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Court of Appeals No. 238741

No. 7566-4-3-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant

v.

JOHN SWIGER,

Respondent

APPEAL FROM THE SUPERIOR COURT
SPOKANE COUNTY
THE HONORABLE ROBERT D. AUSTIN

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

The appellant, State of Washington, has assigned error as follows:

“The trial court erred in crediting defendant for time served ‘in custody’ after he was released from prison while his appeal was pending.”

II. RESPONSE TO ISSUES PRESENTED

1. Is a prisoner released on appeal “in custody” for purposes of time served calculations when he is on electronic home monitoring?
2. Is it proper for the trial court to count electronic home monitoring (24/7) during an appellant’s release on appeal as confinement?

III. STATEMENT OF THE CASE

The State of Washington, appellant herein, has already set out a detailed Statement of the Case in it’s brief, and respondent acknowledges it’s accuracy, with any exceptions noted in the Argument Section of Respondent’s brief, infra.

IV. ARGUMENT

- A. **A PRISONER RELEASED FROM THE DEPARTMENT OF CORRECTIONS ON ELECTRONIC HOME MONITORING PURSUANT TO A COURT ORDER IS IN CUSTODY FOR PURPOSES OF CREDIT FOR TIME SERVED.**

The State's appeal is resolved, to a large measure, by this Court's holding in State v. Anderson, 132 Wn.2d 203, 937 P.2d 581 (1997). Contrary to the State's assertions, Anderson is not significantly distinguishable so as to lessen the impact of that ruling on this case.

In Anderson, the defendant was convicted of attempted second degree murder (designated a "violent offense" under RCW 9.94A.185, just as the first degree assault in the case sub judice is similarly designated), and then placed on electronic home detention pending his appeal. He later claimed "credit for time served" while his case was on appeal for said period of home detention.

Respondent Swiger was already in prison when he was released pending appeal. RAP 7.2. Like Anderson, he was also placed on electronic home monitoring and generally allowed to continue his logging work North of Spokane.

Again, like Anderson, Mr. Swiger sought (and was granted) credit for time served from his prison release date of October 31, 2002 up to his new "report" date back to prison on June 3, 2004. (RP 18-31) The trial court authorized said credit, and then the State appealed to this Court. The

State should have, however, filed an appeal from the original order of release back on October 25, 2002. RAP 2.2(a)(13). To reverse the credit for time served Order now would be unjust and deny Mr. Swiger equal protection of the law.

While it is clear from a close reading of Anderson that this court held persons in Mr. Swiger's fact pattern are not required statutorily to be given credit for time served under electronic home monitoring release, it is equally clear that the equal protection clause of the Fourteenth Amendment requires that a criminal offender be given credit against his/her sentence for post conviction time spent on electronic home detention while the offender's appeal of his/her conviction is pending.

Once the Legislature has chosen to credit all defendants for any pre-sentence electronic home detention, as recognized by this Court in State v. Speaks, 63 Wn. App. 5, 816 P.2d 95 (1991), reversed, 119 Wn.2d 204, 829 P.2d 1096 (1992), then the same Legislature must grant all similarly situated persons the same detention credits. Any difference in treatment must pass the "rational basis" test, since no suspect class or

fundamental right is involved. See In Re PRP of Borders, 114 Wn.2d 171, 176, 786 P.2d 789 (1990).

The Anderson court based its equal protection holding on four earlier precedents in this area of credits: Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974); In Re PRP of Phelan, 97 Wn.2d 590, 647 P.2d 1026 (1982); State v. Phelan, 100 Wn.2d 508, 671 P.2d 1212 (1983); and, In Re PRP of Knapp, 102 Wn.2d 466, 687 P.2d 1145 (1984). After Reanier, there was no distinction between pre-trial and post-conviction confinement. The two Phelan cases reinforced Reanier's ruling. Then last, under Knapp there is no longer any distinction between pre-trial, post-conviction and post imprisonment time in a State mental facility.

There is no important distinction in this case between pre-trial, post conviction and post imprisonment release on electronic home monitoring. Before conviction, some defendants are placed on electronic home detention to assure their physical presence at trial time and to protect the community. After trial and conviction, defendants are placed under home detention with electronic monitoring to assure they serve their sentence following mandate of their appeal, and still for the protection of the community. There can be no rational basis to treat Mr. Swiger any

differently. Equal protection demands and requires the same credits be granted to those who serve electronic home detention after their conviction, and pending the final outcome of their appeal. The Superior Court should be affirmed.

B. THE TRIAL COURT PROPERLY EXERCISED ITS AUTHORITY TO GIVE CREDIT FOR TIME SERVED ON ELECTRONIC HOME MONITORING.

During the time this case was on it's first appeal (before the trial court granted a new trial (CP 19)), the respondent, while released pending the appeal, was not on home monitoring. Then, following the second conviction after the second trial, respondent was eventually placed on home electronic monitoring. (RP 14-15; 18-19; CP 46-48; 73)

It is anticipated that he would receive credit for time served if, and when he had to eventually report to prison following the second appeal mandate.

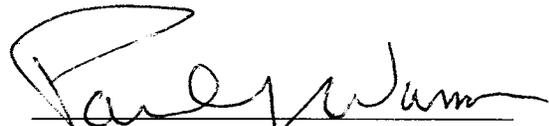
The trial court was vested with the discretion to follow the holding and rational of State v. Anderson, *supra*. State v. Speaks, 119 Wn.2d 204, 829 P.2d 1096 (1992), cited in appellant's brief at 4-7, does not the raise the constitutional protection afforded by the Equal Protection Clause as amplified in Anderson. Judge Austin, as the trial court judge obligated to

determine the correct sentence with the correction calculations for time served, was thus obligated to follow the United States Constitution and this Court's precedents.

IV. CONCLUSION

At great personal expense to himself and his family, Mr. Swiger was on electronic home monitoring while his second appeal following his second trial on the same charge was pending. The trial court properly gave him credit against his ultimate sentence for said time served on home electronic monitoring.

Respectfully submitted,



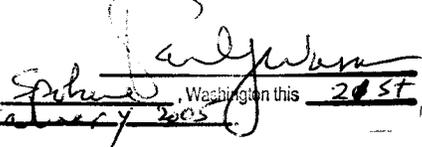
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DECLARATION

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this day the undersigned deposited into the mails of the United States of America a properly stamped and addressed envelope directed to the following attorneys:

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containing a copy of the document to which this declaration is attached.

SIGNED at  Washington this 20th
day of January, 2005.