

CLALLAM COUNTY
COURT OF APPEALS

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

STATE OF WASHINGTON
BY *cm*

NO. 38873-1-II

STATE OF WASHINGTON,

Respondent,

vs.

James Dockens,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 06-1-00418-2

BRIEF OF RESPONDENT

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SERVICE	Jodi Backlund/Manek Mistry Backlund & Mistry 203 Fourth Ave. East, Suite 404 Olympia, WA 98501	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: August 24, 2009, at Port Angeles, WA <i>Deeann Hamrick</i>
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I. COUNTER-STATEMENT OF THE ISSUES

1. Did the trial court err when it refused to credit the defendant's ultimate sentence with the time he spent released from confinement, even though he was subject to the following conditions: (1) that he reside at a specific residence, (2) that he maintain a curfew between the hours of 8 p.m. and 6 a.m., and (3) that he report daily to a local agency to ensure compliance with the conditions of his release?
2. Did the trial court violate the Defendant's equal protection guarantees when it refused to credit his ultimate sentence with the time he spent released from confinement, even though an offender is entitled to receive credit for time served if he or she is subject to home detention and electronic home monitoring prior to sentencing?

II. STATEMENT OF THE CASE

FACTS

For ten years, James Dockens (Dockens) was an employee and bookkeeper of Evergreen Collision Center, Inc. (Evergreen), a small business in Port Angeles, Washington. Record of Proceedings (RP) (12/18/2008) at 16. Pursuant to his position, Dockens had access to the company's finances. RP (12/18/2008) at 16-17; CP TBD (Plea Agreement, Stipulation and Waivers Dec. 14, 2006). Specifically, Dockens had access to the administrative account, which the company used to ensure it had the funds necessary to pay requisite taxes. RP (12/18/2008) at 16-17; CP TBD (Plea Agreement, Stipulation and Waivers Dec. 14, 2006).

Over the course of several years, Dockens used the administrative funds as his own private expense account. RP (12/18/2008) at 18-20; CP TBD (Plea Agreement, Stipulation and Waivers Dec. 14, 2006). In addition, Dockens filed incorrect financial reports with the Internal Revenue Service (IRS) to hide the embezzlement. RP (12/18/2008) at 21-22; CP TBD (Plea Agreement, Stipulation and Waivers Dec. 14, 2006). As a result of Dockens's theft, Evergreen estimated that it suffered a loss of \$900,000 between 2001 and 2006.¹ RP (12/18/2008) at 24-28.

PROCEDURAL HISTORY

The State originally charged Dockens with Theft in the First Degree, and eighteen counts of money laundering. CP 36. The State alleged that the crimes occurred between 2003 and 2006. CP 36.

The trial court set bail at \$500,000. RP (09/01/2006) at 12; CP TBD (Order of Conditions and/or for Release, Sept. 1, 2006). The trial court prohibited Dockens from transferring, selling, or encumbering property. RP (09/01/2006) at 13. The State requested the order due to the

¹ The State estimated that Evergreen's losses approached \$1.5 million dollars in light of the interest that the company would have to pay on a loan it needed to repay taxes, premiums, and penalties to government entities. See RP (12/18/2008) at 35; CP TBD (Plea Agreement, Stipulation and Waivers Dec. 14, 2006).

risk that Dockens and his family may attempt to liquidate assets and disperse any financial holdings. RP (09/01/2006) at 6, 8, 11.

At a subsequent hearing, the trial court reduced bail to \$25,000. RP (09/06/2006) at 12; CP TBD (Order Modifying Conditions of Release, Sept. 6, 2006). The trial court imposed the following conditions on Dockens's release: that he surrender his passport; that he sign a waiver of extradition; that he adhere to a curfew between 8 p.m. and 6 a.m.;² that he not possess or consume controlled substances unless prescribed by a physician;³ that he not consume alcohol; and that he enroll in a day reporting program, requiring him to report to the electronic home monitoring office Monday through Friday. RP (09/06/2006) at 12-13; CP TBD (Order of Conditions and/or for Release, Sept. 1, 2006); CP TBD (Order Modifying Conditions of Release, September 6, 2006). Again, the trial court ordered that Dockens not sell, transfer, encumber or dispose of any assets or property beyond that which was necessary for him to meet daily living expenses and his attorney fees. RP (09/06/2006) at 13.

² The trial court reset the curfew hours between 9 p.m. and 6 p.m. to accommodate the defendant's voluntary intensive out patient treatment. RP (09/29/2006) at 6; CP 32.

³ The trial court required this condition because there was an allegation that the crime may have been due to Dockens's cocaine addiction. RP (09/06/2006) at 12-13. See also RP (09/01/2006) at 11.

On September 15, 2006, Dockens posted bail and was released from confinement. See RP (09/15/2006) at 5. Dockens subsequently enrolled in the day reporting supervision program on September 18, 2006. CP 17. Pursuant to the program, as it then existed, Dockens was only required to briefly check-in with his assigned counselor.

On October 13, 2006, Dockens pleaded guilty to first degree theft. RP (10/15/2006) at 10. On December 14, 2006, the State dismissed the eighteen counts of money laundering. RP (12/14/2006) at 4. Dockens waived his right to a jury and stipulated to the facts upon which the sentencing court would impose an exceptional sentence. RP (12/14/2006) at 4-5; CP TBD (Plea Agreement, Stipulation and Waivers Dec. 14, 2006); CP 20.

The case then developed a protracted history. A related civil suit and bankruptcy action frustrated Dockens's ability to review certain computer files prior to the sentencing and restitution hearings. See RP (10/09/2008) at 2-3. The sentencing court repeatedly reset the hearing dates pursuant to Dockens's request or waiver. See RP(03/15/2007) at 6; RP (07/26/2007) at 6; RP (09/19/2007) at 5; RP (01/09/2008) at 4-6; RP (02/21/2008) at 5; RP (03/28/2008) at 4; RP (05/09/2008) at 4; RP (07/10/2008) at 4; RP (08/13/2008) at 3; RP (09/11/2008) at 3; RP (10/09/2008) at 5; RP (10/30/2008) at 4.

The matter finally proceeded to sentencing on December 18 and December 31, 2008. Under the sentencing guidelines, Dockens's offender score set the standard range for first degree theft between two and six months. See RP (12/31/2008); CP 28. The trial court imposed an exceptional sentence of 45 months. RP (12/31/2008) at 20; CP 32. The trial court based the exceptional sentence on the fact that Dockens committed a major economic offense, and the crime comprised multiple and regular offenses over a substantial period of time. RP (12/18/2008) at 48-49, 52; CP 20. The court noted that the State could have charged additional offenses. RP (12/31/2008) at 19-20. The sentencing court was also troubled that Dockens took steps to liquidate and disperse assets contrary to its earlier orders. RP (12/31/2008) at 18-19.

The sentencing court refused to award Dockens with credit for time served while he was on conditional release. RP (12/31/2008) at 8.

The court reasoned:

[I]n this state we have a determinative sentencing scheme that is set out in the sentence reform act. Cases routinely have indicated that the jurisdiction of the Court is limited to what it is authorized to do by the act or prohibited by what it is prohibited from doing in that act. That act talks about alternatives to confinement which are acceptable as alternatives to confinement. Day reporting is not one of them.

RP (12/31/2008) at 8. However, the sentencing court did credit Dockens's sentence for the fifteen days that he served in jail between August 31, 2006, and September 15, 2006. RP (12/31/2008) at 22; CP 32.

Evergreen requested that Dockens pay restitution in the amount of \$400,000, the amount that it could prove via the checks that he'd drawn on the administrative count for his personal use. RP (12/18/2008) at 32. The State requested that the trial court order restitution in an amount of \$600,000 to \$800,000, which was consistent with the court's authority to double a restitution award. RP (12/18/2008) at 35-36. Dockens argued that restitution should be set at the amount to which he had stipulated - \$400,000. RP (12/18/2008) at 37.

The sentencing court noted that Dockens stipulated that he stole an amount that was between 200 and 270 times the minimum limit for Theft in the First Degree, a figure between \$300,000 and \$405,000. RP (12/18/2008) at 41-42. The court added an additional \$60,000 for the costs that Evergreen incurred when it hired an accounting firm to help them understand the extent of the theft. RP (12/18/2008) at 42. It also determined that Evergreen would have to pay approximately \$115,000 to \$120,000 in interest payments. RP (12/18/2008) at 43. Ultimately, the

sentencing court ordered Dockens to pay \$650,000 in restitution. RP (12/18/2008) at 43.

Dockens appealed. He only challenges the sentencing court's refusal to credit his sentence with the time he spent released from confinement.

III. ARGUMENT

A. THE DEFENDANT IS NOT ENTITLED TO CREDIT FOR TIME SERVED BECAUSE HE WAS NOT HELD IN CONFINEMENT PRIOR TO SENTENCING.

Mr. Dockens argues that the trial court erred when it refused to credit his sentence with the time he spent on conditional release, because he had to reside at a specific address, was subject to a curfew, was required to remain in Western Washington, and had to report Monday through Friday to the same agency that monitors the electronic home detention program. See Appellant's Brief at 4-7. Mr. Dockens equates his conditional release to "house arrest." See Appellant's Brief at 4-7. This Court should hold that Mr. Dockens was not entitled to credit for time served because he was not held in confinement prior to sentencing.

Former RCW 9.94A.505 (2006) requires a sentencing court to credit all pre-sentence confinement. *See also State v. Speaks*, 119 Wn.2d 204, 209, 829 P.2d 1096 (1992); *State v. Vasquez*, 75 Wn. App. 896, 898

881 P.2d 1058 (1994). Former RCW 9.94A.030 (2006) provided an unambiguous definition of confinement:

(11) “Confinement” means total or partial confinement.

....

(32) “Partial confinement” means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

....

(47) “Total confinement” means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

Confinement spent in the context of “home detention,” requires that the offender be “subject to electronic surveillance.” Former RCW 9.94A.030(27) (2006). In light of the Legislature’s clear language, there is no room for judicial interpretation. *See Speaks*, 119 Wn.2d at 209; *Vasquez*, 75 Wn. App. at 898.

In *State v. Vasquez*, the defendant was charged with possession of cocaine with intent to deliver within 1,000 feet of a school zone. 75 Wn. App. at 897. On November 15, 1991, after spending 10 days in jail, he was released pending trial. *Id.* Included in the conditions of release were the requirements that he live at a certain address. *Id.* He was also

prohibited from leaving his residence between 6 p.m. and 6 a.m. on work days and from leaving the house at all during non-work days. *Id.* Additionally, he was subject to occasional unannounced visits by police officers to verify compliance with the order. *Id.* The defendant was not monitored electronically, but he complied with all conditions of his home release. *Id.* On December 11, 1992, the defendant entered an *Alford* plea to the crime charged. *Id.* The sentencing court imposed a 21-month sentence, but it refused to credit his sentence with the thirteen months he served while on conditional release. *Id.* Division III affirmed, holding that the defendant's conditional release did not constitute "home detention" or "confinement" as defined by statute. *Id.* at 898, 899.

The present case is similar to *State v. Vasquez* in many respects. Like *Vasquez*, Mr. Dockens served a brief period, 15 days, in jail until he was released pending trial and the ultimate sentencing hearing. *See* RP (09/15/2006) at 5; RP (12/31/2008) at 22; CP 32. Like *Vasquez*, Mr. Dockens was released on a conditional basis, including: that he reside at a specific address, and that he be subject to a curfew. RP (09/06/2006) at 12-13; CP TBD (Order of Conditions and/or for Release, Sept. 1, 2006); CP TBD (Order Modifying Conditions of Release, September 6, 2006). Like *Vasquez*, Mr. Dockens was not subject to electronic monitoring. *See* RP (09/06/2006) at 12-13; CP TBD (Order of Conditions and/or for

Release, Sept. 1, 2006); CP TBD (Order Modifying Conditions of Release, September 6, 2006).

However, unlike *Vasquez*, where the defendant was confined to his residence except during business hours, Mr. Dockens's release was not nearly as restrictive. In the present case, the trial court never ordered that Mr. Dockens be confined to his residence. *See* RP (09/06/2006) at 12-13; CP TBD (Order of Conditions and/or for Release, Sept. 1, 2006); CP TBD (Order Modifying Conditions of Release, September 6, 2006). In fact, Mr. Dockens was free to move throughout the community after he reported to the local agency. His free movement is exemplified by his attendance at voluntary drug treatment functions and his filing for marital dissolution in neighboring counties. *See e.g.* RP (09/29/2006) at 6; RP (12/31/2008) at 18. The State was never able to electronically track or monitor Mr. Dockens's movements. This Court should find that Mr. Dockens was not under home detention or confinement pending his sentencing. *See* RCW 9.94A.030 (2006). *See Vasquez*, 75 Wn. App. at 898, 899. Thus, he was not entitled to credit for time served pursuant to RCW 9.94A.505(6) (2006).

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B. THE COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO EQUAL PROTECTION BECAUSE HE WAS NOT SIMILARLY SITUATED AS AN OFFENDER AWAITING SENTENCE UNDER HOME DETENTION AND ELECTRONIC SURVEILLANCE.

The Fourteenth Amendment to the United States Constitution, and the Washington Constitution article I, section 12, guarantee that persons similarly situated with respect to the legitimate purposes of the law must receive equal treatment. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); *State v. Berrier*, 110 Wn. App. 639, 648, 41 P.3d 1198 (2002).

Washington appellate courts analyze an equal protection challenge under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis. *Manussier*, 129 Wn.2d at 672-673; *Berrier*, 110 Wn. App. at 648. When a legislative classification does not involve a suspect class or threaten a fundamental right, the appellate courts employ the more relaxed, deferential standard of review – rational basis. *Manussier*, 129 Wn.2d at 673; *Berrier*, 110 Wn. App. at 649. Here, Mr. Dockens's challenge concerns a physical liberty interest and does not involve a suspect class. Thus, this Court should review the present issue under the rational basis test. *See Manussier*, 129 Wn.2d at 673. *Berrier*, 110 Wn. App. at 649. *See also State v. Phelan*, 100 Wn.2d

508, 514, 671 P.2d 1212 (1983), *superseded by statute on other grounds* by RCW 9.94A.728.

Under the deferential rational basis test, the challenged law must serve a legitimate state objective. *Manussier*, 129 Wn.2d at 673; *Berrier*, 110 Wn. App. at 649. “[T]he law must not be wholly irrelevant to achieving that objective,” *Manussier*, 129 Wn.2d at 673; and its “means must be rationally related to the objective.” *Berrier*, 110 Wn. App. at 649. The Legislature has broad discretion to determine what the public interest demands and the measures necessary to secure and protect that interest. *Manussier*, 129 Wn.2d at 673; *Berrier*, 110 Wn. App. at 649. The party challenging the classification has the burden to show that the law is purely arbitrary. *Manussier*, 129 Wn.2d at 673; *Berrier*, 110 Wn. App. at 649.

Mr. Dockens argues that the trial court violated his Fourteenth Amendment equal protection rights when it refused to credit the time that he spent prior to sentencing on “court-ordered house arrest.” See Appellant’s Brief at 4-7. Specifically, Mr. Dockens claims that he is entitled to credit for time served “because he was restrained in the same manner as a person on electronic home monitoring.” See Appellant’s Brief at 5. This Court should find that Mr. Dockens’s argument is

unpersuasive because he was not similarly situated as a person under electronic home monitoring (EHM).

First, despite Mr. Dockens's claims, he was never under house arrest. RCW 9.94A does not define "house arrest." However, Blacks Law Dictionary (8th ed, pp. 756) defines the term as follows:

The confinement of a person who is accused or convicted of a crime to his or her home, usu[ally] by attaching an electronically monitored bracelet to the criminal offender. Most house-arrest programs require the offender to work and permit leaving the home only for reasons such as work, medical needs, or community-service obligations.

This definition is consistent with "home detention" as defined by RCW 9.94A.030(27) (2006), *supra*, which requires that the offender be "confined in a private residence subject to electronic surveillance." While Mr. Dockens was subject to standard conditions of release, he was never confined to his residence. *Compare Vasquez*, 75 Wn. App. at 897 (defendant was prohibited from leaving his residence between 6 p.m. and 6 a.m. on work days and from leaving the house at all during non-work days). After Mr. Dockens reported to the monitoring agency, he was free to move about the western half of the state and engage in his private affairs. RP (09/06/2006) at 12-13; CP TBD (Order of Conditions and/or for Release, Sept. 1, 2006); CP TBD (Order Modifying Conditions of

Release, September 6, 2006). Unlike an individual on EHM, this Court should find that Mr. Dockens was not held in confinement.

Second, Mr. Dockens was not subject to continuous electronic surveillance. When an offender is subject to electronic monitoring, the State is able to track his or her movements twenty-four hours a day and seven days a week. This type of supervision is a serious restriction on one's liberty and privacy. The trial court regularly imposes this condition when there is a risk that an offender may (1) contact his or her victim, (2) enter a prohibited zone or area of the community, or (3) abscond prior to trial or sentencing. The offender's electronically monitored bracelet functions as a tether, informing the State whether the offender is in compliance with the conditions of his or her release. As soon as the State is aware of a violation, it can locate the offender, make an arrest, and bring him or her before the court. Here, Mr. Dockens was only required to check-in with the local agency. After Mr. Dockens reported,⁴ the State could not supervise his movements or determine whether he was in constant compliance with the conditions of his release. This Court should find that Mr. Dockens's conditions of release did not curtail his liberty

⁴ At the time that Mr. Dockens was enrolled in the day reporting program at Friendship Diversion, the monitoring agency, he only had to check-in briefly with his counselor. He was never responsible to the agency for eight hours per day, nor subject to more onerous treatment requirements or skills development classes that the agency required of defendants/offenders that enrolled in the program after April 2008.

and privacy to the same degree as experienced by offenders held in confinement pursuant to the EHM program.

Finally, a rational basis supports the Legislature's decision to credit the sentences of offenders subject to home detention and electronic surveillance prior to their ultimate sentence, see RCW 9.94A.505(6) (2006), but not the offenders on conditional release pending sentencing. The time that offenders spend under home detention and electronic surveillance is time spent in confinement and, if not credited against a maximum or mandatory minimum sentence, has the effect of potentially enlarging the time of confinement allowed by law. *See Reanier v. Smith*, 83 Wn.2d 342, 351, 517 P.2d 949 (1974) (observing that pretrial detention and postconviction detention are indistinguishable in terms of their effect on the imprisoned defendant). The same scenario does not arise when an individual is free of confinement pending sentencing. In fact, if an offender received credit for time served under a conditional release not amounting to confinement, the effect would often result in a sentence below the requisite mandatory minimum sentence. The trial court properly credited the fifteen days that Mr. Dockens spent in jail prior to his release. However, the trial court did not err when it refused to credit Mr. Dockens's sentence with the two years he spent free of confinement.

Mr. Dockens relies on an opinion from California, *People v. Lapaille*, 15 Cal. App. 4th 1159, 19 Cal. Rptr.2d 390 (1993), to support his claim that he is entitled to credit toward his ultimate sentence. See Appellant's Brief at 6-7. In *People v. Lapaille*, the defendant was released on his own recognizance (O.R.) shortly after his arrest (spending only three days in jail prior to sentencing). 15 Cal. App. 4th at 1162. The trial court ordered the defendant not to leave his residence, except to visit his lawyer and make court appearances. *Id.* The Defendant remained confined to his residence for a total of 371 days. *Id.* The trial court subsequently modified the defendant's release, but only to allow him 30 minutes in the morning and afternoon to pick up his daughter at the bus stop. *Id.* at 1163. The trial court removed the defendant from "home detention" and placed him on "straight O.R." after he and his wife waived their fourth amendment rights so that the authorities could enter and search their residence at any time during his release. *Id.* At sentencing, the lower court refused to award custody credits to the defendant for the 371 days he spent confined to his residence. *Id.*

The *Lapaille* court considered whether the failure to award the defendant custody credits for his pre-conviction house arrest, while awarding them to those confined on a electronic home detention program, violated his right to equal protection. *Id.* at 1168. Upon review,

the appellate court applied strict scrutiny, stating “[w]hen the equal protection issue involves a fundamental interests, such as liberty, our courts have required that the state establish that it has a compelling interest in making such classifications.” *Id.* The court sought to determine whether the defendant’s restraint was as “custodial” as those confined subject to electronic tracking. *Id.* at 1169. The appellate court noted that in California an offender on electronic home detention must remain in the interior of their homes during hours designated by the program administrator, admit the administrator to their homes at any hour to verify compliance with the program, wear a monitoring device, be subject to arrest without warrant if there is reasonable cause to believe they have violated program rules, and abide by other rules and regulations imposed by county authorities. *Id.* The appellate court found that the defendant’s confinement was as custodial as one held on electronic detention because he was confined to his home except to visit his lawyer, attend court, and pick child up from bus stop. *Id.* at 1170. The appellate court went on to state that the only real difference between electronic detention and the defendant’s situation was that in the former instance one’s location was verified by electronic tracking, while in *Lapaille* verification was based on telephone calls. *Id.* The *Lapaille* court held that these “procedural” differences were not a legitimate bases for

treating the defendant differently from those placed on electronic home detention programs. *Id.*

This Court should decline to follow the *Lapaille* decision. First, *Lapaille* applied a higher level of scrutiny than that employed by the Washington's appellate courts. In *Lapaille* the appellate court appeared to apply "strict scrutiny." 15 Cal. App. 4th at 1168. In Washington, the appellate courts apply the more deferential rational basis test to legislative classifications pertaining to physical liberty interests. *Manussier*, 129 Wn.2d at 673; *State v. Shawn*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993); *Berrier*. 110 Wn. App. at 649. *See also State v. Phelan*, 100 Wn.2d 508, 514, 671 P.2d 1212 (1983) (finding physical liberty to be an important, but not a fundamental, right), superseded by statute on other grounds by RCW 9.94A.728.

Second, the defendant in *Lapaille* was confined to his residence, and was allowed leave only to visit his attorney, attend court, and meet his daughter at the bus stop. 15 Cal. App. at 1162-63. In the present case, and as argued above, Mr. Dockens was not confined to his residence. While he had to maintain the same address and remain under a curfew, he was still free to move throughout Western Washington. RP (09/06/2006) at 12-13; CP TBD (Order of Conditions and/or for Release, Sept. 1, 2006); CP TBD (Order Modifying Conditions of Release,

September 6, 2006). *See e.g.* RP (09/29/2006) at 6; RP (12/31/2008) at 18. The conditions of Mr. Dockens's release were not "custodial" like the defendant's confinement in *Lapaille*.

Finally, this Court should reject any argument that Mr. Dockens's release, even with the requirement that he report daily to a local agency, was the functional equivalent to detention pursuant to electronic surveillance. As argued above, day reporting is not the same as electronic surveillance. Furthermore, Mr. Dockens was only required to briefly check-in with his counselor once a day, Monday through Friday. Finally, Washington case law rejects the argument that conditions of release, even those that amount to house arrest, are functionally indistinguishable from EHM. *State v. Vasquez*, 75 Wn. App. 896, 881 P.2d 1058 (1994); *See also Reno v. Koray*, 515 U.S. 50, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (rejecting the functional equivalent test and holding that a defendant who had spent time at a treatment center under conditions significantly curtailing his liberty while "released" on bail was not entitled to credit for time served under the statute that requires credit for time spent under official detention). The mere fact that Mr. Dockens was required to report to the same agency that oversees the EHM program is not sufficient to find that his situation was similar to electronic home detention.

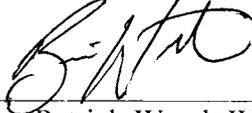
Because Mr. Dockens was not confined or detained for the two years pending his sentence, his situation is dissimilar to that of an offender confined via EHM. Furthermore, a rational basis supports the Legislature's decision to credit offenders for time served in pre-sentence confinement, while not awarding credit to offenders free of confinement due to their conditional release. There is no equal protection violation. Thus, the trial court did not err when it refused to credit his sentence with the time he spent under conditional release. This Court should affirm.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Mr. Dockens's sentence.

Respectfully submitted on August 24, 2009.

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APPENDIX "A"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF CLALLAM [] JUVENILE DIVISION

1 2006

STATE OF WASHINGTON,

vs.

Plaintiff,

JAMES J. DOCKENS

Defendant/Respondent.

NO. 06 1 00418 2

ORDER OF CONDITIONS AND/OR FOR RELEASE

PENDING [X] TRIAL [] SENTENCING [] APPEAL [] HEARING

SCANNED

THE COURT HAVING DETERMINED that release on personal recognizance will not reasonably assure the Defendant/Respondent's appearance, or there is a likely danger that Defendant/Respondent will commit a violent crime, or seek to intimidate witnesses, or otherwise interfere with the administration of justice, IT IS ORDERED that the release of the Defendant/Respondent is authorized under the following conditions:

- 1. [X] Cash bail or execution of security bond in the amount of \$500,000.00. Ball is posted to guarantee compliance with all conditions of release herein and may be forfeited upon a violation of conditions and/or a failure to appear;
- 2. [X] Maintain residence at the following address: 432 E Front Street, Port Angeles, Washington;
- 3. [X] Travel restrictions as follows: Western Washington only;
- 4. [] Maintain curfew - remain within address at #2 (above) - during the following hours: _____;
- 5. [X] Defendant shall not contact nor have any communication with: EVERGREEN COLLISION OR EMPLOYER - DAVID ANSTETT;
- 6. [] Defendant shall not drive a motor vehicle unless licensed and insured;
- 7. [X] Defendant shall not possess any firearms or other deadly weapons;
- 8. [X] Defendant shall not drink or possess intoxicating liquors and shall remain out of places where it is the chief item of sale;
- 9. [X] Defendant shall not use or possess any drugs except as prescribed by physician;
- 10. [X] Defendant shall not commit any criminal violation of law;
- 11. [X] Defendant shall maintain contact with his/her attorney and return to Court as directed;
- 12. [] _____

13. [XX] DEFENDANT SHALL APPEAR: Wed Sept 6, 2006 at 1:00 p.m. AND AS ORDERED. Defendant is remanded to the Sheriff for: [] Booking and release; [X] Custody pursuant to above conditions.

DATED this 1st day of Sept, 2006

Presented by:

[Signature of Deputy Prosecuting Attorney]

[Signature of Judge]

JUDGE

(Deputy) Prosecuting Attorney WBA # 8582

I UNDERSTAND THAT HAVING BEEN RELEASED BY THE COURT or admitted to bail, I am required to reappear as ordered and that my failure to appear as required constitutes the crime of Bail Jumping (RCW 9A.76.170). Defendant's signature: [Signature]

ORDER FOR RELEASE

SCANNED - 1

FILED
CLALLAM COUNTY
SEP - 6 2006
BARBARA CHRISTENSEN, Clerk

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

STATE OF WASHINGTON,)
Plaintiff,)

vs.)

JAMES J. DOCKENS)
Defendant.)

NO. 06-1-00418-2

ORDER MODIFYING
CONDITIONS OF RELEASE
ORMD

The above matter having come before the Court on Motion to Modify the conditions of release, it is now ORDERED that the Order for Release presently in effect is hereby modified as follows:

- The Bail/Bond is set at the following amount: \$25,000.00
- The Defendant is released on his/her personal recognizance.
- The curfew is set as follows: 8pm-6am
- The Defendant shall reside at the following location:

Travel restrictions are set as follows:

Other: Surrender passport to PAPP prior to release -
(Mon - Fri) report daily to EHM office - other conditions as set

All other conditions set forth in the Order for Release presently in effect shall remain in effect except as otherwise modified herein.

Date: 9/6/06

[Signature]
JUDGE

[Signature]
(Deputy) Prosecuting Attorney

[Signature]
Attorney for Defendant
[Signature]
Defendant

c: jail; pros; Ritchie

SCANNED

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FILED
CLALLAM CO CLERK
2006 DEC 14 A 11:48
BARBARA CHRISTENSEN

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON,

Plaintiff,

vs.

JAMES J. DOCKENS,

Defendant.

NO. 06-1-00418-2

PLEA AGREEMENT,
STIPULATIONS AND WAIVERS

()

COMES NOW, the parties by and through their respective attorneys and enter the following plea agreement, stipulations, and waivers:

1. Upon entry of the following waivers and stipulations by the defense, the State will dismiss the remaining 18 counts of Money Laundering.

2. The Defendant waives any and all claims and/or arguments concerning notice and/or authority of the Court to impose an exceptional sentence over the standard sentencing range of 0 to 90 days for Theft in the First Degree; however, the defendant expressly does not agree that an exceptional sentence is appropriate or waive his right to argue against the imposition of an exceptional sentence.

3. The Defendant expressly waives his right, under Washington v. Blakely and RCW 9.94A.535, to have a jury determine any and all facts and conclusions on which an exceptional sentence could be based, and stipulates that the judge hearing this matter may make such determinations and impose an exceptional sentence should he find such appropriate.

4. The Defendant stipulates that the Court and not a Jury may determine whether this offense was a major economic offense under RCW 9.94A.535. The Defendant fully understands that he has the right to have an impartial Jury of 12 decide these issues (facts and conclusions) and hereby waives that right and requests that the Judge make all such determinations, including the determination of whether the facts are legally sufficient to support

1 - PLEA AGREEMENT, STIPULATIONS AND WAIVERS

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469

1 an exceptional sentence and whether a standard range sentence is clearly too lenient in light of
2 the facts found by the Court and the purposes of the Sentencing Reform Act.

3 5. The Defendant stipulates that he occupied a position of trust, confidence, or
4 fiduciary responsibility with respect to the victim, i.e., that he was the bookkeeper for the
5 victim's business and solely responsible for the management of the victim's business
6 administrative account and solely responsible for making payments from that account to various
7 governmental entities. The Defendant stipulates that over a period of at least three years that he
8 took funds from that account on numerous multiple occasions (normally multiple times each
9 month) to pay his own bills and consequently the account was insufficient to make the payments
10 owed to those various governmental entities. As a result, the victim's business continues to owe
11 those past due payments. The Defendant stipulates he committed theft by embezzlement of funds
12 from this administrative account (from which payments such as payroll taxes, labor and industry
13 premiums, and federal taxes were to be paid) in the neighborhood of three to four hundred
14 thousand dollars. The Defendant stipulates that this is amount is approximately 200 to 270 times
15 the amount necessary to establish the crime of Theft in the First Degree and stipulates that the
16 court has the authority to determine whether or not this is substantially greater than typical for
17 the offense but reserves the right to argue that such determination can only be made through
18 statistical evidence of embezzlement cases in Washington and that this method of determining
19 the aggravator "major economic offense" is vague and/or overbroad.

20 6. The Defendant stipulates that the Judge may determine from the facts contained in
21 paragraph 5 of this document whether or not they are legally sufficient to support an exceptional
22 sentence above the standard range and whether a standard range sentence is clearly too lenient.
23 The Defendant does not waive his right to argue that the aggravator "major economic offense" is
24 overbroad or vague and not supported by statistical evidence. The Defendant does not waive his
25 right to argue that the "position of trust" factor inheres in the crime of theft by embezzlement and
cannot be used as an aggravating factor.

7. The Defendant agrees that any attempt to withdraw the Defendant's guilty plea, or
any attempt to appeal or collaterally attack any conviction or sentence entered under this cause

1 number other than for abuse of discretion in setting the length of an exceptional sentence (should
 2 the Court find one warranted) or that the aggravator "major economic offense is overbroad or
 3 vague and requires statistical evidence or that the "position of trust" aggravating factor inheres in
 4 the charge of theft by embezzlement will constitute a breach of this agreement. The Defendant
 5 agrees that upon a finding by the Court that the Defendant has breached the agreement, the
 6 Defendant will still be bound by the guilty plea(s) and the State will be authorized to file any
 7 additional charges, any other or greater offenses based on the same conduct, and/or any statutory
 8 enhancements that were not filed or were dismissed as part of this plea agreement, and that
 9 neither double jeopardy nor mandatory joinder rules will be cause for dismissal of the new
 10 and/or additional charges or enhancements; and that the Defendant may be sentenced anew.

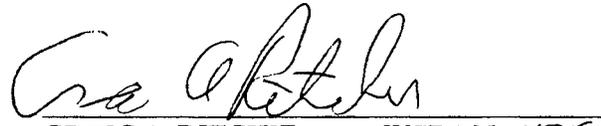
11 **DEFENDANT'S ACKNOWLEDGEMENT:** I enter into this agreement freely and voluntarily. No
 12 one has threatened me or any other person to cause me to enter into this agreement. My attorney
 13 has explained the above paragraphs to me and we have fully discussed them. I understand them
 14 all, and understand that I waive substantial rights by entering into this agreement.

15 
 16 _____
 17 JAMES J. DOCKENS, Defendant

12/14/06

18 Presented by

19 
 20 _____
 21 DEBORAH S. KELLY WBA #8582
 22 Prosecuting Attorney

23 
 24 _____
 25 CRAIG A. RITCHIE WSBA No. 7818
 Attorney for Defendant

26 The Court finds the foregoing agreements, waivers, and stipulations by the parties to have been
 27 entered freely and voluntarily with a full understanding of their respective rights. The Court
 28 hereby approves the plea agreement this 14th day of December, 2006.

29 
 30 _____
 31 HONORABLE KENNETH DAY
 32 WILLIAMS, JUDGE