

78097-8

Court of Appeals No. 238741

Sup. Ct. No. 75664-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

JOHN L. SWIGER,

Respondent.

APPELLANT'S REPLY BRIEF

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INDEX

INTRODUCTORY STATEMENT 1

ISSUE PRESENTED 1

ARGUMENT..... 1

A. THE RESPONDENT’S READING OF THE
ANDERSON DECISION WOULD REQUIRE
THIS COURT TO OVERRULE SEVERAL
STATUTES AND PRIOR CASES..... 1

CONCLUSION 5

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. ANDERSON, 132 Wn.2d 203,
937 P.2d 581 (1997)..... 1, 2, 3, 4

STATE V. BERNHARD, 108 Wn.2d 527,
741 P.2d 1 (1987)..... 2

STATE V. HARDESTY, 129 Wn.2d 303,
915 P.2d 1080 (1996)..... 3

STATE V. PRINGLE, 83 Wn.2d 188,
517 P.2d 192 (1973)..... 3

STATE V. SHOVE, 113 Wn.2d 83,
776 P.2d 132 (1989)..... 2

STATE V. SPEAKS, 119 Wn.2d 204,
829 P.2d 1096 (1992)..... 3

I.

INTRODUCTORY STATEMENT

Appellant, State of Washington, respectfully submits this reply brief on one issue presented by Respondent's brief.

II.

ISSUE PRESENTED

(1) Did this court in its *Anderson* decision overrule the legislative definitions for custody and home detention and its previous precedent governing trial court authority to modify prison sentences?

III.

ARGUMENT

A. THE RESPONDENT'S READING OF THE *ANDERSON* DECISION WOULD REQUIRE THIS COURT TO OVERRULE SEVERAL STATUTES AND PRIOR CASES.

The respondent understandably tries to fit this case into this court's ruling in State v. Anderson, 132 Wn.2d 203, 937 P.2d 581 (1997). His interpretation of the case, however, conflicts with several other decisions and would require that legislation be invalidated and prior cases overruled. Anderson can not bear the construction respondent would place on it.

Respondent did not take issue with appellant's argument that the trial court lacked authority to modify a sentence by converting a prison term to a term of partial confinement or that courts were not empowered to impose lengthy terms of partial confinement for serious violent offenses. He instead argued that the Equal Protect Clause as interpreted by Anderson simply required that credit be given. His argument ignores one of the critical distinctions between this case and Anderson – the fact that defendant in fact had been in prison serving a term of total confinement at the point when the trial court granted the “release” to GPS monitoring. In Anderson, the defendant had been released from the county jail to electronic home detention. 132 Wn.2d at 205. If Anderson gives courts the power to modify judgments and change prison placements, then the cases noted in the original brief¹ (as well as the authorities cited therein) are invalid and this court should overrule them.

A similar problem arises from Respondent's argument that Anderson holds there is no distinction between legislatively authorized electronic detention before trial and post-sentencing GPS monitoring. There are several flaws with that argument, including the fact that the Legislature has limited home detention as punishment to certain offenses and for a

¹ State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989); State v. Bernhard, 108 Wn.2d 527, 741 P.2d 1 (1987). See Brief of Appellant at pp. 9-10.

limited period of time. The trial court violated both those limitations in this case. The problem arises from the fact, made clear by this court in both Anderson and State v. Speaks, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992), that electronic “detention” is only considered custody because the Legislature says it is. Because the issue was not presented by the State in Anderson until too late, this court declined to reach the issue of whether the trial court was authorized to release someone to home detention after conviction for a serious violent offense. 132 Wn.2d at 213. That is not the case here since the prosecution objected at every opportunity. In essence, the construction of Anderson urged by Respondent here creates a hierarchy of statutes – the definition of electronic monitoring as “custody” has to be followed, but the restrictions on the use of electronic monitoring are ignored. This court did not reach that issue in Anderson and if it is truly limiting the reach of the other statutes, it should so declare.

Respondent concludes with an emotional appeal that he was on monitoring at “great expense” and with the expectation that he would be credited with that time against his sentence. *See* Brief of Respondent at pp. 5-6. No one has the right to expect an unauthorized sentence. State v. Pringle, 83 Wn.2d 188, 517 P.2d 192 (1973); State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996). Defendant was on notice throughout these proceedings that the State did not believe his “release”

could be treated as “custody.” He also can not possibly believe that his release from prison to stay at his own home and work at his family job was the equivalent of the home lockdown detention in Anderson. The meager geographic restrictions placed on the defendant by the GPS monitoring simply did not equate with what went on in Anderson, and the lack of restrictions on defendant’s behavior while living at home simply can not equate to being in prison.

Defendant beat a young man into a permanent vegetative condition and then returned, with trial court blessing, to his normal life of work and sleeping at home with minimal restrictions and no other monitoring. There was no significant restriction on him during this time. His calls for equity fall far short of triggering the conscience of the court. He is the one who has been gaming the system.

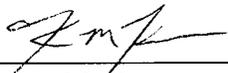
This case presents the issues this court did not need to address in Anderson. The facts here are significantly different and this court should address the issues left open previously. This case is well beyond Anderson and is not governed by that ruling.

IV.

CONCLUSION

For the reasons stated herein and previously, the trial court should be reversed and the case remanded with directions to delete the credit for time spent at home.

Respectfully submitted this 18th day of February, 2005.



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