FILED

MAR 19 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 279464 Consolidated with 286371

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JESSE ALAN McREYNOLDS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE F. JAMES GAVIN, JUDGE

REPLY BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
Deputy Prosecuting Attorney
WSBA #18364
Attorney for Respondent
211, Courthouse
Yakima, WA 98901
(509) 574-1200

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I. ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court's imposition of community custody for the offense of attempted second degree kidnapping contrary to the decision in In re Post Sentence Review of Leach, 161 Wn.2d 180, 163 P.3d 782 (2007)?
2. Whether the Appellant Jesse Alan McReynolds was held unlawfully beyond his maximum release date and improperly transferred to the custody of the Department of Corrections?
3. Whether the trial court's entry of an order directing HIV testing was in error?
4. Whether the trial court erred in entering a sexual assault protection order?
5. Whether McReynolds was advised of all of the consequences of his plea?
6. Whether McReynolds was deprived of his right to effective assistance of counsel in connection with his plea and sentencing?

B. ANSWER TO ASSIGNMENTS OF ERROR.

1. The State concedes that community custody would not apply to a conviction for attempted second degree kidnapping, but since

McReynolds has served his sentence, including any period of community custody, the issue is moot on appeal.

2. McReynolds was not unlawfully held beyond his release date, as the trial court sentenced him to confinement of more than one year, and there is a statutory requirement that he be transferred to a state facility to complete his sentence.

3. While there is no specific statutory authority to impose a requirement that McReynolds submit to HIV testing, he stipulated to the order, and the issue is moot on appeal as the test has been completed already.

4. The State concedes that there is no statutory authority for entry of a sexual assault protection order, and the order should be vacated.

5. McReynolds was advised of all the consequences of his plea. The possibility of a future civil commitment pursuant to RCW 71.09 is a collateral consequence of a plea, and a defendant need not be advised of that collateral consequence.

II. STATEMENT OF THE CASE

The Statement of the Case contained in the Appellant's opening brief is accurate. RAP 10.3(b). Additionally, the State would incorporate its Statement of the Case in the original response to the Personal Restraint

Petition in cause number 279464, as well as the Department of Corrections' Facts Relevant To Claims on Appeal contained in its response.

III. ARGUMENT

1. The State concedes that there is no statutory authority to impose community custody for a conviction for attempted second degree kidnapping. The issue, however, is moot.

Counsel for the State has reviewed the pleadings, sentencing documents, as well as the relevant statutory and case authorities, and concedes that attempted second degree kidnapping is not an offense for which a sentencing court can impose community custody. Relevant here is former RCW 9.94A.715, in effect at the time McReynolds was sentenced, as well as RCW 9.94A.411(2), which sets forth a list of crimes against persons. While Leach, supra, specifically addressed whether attempted assault would necessitate imposition of community custody, it is dispositive on this issue, as well, as the Supreme Court held that the list at RCW 9.94A.411(2) is exclusive. Id., at 186. Further, attempted second degree is neither a violent offense nor a sex offense without a finding of sexual motivation. Mr. McReynolds cannot be subject to the conditions of community custody at this time since he was sentenced in 2008, so the issue is moot; the court cannot grant meaningful relief on this assignment

of error since his 17 month sentence, as well as any community custody time, has run.

2. McReynolds was not held unlawfully beyond his release date, as the court was required to commit him to the custody of the State Department of Corrections.

McReynolds maintains on appeal that he should have been released immediately after sentencing, as the Yakima County Department of Corrections calculated that he had credit for 363 days, plus 181 earned release time, and thus had more than served his 17 month sentence.

It is true that in the event that an offender is transferred from a county jail to the department, the jail is required to certify the amount of time spent in custody at the jail, together with the amount of earned release time. RCW 9.94A.728(1).

Further, RCW 9.94A.190(1) provides that any sentence which includes a term of confinement of more than one year must be served in a facility operated by the state. The transfer to a state facility is thus mandatory, and it is the Department of Corrections which is responsible for accepting the certification for presentence credit. The sentencing court here would have been without authority to sentence McReynolds to a prison term, then to simply release him from the county facility, no matter how much credit he had.

Again, since McReynolds has served his sentence, the court has no meaningful relief to grant him.

3. McReynolds agreed to the HIV order, and the issue is moot in any event.

McReynolds maintains that the order that he be subject to an HIV blood test was in error, as his stipulation, he now maintains, was not knowing, voluntary and intelligent.

McReynolds acknowledged in his *Alford* plea statement that the offenses to which he was entering the pleas were not sex offenses, "but the defendant will stipulate to a HIV test." **(CP 16)**

It should be noted that the HIV order itself provides that the test would be performed either by a healthcare provider at the county jail, or by the Department of Corrections. Once again, since McReynolds completed his sentence and is no longer in the custody of the Department of Corrections as a result of the sentences imposed here, the test, if it were to be done at all, was done long ago. There is, once again, no meaningful relief available to him

4. The State concedes that there is no authority for entry of a sexual assault protection order.

The State has reviewed the statutory requirements for entry of a sexual assault protection order, and is of the opinion that the facts of this case do not meet those requirements. The sentencing court would have

had authority to grant such a request on behalf of a minor victim of sexual assault, but there must be a showing of either "sexual conduct" or "sexual penetration" as the terms are defined at RCW 7.90.010. The order should be vacated.

5. The possibility of a sexually violent predator petition is a collateral consequence of a plea to attempted second degree kidnapping.

Mr. McReynolds claims that he should have been advised of the potential for an SVP proceeding under RCW 71.09 before his pleas were accepted, and that this court should hold that such consequences are direct in light of recent decisions in Padilla v. Kentucky, __U.S.__, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011). Further, he asserts that his attorney's failure to advise him of the possibility of the potential of SVP proceedings constituted ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

However, by its plain language, Padilla only refined Strickland to include criminal cases which have the potential for "adverse immigration consequences." Padilla, 130 S. Ct. at 1486.

In contrast to immigration consequences, it is well-settled in Washington that potential SVP proceedings are collateral, not direct, consequences of a plea. In denying McReynolds' first PRP, the court

cited In re Detention of Abolafya, 114 Wn. App. 137, 147, 56 P.3d 608 (2002). This court also reached a similar result in In re Personal Restraint of Paschke, 80 Wn. App. 439, 909 P.2d 1328 (1996):

> It is not automatically imposed on a defendant once he pleads guilty, nor does it automatically enhance his sentence. His status as a sexually violent predator is determined in a subsequent independent trial where he is afforded assistance of counsel, the right to a jury, and expert witnesses to testify in his behalf. RCW 71.09.050. Proof of his status must be shown beyond a reasonable doubt. RCW 71.09.060(1)
>
> Id., at 444. *See, also* In the Matter of the Detention of Campbell, 139 Wn.2d 341, 360, 986 P.2d 771 (1999).

Neither the court, nor McReynolds' counsel, was under an obligation to advise him of potential SVP proceedings, and he has not met his burden here.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions, but remand for vacation of the sexual assault protection order.

Respectfully submitted this 16th day of March, 2012.

Kevin G. Eilmes, WSBA No. 18364
Deputy Prosecuting Attorney
Attorney for Respondent