 and is currently codified as RCW 9.94A.637. The operative language is much the same in both, and only RCW 9.94A.220 is set forth below:

When an offender has completed the requirements of the sentence, the secretary of the department or his designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge. . . . .

Donaghe argues that because DOC terminated his supervision, the court is required to issue him a discharge. However, he did not complete the requirements of his sentence, which is the event that triggers a discharge, nor did DOC notify the court that he did. The only documentation in the record is a letter from DOC to Donaghe, dated January 23, 2006, in reply to his request for conviction information and the dates of his incarceration. [CP 41] In pertinent part it reads: "He was on supervision with the Department of Corrections from 4/25/96 until 11/24/04 when these cases were terminated."

There is no authority for the proposition that termination of supervision equals notification that the sentence is complete. It is a reasonable inference that DOC simply terminated supervision of Donaghe because he had been confined pursuant to the sexually violent predator commitment statutes from 1995 on. Like all State agencies, DOC must deal with limited resources, and keeping Donaghe on DOC supervision while he was otherwise in custody would have been a waste of time, effort, and money. There is no evidence that DOC ever notified the court that Donaghe's sentence was complete, and there shouldn't be, because he didn't. The court did not act outside its authority to refuse a certificate of discharge when the requirements of the statute had not been met.

There can be situations where an offender is not under the supervision of DOC, yet not eligible for a discharge. While the current version of the discharge statute does not apply to Donaghe's case, it is illustrative. RCW 9.94A.637(c) provides:

When an offender who is subject to requirements of the sentence in addition to the payment of legal financial obligations either is not subject to supervision by the department *or does not complete the requirements while under supervision of the department*, it is the offender's responsibility to provide the court with verification of the completion of the sentence conditions other than the payment of legal financial obligations. . . .

(Emphasis added.) If a termination of supervision equaled discharge, this section would be irrelevant. Even though this is the present statute, presumably if Donaghe provided proof that he had completed all conditions of his sentence, including community supervision [CP 12], the court would be required to issue a certificate of discharge. He has not done so, nor can he, because he has not been in the community since he was sentenced in this cause.

4. Tolling Donaghe's community supervision in the criminal case does not render his SCC commitment punitive or unconstitutional.

Donaghe argues that denying him the right to vote renders his commitment as a sexually violent predator unconstitutionally punitive. While his cited case, Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), upheld the Kansas version of the sexually violent predator commitment act, the language arguably allows the interpretation that in some circumstances it could violate constitutional protections. The Washington commitment statute has passed constitutional muster in a number of cases, e.g., In re Pers. Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993), *reversed in part on other grounds*, In re Detention of Lewis, 163 Wn.2d 188, 177 P.3d (2008).

It is not, however, his commitment as a sexually violent predator that resulted in Donaghes' disenfranchisement. It is his failure to complete his sentence in a criminal case. He provides no authority for the proposition that results from one proceeding can affect the constitutionality of an entirely different proceeding. Nor does a convicted felon have a constitutionally protected right to vote. Article VI, section 3, of the Washington Constitution specifically disenfranchises felons. Madison v. Washington, 161 Wn.2d 85, 96, 163 P.3d 757 (2007). ". . . [T]he right to vote is not fundamental for convicted felons." Id., at 101.

#### D. CONCLUSION.

The trial court properly applied the law as it existed when Donaghe committed the crimes for which he was sentenced, and properly denied his certificate of discharge. He has not completed the conditions of his sentence and is not entitled to a discharge. The State respectfully asks this court to affirm the Superior Court's denial of a certificate of discharge.

Respectfully submitted this 29<sup>th</sup> of September, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief No. 37008-5-II, on all parties or their counsel of record on the date below as follows:

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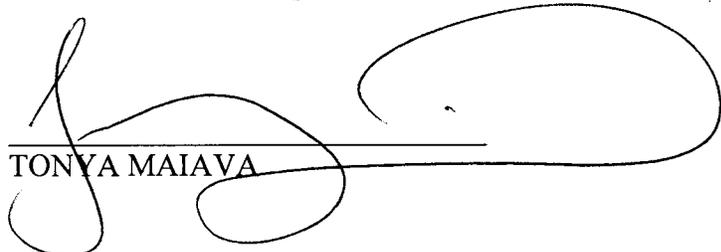
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DEPUTY

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

Dated this 29<sup>th</sup> day of September, 2008, at Olympia, Washington.

  
TONYA MAIAVA