

83451-2
No. 83738-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL W. DONAGHE,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS, DIVISION II

Court of Appeals No. 37008-5-II
Thurston County Superior Court No. 90-1-00151-6

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

Samuel Donaghe has been in custody for a long time. The Court of Appeals, in the opinion of which Donaghe is seeking review, recites a sketchy version of his history. State v. Donaghe, 152 Wn. App. 97, 215 P.3d 232 (2009). Specifically at issue here is correct interpretation of his current status following his plea of guilty to two counts of rape, one second degree and one third degree. While he was serving his sentence for those crimes, the State filed a petition to classify him as a sexually violent predator (SVP) under RCW 71.09.010. As soon as he completed his sentence, he was transferred to the Special Commitment Center (SCC), where he is still being held; he was never been released from confinement at any time in the interim.

Donaghe wants his right to vote restored. He is asking this court to find that he has completed the conditions of his sentence and is entitled to a certificate of discharge pursuant to RCW 9.94A.637, making him eligible to vote. The State is asking this court to find that he has not completed the conditions of his sentence and thus is not entitled to a certificate of discharge. That determination requires an answer to questions about the nature of community custody, when it begins, and when it ends. Divisions II

and III of the Court of Appeals have answered those questions differently.

II. ISSUES

1. Whether the Sentencing Reform Act permits time spent in civil confinement beyond the confinement time imposed in the judgment and sentence to be counted toward the term of community custody.

2. Whether the trial court was required to grant Donaghe a certificate of discharge based on the fact that the Department of Corrections terminated supervision.

3. Whether the statutes concerning community custody are ambiguous, thus requiring, under the rule of lenity, that they be interpreted most favorably to the defendant.

4. Whether Donaghe's civil commitment is unconstitutional because he continues to be disenfranchised.

III. STATEMENT OF THE CASE.

The substantive facts at issue in this review are the same as the procedural facts. On June 15, 1990, Samuel Donaghe entered an *Alford*¹ plea of guilty to one count of second degree rape and one count of third degree rape. [CP 6-9] He was sentenced to 42 months of confinement on the first charge and a concurrent 17 months on the second. He was also sentenced to a one-year term

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)

of community placement.² [CP 11-14] Donaghe subsequently brought a motion to withdraw his guilty pleas, which was denied. The trial court entered lengthy Findings of Fact and Conclusions of Law. [CP 20-32]

On May 10, 1995, the day his sentence was to end, the State filed a motion to confine Donaghe as an SVP. The trial finally took place in 2003, the court found him to be an SVP, and he appealed. The Court of Appeals affirmed in an unpublished opinion, 2005 WL 1845669 (Wash. App. Div. 2). That opinion contains a more detailed account of Donaghe's legal difficulties.³

In November of 2007, the trial court heard Donaghe's motion for a certificate of discharge. In support of his argument that he was entitled to discharge, he offered a letter from a correctional record specialist at the Department of Corrections (DOC) which said, in relevant part:

Dear Mr. Donaghe

This letter is in response to your request for conviction information and the dates of incarcerations of the above named

2 The courts and all parties have used the terms community placement and community custody interchangeably. See Donaghe, 152 Wn. App. at 101 n.4. For purposes of the issues before this court, they can be used interchangeably.

3 An unpublished opinion may be used as evidence of facts established in a different case involving the same parties. In re Pers. Restraint of Davis, 95 Wn. App. 917, 920 n. 2, 977 P.2d 630 (1999).

Mr. Donaghe was convicted out of Thurston County (cause #901001516) on 10/30/91 for Rape 2nd and sentenced to a maximum term of 3 years & 6 months. He was convicted out of Thurston County (cause #901001516) on 10/30/91 for Rape 3 and sentenced to a maximum term of 1 year & 5 months. Mr. Donaghe was received at Washington Corrections Center on 6/8/94 and released on 4/25/96.

Mr. Donaghe was also convicted out of Thurston County (cause #911003894) on 10/30/91 for Assault 2nd and sentenced to a maximum term of 1 year & 1 month.

He was on supervision with the Department of Corrections from 4/25/96 until 11/24/04 when these causes were terminated.

Donaghe's motion was denied, as well as a motion for reconsideration. [CP 38-40] The court again entered detailed Findings of Fact and Conclusions of Law. [CP 44-46]

Donaghe then appealed and the Court of Appeals, Division II, affirmed in the decision that is now before this court.

IV. ARGUMENT.

A. The Sentencing Reform Act does not permit any confinement time spent in excess of the time imposed in the judgment and sentence to be counted toward a term of community custody. Community custody must be served in the community.

In 2008 and 2009, two divisions of the Court of Appeals issued three opinions addressing the issue of when community custody begins and where it can be served. The two divisions reached opposite conclusions. Division Three decided In re the

Pers. Restraint of Knippling, 144 Wn. App. 639, 183 P.3d 365 (2008). In that case, Knippling was convicted in 2003 of second degree assault and first degree animal cruelty and apparently received an exceptional sentence greater than the standard range sentence. On appeal, his convictions were affirmed but his sentence was remanded based on Blakely v. Washington, 542 U. S. 296, 124 S. Ct. 2531, 159 L. Ed 2d 403 (2004). By the time of remand he had served 41 months; on resentencing he received 17 months. Knippling, 144 Wn. App. at 641. The trial court apparently refused to count the extra 24 months towards the 18 to 36 months of community custody he was also ordered to serve. Id., at 641-42. On appeal, Division Three held that community custody begins as soon as confinement time is completed and that Knippling had completed 24 months of his community custody before he was released from confinement. Id., at 643. Judge Sweeney dissented on the grounds that community custody must be served in the community and that RCW 9.94A.625(3) prohibits tolling even when a person serves more time than he should. Id., at 643-44.

A little more than a year later Division Two decided State v. Jones, 151 Wn. App. 186, 210 P.3d 1068 (2009), *review granted*, ___Wn.2d___ (2010). Jones pleaded guilty to first degree child

molestation and was sentenced to 130 months of incarceration and 36 months of community custody. The case was remanded following a successful personal restraint petition because his offender score had been calculated incorrectly, and he was resentenced to 51 months of incarceration and 36 months of community custody. By that time Jones had served 81 months. He sought to have the extra 30 months credited toward his community custody, but the trial court refused. *Id.*, at 188-89. Division Two affirmed, disagreeing with Knippling, and held that a term of community custody does not begin until an offender is released into the community. *Id.*, at 194.

A different panel of Division Two decided the case on review here, State v. Donaghe, 152 Wn. App. 97, 215 P.3d 232 (2009). The facts have been set forth above. The majority again rejected the holding in Knippling, agreeing with Judge Sweeney's dissent, and held that community custody can only be served in the community. *Id.*, at 107. Judge Armstrong dissented, concluding that the majority result was "patently unfair and unlawful." *Id.*, at 113.

The State urges this court to adopt the reasoning of the majority opinion in the court below, the Jones court, and the dissent

in Knippling. That reasoning takes into account all of the pertinent statutes and is consistent with the legislature's intent.

As noted above, Donaghe was sentenced to community placement. Community custody is a subset of community placement and is defined in RCW 9.94A.030(5):

"Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to RCW 9.94A.505(2)(b), 9.94A.650 through 9.94A.670, 9.94A.690, 9.94A.700 through 9.94A.715, or 9.94A.545, served in the community subject to controls placed on the offender's movement and activities by the department.

Community placement is defined in RCW 9.94A.030(7):

"Community placement" means that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

A term of community custody can be tolled. The tolling statute in effect now is RCW 9.94A.625. At the time Donaghe committed these offenses, it was codified as RCW 9.94A.170. Former RCW 9.94A.170 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.

Section (1) of the RCW 9.94A.625 reads essentially the same as above, 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 was convicted of sex offenses. Since the time of his conviction, the legislature has specifically addressed community custody requirements for sex offenders whose crimes were committed after July 1, 2000. While this section would not apply to Donaghe, the language is instructive when considering legislative intent. In pertinent part, RCW 9.94A.715(1) reads:

. . . [T]he court shall, in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728(1) and (2); . . . Except as provided in RCW 9.94A.501,⁴ the department shall supervise any sentence of community custody imposed under this section.

The court in Jones framed the issue in terms of tolling. Jones, 151 Wn. App. at 190. (“[T]he central issue underlying this appeal is whether Jones’s community custody term began at the completion of his 51-month incarceration term or whether it was tolled until he was actually released into the community.”) The court below in Donaghe did not use the term tolling, but found that the term of community custody had never begun. Donaghe, 152 Wn. App. at 108 (“ . . . Donaghe’s community placement cannot begin until the State releases him from confinement to supervision *in the community*,” emphasis in original.) The difference between Donaghe and Jones, of course, is that Donaghe is being held in civil confinement as a SVP, while Jones served extra time in prison on a criminal sentence that was later reduced. However,

⁴ RCW 9.94A.150 has been recodified as RCW 9.94A.728. LAWS OF 2001, ch. 10, § 6.

“confinement” is defined as “total or partial confinement,” RCW 9.94A.030(11), and total confinement takes place within the “physical boundaries of a facility or institution operated or utilized under contract by the state or other unit of government. . .”. RCW 9.94A.030(47). Under this definition, Donaghe is confined.

An appellate court reviews statutory interpretations de novo. State v. Alvarado, 164 Wn.2d 556, 561, 192 P.3d 345 (2008). The purpose is to discern and apply the intent of the legislature. Id., at 561-62. When the meaning of the statute is plain on its face, courts must follow that plain meaning. In doing so, the court looks to the ordinary meaning of the language, the general context of the statute, related statutes, and the totality of the statutory scheme. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). The reviewing court is to give effect to all of the language in the statute so that no portion is left meaningless or superfluous. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The court in Knippling paid lip service to these principles. It held that RCW 9.94A.625(3) was not controlling. However, it ignored the definitions in RCW 9.94A.030(5) and (7), and held that community custody begins “when the offender completes his confinement time,” relying on RCW 9.94A.715(1). Knippling, 144

Wn. App. at 643. It did not explain why that is the sole triggering event for the beginning of community custody. A more reasonable interpretation is that community custody does not begin before the confinement time is completed, but neither does it begin before the offender is actually released into the community. While the legislature did not define "community," considering the context of the Sentencing Reform Act (SRA) the most reasonable definition is "general society," not "people confined in a particular jail or prison." The Knippling court disposed of the issue in a scant two pages of analysis. It seems likely that the majority in Division Three thought it was unfair for Knippling to have spent 24 months in prison without getting some sort of credit for it, and reached its holding based on a less than thorough analysis of the SRA. However, deciding what the legislature intended for all offenders based on what seems "fair" for one particular offender does not meet the standard for statutory construction.

Other courts have discussed the nature of community custody.

Community custody is the intense monitoring of an offender in the community for a period of at least one year after release or transfer from confinement. Although it has other purposes, community custody

continues in the nature of punishment, and is not equivalent to general release.

In re the Pers. Restraint of Crowder, 97 Wn. App. 598, 600-01, 985 P.2d 944 (1999).

The legislature intends that all terms and conditions of an offender's supervision in the community, *including the length of supervision* and payment of legal financial obligations, *not be curtailed by an offender's absence from supervision for any reason including confinement in any correctional institution.*

In re the Pers. Restraint of Dalluge, 162 Wn.2d 814, 819, 177 P.3d 675 (2008), emphasis in original, quoting the legislature's uncodified statement of purpose in LAWS OF 2000, ch. 226, §1.

By design, the whole "period" of community custody must be served in the community. With an exception that is not relevant to us today, any time an offender spends in jail does not count toward serving a community custody sentence.

Id., at 815.

"The legislative goal of community custody is to protect the public from offenders who have injured or threatened to injure another." In re the Postsentence Review of Manier, 135 Wn. App. 33, 35, 143 P.3d 604 (2006), citing to State v. Barnett, 139 Wn.2d 462, 469, 987 P.2d 626 (1999).

The court in Jones and the majority in Donaghe considered all of the statutory provisions regarding community custody and

harmonized them. The reasoning of those opinions is more reasonable and persuasive than that of the Knippling court, and the State urges this court to adopt the analysis of Jones and Donaghe. Donaghe has been in confinement as an SVP since he completed the incarceration time for these offenses, and has not been in the community at all. He has not completed his community custody.

B. The trial court was correct in denying Donaghe a certificate of discharge.

1. Because at the time Donaghe's crimes were committed the court determined tolling, the court properly made that decision.

The current RCW 9.94A.625 and the former RCW 9.94A.170, which was in effect when Donaghe committed these crimes, are set forth above on pages 7 to 9. The sentencing statutes to be applied are those in effect at the time the crime was committed. See State v. Bader, 125 Wn. App. 501, 503, 105 P.3d 439 (2005); State v. Taylor, 111 Wn. App. 519, 523, 45 P.3d 1112 (2002); In re the Pers. Restraint of Albritton, 143 Wn. App. 584, 591 fn. 4, 180 P.3d 790 (2008).

2. The Department of Corrections has not determined that Donaghe has completed the requirements of his sentence, nor has it notified the court that he has, therefore the court could not issue him a certificate of discharge.

The statute governing discharge upon completion of a 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.

The only documentation that Donaghe has provided is the letter from DOC quoted above on pages 3 and 4. That letter does not say that he completed the requirements of his sentence, only that his DOC supervision was terminated. As the State argued in its response brief in the Court of Appeals, termination does not equal completion. Brief of Respondent 8-10. Nor did DOC provide the required notification to the court. It merely responded to Donaghe's request for information.

Aside from the tolling issue, the court was correct in denying Donaghe a certificate of discharge because DOC did not notify the court that he had completed the requirements of his sentence.

C. The statutes concerning community custody are not ambiguous, and the rule of lenity is not applicable.

“A statute is ambiguous if it is susceptible to two or more reasonable interpretations.” State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998). Courts do not construe unambiguous statutes. State v. Ramirez, 140 Wn. App. 278, 290, 165 P.3d 61 (2007).

The State maintains that Donaghe’s interpretation, like that of the majority in Knippling, is not reasonable. It ignores much of the plain language of the statutes as argued in the first section above. Interestingly, the Knippling court found that “the statute is clear that the term of community custody begins when the offender completes his confinement time.” Knippling, 144 Wn. App. at 643. The court in Donaghe found that “under the plain, unambiguous language of RCW 9.94A.030(7), community placement cannot begin until after the State releases an offender into the community.” Donaghe, 152 Wn. App. at 108. The Jones court said nothing about finding the statutes ambiguous. Donaghe argues that the conflicting interpretations show statutory ambiguity. Petition for Review 11. The State

maintains that is not the case; rather, the Knippling court wrongly applied the statutes. Because there is no ambiguity, the rule of lenity does not apply.

D. Donaghe's continuing disenfranchisement does not render the civil commitment unconstitutional.

Until 2009, without a certificate of discharge a felon's voting rights could not be restored. In 2009 the legislature passed House Bill 1517, which allows for voting rights to be provisionally restored as long as the offender is no longer under the authority of DOC. LAWS OF 2009, chap. 325, § 1. A person subject to community custody is under the authority of DOC. Id. Donaghe argues since the court has decided he is still subject to a term of community custody, he may not be able to regain his right to vote even under this new law. He argues that this makes the civil commitment punitive and thus unconstitutional. Petition for Review 8.

The constitutionality of the civil commitment statutes is not before this court. The State maintains, as it did in the Court of Appeals, that his disenfranchisement results from his criminal conviction, not his civil commitment, and a "side effect" of a criminal conviction has no effect whatsoever on

the SVP commitment. The State urges this court to adopt the reasoning of the majority below. Donaghe, 152 Wn. App. at 112-13.

The dissent in Donaghe believed that because disenfranchisement is punitive the civil commitment is perpetuating a non-treatment condition. It cited to In re Pers. Restraint of Young, 122 Wn.2d 1, 857 P.2d 989 (1993). In that case, however, this court said that while the civil commitment scheme “does involve an affirmative restraint, the civil commitment goals of incapacitation and treatment are distinct from punishment, and have been so regarded historically. . . . [T]he statute is necessary to serve the legitimate and vital purpose of protecting innocent potential victims.” Id., at 21-22. Confinement is punitive when it follows a criminal conviction, and treatment-oriented when it follows an SVP commitment, but it is still confinement. “[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.” Kansas v. Hendricks, 521 U.S. 346, 363, 117 S. Ct. 2027, 138 L. Ed 2d 501 (1997), quoting from United States v. Solerno, 481 U.S. 739, 746, 107 S. Ct.

2095, 95 L. Ed. 2d 697 (1987). Donaghe did not lose his right to vote because he was committed as a sexual predator. The fact that he is still disenfranchised does not “inexorably lead to the conclusion” that the civil commitment procedure is punishing him.

In Madison v. State, 161 Wn.2d 85, 163 P.3d 757 (2007), this court conducted a lengthy analysis of the disenfranchisement and re-enfranchisement statutes and found they passed constitutional muster. That case was decided before the 2009 legislation permitting some felons to regain provisional voting rights. In that opinion, the court said:

“[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.” . . . The State clearly has an interest in ensuring that felons complete all of the terms of their sentence, and there is no requirement that the State restore voting rights until they do so.

Id., at 108, quoting Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

Article VI, section 3, of the Washington Constitution specifically disenfranchises felons. As the court below in this case noted, the State could prohibit convicted felons from ever regaining the right to vote and it would not violate the constitution. Donaghe, 152 Wn. App. at 112, quoting from Madison, 161 Wn.2d at 106.

What is "fair" often looks different from different perspectives. It is not unconstitutionally unfair that Donaghe has never been able to complete community custody and therefore get a certificate of discharge.

V. CONCLUSION.

Division Two has correctly interpreted the applicable SRA statutes at issue in Jones and Donaghe. Division Three, in Knippling, has not. The State respectfully asks this court to affirm the Court of Appeals in Donaghe's case.

Respectfully submitted this 24th day of March, 2010.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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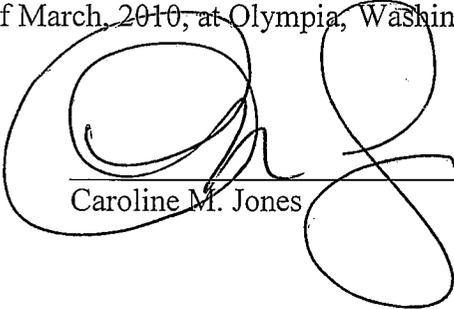
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 24 day of March, 2010, at Olympia, Washington.



Caroline M. Jones