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NO. _____

COA NO. 61629-3-I

83867-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA HARRIS,

Respondent,

v.

HON. EDSONYA CHARLES, DIRECTOR OF KING COUNTY ADULT
DETENTION, and CITY OF SEATTLE,

Appellants.

PETITION FOR REVIEW

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ORIGINAL

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A. DESIGNATION OF PETITIONER

Joshua Harris, respondent in the Court of Appeals and petitioner in the King County Superior Court, petitions for review in this court.

B. DECISION SUBJECT TO REVIEW

Harris seeks review of the published Court of Appeals decision in *Harris v. Charles, et al.*, ___ *Wn.App.* ___, COA NO. 61629-3-I (Slip Opinion filed August 31, 2009).

C. ISSUES PRESENTED FOR REVIEW

1. Where the superior court granted Harris' writ of habeas corpus, was the City's appeal of that judgment moot when the Seattle Municipal Court implemented the order to credit 140 days of electronic home detention against his 90 day sentence before the City appealed the order, the City did not obtain a stay of the order and acquiesced in the execution of the judgment? Does double jeopardy and due process preclude a court from re-sentencing Harris when he has completed the original sentence?

2. Was Harris entitled to credit for 140 days served on pre-trial electronic home detention against his 90 day sentence for DWLS Third

Degree, a simple misdemeanor with a maximum sentence of 90 days in jail?

Do equal protection, double jeopardy or due process require credit for pretrial electronic home detention?

D. STATEMENT OF THE CASE

On March 7, 2008, Seattle Municipal Court Judge Edsonya Charles sentenced Harris to 90 days in jail for DWLS 3rd degree¹ consecutive to a 90 day suspended sentence for driving without an ignition interlock device. CP 13. The judge refused to credit Harris credit with the 140 days he served pre-adjudication on electronic home detention. CP 14². Harris was ordered to report to jail on April 9. Harris filed a writ of habeas corpus on March 31, 2008. His petition alleged the denial of credit for time served on electronic home detention violated his right to equal protection of the law. CP 5-7.

The writ was heard on April 4. The superior court granted the writ on April 7 and ordered the Seattle Municipal Court to credit Harris the electronic

¹90 days is the statutory maximum jail term for this crime. SMC 11.56.320(D); SMC 12A.02.070.

²Electronic home detention was imposed in addition to \$5,000 bail, which Harris posted. He was not released until the home detention was arranged. CP 11-13. The electronic home detention device included a breathalyzer. CP 2, 11.

home detention against his 90-day jail term. CP 38-39. The City did not seek a stay of the superior court order. On April 8, 2008, Judge Charles complied with the order and credited Harris with 90 days time served. Appendix 1 to Respondent's Brief. Consequently, Harris' jail sentence was completed. The City filed a notice of appeal from the superior court's order on May 5, 2008.

E. AUTHORITY AND ARGUMENT

1. Why review should be granted

This case meets the criteria for review in RAP 13.4(b)(1), (3) and (4). The court should granted review because the Court of Appeals decision conflicts with *State v. Anderson*, 132 Wn.2d 203, 213, 937 P.2d 581 (1997) and *State v. Hardesty*, 129 Wn.2d 303, 310, 915 P.2d 1080 (1996); presents significant constitutional questions; and involves issues of substantial public interest that should be addressed by this court.

The use of pretrial electronic home detention or monitoring (EHM or EHD) has grown significantly over the last few years as an alternative to pretrial incarceration in the state's increasingly over crowded jails.

Generally, the accused pays for the use of this alternative, so there is an incentive to resolve the case quickly, particularly where the defendant is indigent. In Seattle Municipal Court, it has been common practice for judges to give credit for the time spent on pretrial electronic detention. Judge Charles' denial of credit for the time Harris served on pretrial EHD was a departure from this practice and from the law. The Court of Appeals ruling is the first published decision to address the issues presented here and conflicts with this court's precedent. Harris urges this court to accept review and to do so in an expeditious manner.

2. The City's appeal should have been dismissed.

This court should accept review and reverse the Court of Appeals decision permitting Harris is be remanded into custody to serve an additional 90 days. The City's appeal is moot as re-sentencing would constitute double jeopardy under the facts of this case. State v. Veazie, 123 Wash.App. 392, 397-98, 98 P.3d 100 (2004). A question is moot when the court cannot grant relief. State v. Turner, 98 Wash.2d 731, 733, 658 P.2d 658 (1983). The City is not entitled to the relief obtained: to take away the credit for the time

Harris served on electronic home monitoring, re-sentence him to 90 days in jail and remand him into custody. Re-imposition of the 90 day jail term violates the constitutional prohibition against double jeopardy.

The constitutional prohibition against multiple punishments may prevent the government from re-sentencing a defendant.³ State v. Hardesty, 129 Wn.2d 303, 310, 915 P.2d 1080 (1996). Double jeopardy and due process protect a defendant's legitimate expectation of finality in the original sentence. Hardesty, 129 Wn.2d at 312, citing DeWitt v. Ventetoulo, 6 F.3d 32 (1st Cir. 1993), cert. denied, 114 S.Ct. 1542 (1994).

[T]he defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, *unless the defendant is on notice the sentence might be modified due to either a pending appeal or the defendant's own fraud in obtaining the erroneous sentence.*

.....
What matters for purposes of double jeopardy is not the *legality or illegality of the sentence* under the sentencing statute, but the defendant's expectation of finality.

(emphasis added) Hardesty, 129 Wn.2d at 312-13, 315. A defendant's expectation of finality is determined in each case by examining a number of

³Washington's state double jeopardy clause is interpreted in the same manner as the federal provision. Hardesty, 129 Wn.2d at 310, note 2.

factors such as the completion of the sentence, the passage of time, the pendency of appeal or review, or the defendant's misconduct. *Id.* at 311. *See also State v. Traicoff*, 93 Wn.App. 248, 256, 967 P.2d 1277 (1998) (no reasonable expectation of finality in portion of sentence –community placement– Traicoff had not yet begun to serve); *State v. H.J.*, 111 Wn.App. 298, 304-05, 44 P.3d 874 (2002) (no expectation in finality where juvenile had served only one month of 24 month period of supervision).

The Court of Appeals decision conflicts with *Hardesty*, because the court looked at only one of the factors relating to the expectation of finality –whether an appeal was available. In this case, that factor is neither relevant nor dispositive.

The superior court granted Harris' writ of habeas corpus on April 7, 2008. The City did not seek a stay of the order.⁴ The next day, the municipal court held a hearing to implement the order. The City was represented by the same Assistant City Attorney who litigated the writ. The

⁴Had the City done so, Harris would have sought a stay of his report date. The status quo could have been maintained pending the City's appeal.

municipal court complied with the superior court's order. The judge gave Harris credit for 140 days of electronic home detention against his 90 day sentence, and struck the jail report date. At this point, Harris had completed his sentence. Only then did the City appeal the superior court's order granting the writ.

Generally, double jeopardy is not implicated where the government files a timely appeal from an allegedly lenient sentence. State v. Freitag, 127 Wash.2d 141, 145, 896 P.2d 1254 (1995). In *Freitag*, "[t]he State immediately appealed the trial court's erroneous sentence putting Freitag on notice that her sentence was not final." Id. But in the case at bar, the City's subsequent appeal does not prevent Harris' legitimate expectation in the finality of his sentence for three reasons.

First and foremost, Harris completed his sentence. On April 7, 2008, the municipal court credited him with the time he served on electronic home monitoring. Harris' obligation to the court was satisfied. His 90-day jail term was completed. He legitimately expected his sentence was final.

Second, the City took no action to prevent the superior court's order

from being implemented by the municipal court. The City did not seek a stay of the order pending a subsequent appeal. Rather, the City stood by as the sentencing judge executed the superior court's judgment and credited Harris with sufficient time to satisfy his entire jail sentence. At that point, Harris had no expectation that the City would seek to undo what had been completed. While the City has a statutory right to appeal the superior court's judgment as a final order pursuant to RAP 2.2(a)(1), the City filed the appeal only after the superior court judgment had been executed. The City's appeal from the writ – absent any effort to prevent the implementation of the superior court's order and in light of the acquiescence to the execution of that judgment– comes too late to divest Harris of his legitimate expectation of finality in his completed sentence.

Third, *Freitag* and similar cases are inapplicable because the sentencing scheme and related court rules at issue there expressly authorized the prosecution to appeal a sentence. *Id.* See also RCW 9.94A.585(2); RAP 2.2(b)(6); State v. Pascal, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987). In contrast, the prosecution has no right to appeal sentences imposed by courts

of limited jurisdiction.

The government may not appeal in a criminal case unless specifically authorized by court rule or statute. State v. AMR, 147 Wn.2d 91, 95, 51 P.3d 790 (2002); State v. Smith, 117 Wn.2d 263, 270, 814 P.2d 652 (1991).

Prudential concerns, and the humanity of the law require legislators to speak in a clear voice when giving the government the right to appeal a criminal case.

(Citations omitted.) AMR, 147 Wn.2d at 95. The government's ability to appeal, when granted, is strictly construed. State v. Rock, 9 Wn.App. 826, 829, 515 P.2d 830 (1973), rev. denied, 83 Wn.2d 1007 (1974). There is no statute, court rule or case that grants "in a clear voice" the government the right to appeal sentences imposed by courts of limited jurisdiction. Unlike RAP 2.2, RALJ 2.2 does not authorize the government to appeal a criminal sentence. While the RALJ generally allow an "aggrieved party" to appeal a "final decision," the same rule then specifically restricts the government's right to appeal in criminal cases. RALJ 2.1(a); RALJ 2.2(a) and (c). RALJ 2.2(c) permits the prosecution to appeal in criminal cases "only" in the types of decisions listed. RALJ 2.2(c)(1)-(4). The list is exclusive and does not

authorize the government to appeal any sentences.

In support of its contrary holding, the Court of Appeals looked at only one of the *Hardesty* factors, whether the time for appellate review had expired. Slip Opinion at 6, citing U.S. v. Rico, 902 F.2d 1065, 1068 (2d Cir. 1990). *Rico* is clearly distinguishable. In that case, as in *Hardesty*, the government was entitled to appeal the sentence. Also, the sentence imposed in *Rico* was the result of a clear mistake that the government immediately sought to correct. The defendant was not entitled to more than the benefit of her plea bargain.

3. Equal protection, double jeopardy and due process require that Harris receive credit for the 140 days he served on pre-trial electronic home detention against the 90-day statutory maximum sentence.

The superior court properly granted the writ of habeas corpus, ruling that Harris was entitled to the same credit for pre-trial electronic home detention as provided to most felons. CP 38-39. This court can affirm the superior court on this basis and any other reason supported by the law and the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.3d 610 (2000); State v.

Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

Credit for time spent in detention prior to trial, conviction and sentencing against statutory maximum jail terms is guaranteed by due process, equal protection of the law and the prohibition against multiple punishments. Reanier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949, 953 (1974). Double jeopardy guarantees the offender will not serve more time in confinement than is provided by law. Reanier, 83 Wn.2d at 347 note 4.

"Pre-trial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty." Reanier, 83 Wn.2d at 349. This analysis is not limited to indigent persons who cannot post bail. "Whether the pretrial confinement be occasioned by the inability to post bail or the individual's inability to 'otherwise procur(e) his release from confinement prior to trial', *Reanier* requires that credit for time served be granted against the individual's maximum sentence." In re petition of Phelan, 97 Wash.2d 590, 594, 647 P.2d 1026 (1982) (Phelan I) Washington courts adopted the double jeopardy analysis from *North Carolina v. Pearce*. "[T]he constitutional guarantee against multiple punishments for

the same offense absolutely requires that *punishment already exacted* must be fully 'credited' in imposing sentence upon a new conviction for the same offense." (Emphasis added.) State v. Phelan, 100 Wash.2d 508, 671 P.2d 1212 (1983) (Phelan II), citing North Carolina v. Pearce, 395 U.S. 711, 718-19, 89 S.Ct. 2072, 2077, 23 L.Ed.2d 656 (1969). Prior detention must be credited to any sentence imposed. Id. This is particularly true when the statutory maximum punishment has been imposed and served.

The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction.... Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.

Pearce, 395 U.S. at 718, *quoted in Phelan*, 100 Wn.2d at 515. "This language mandates credit not only against maximum and mandatory minimum terms but against discretionary minimum terms as well." Phelan, 100 Wn.2d at 515, *citing also State v. Shannon*, 60 Wash.2d 883, 890-91, 376 P.2d 646 (1962).

The Court of Appeals asserted that Harris had not established that electronic home detention when used as a condition of pretrial release "was

intended to be punishment or that the effect is so punitive that it amounts to a criminal penalty.” Slip Opinion at 13, 12-13, citing In re PRP of Metcalf, 92 Wn.App. 165, 178, 963 P.2d 911 (1998) (absent an express legislative directive that an action is intended to be punishment, courts must determine whether the purpose or effect is so punitive as to amount to a criminal penalty). While EHD does not involve some of “the hardships of staying in jail,” it is still house arrest. Harris’ movements and ability to leave his home were controlled and he was subjected to breath tests to determine whether he used alcohol. This is certainly punitive in its purpose and effect.

Phelan II rejected the court’s position that pre-trial conditions of release or detention are not necessarily intended to be punitive.

It was multiple punishment, not multiple rehabilitation, which concerned the court in *Pearce*. Similarly, *while presentence incarceration may not technically be considered punishment*, we doubt that a convicted defendant makes any distinction. Accord, *Schorhorst, Presentence Confinement and the Constitution: The Burial of Dead Time*, 23 *Hastings L.J.* 1041, 1067-69 (1972).

(Emphasis added.) Phelan, 100 Wn.2d at 515. In Washington, it is established that an offender must get credit against a sentence for all time

spent in jail, but no credit is guaranteed for merely being subject to the usual probation conditions. State v. Hultman, 92 Wash.2d 736, 600 P.2d 1291 (1979); In re Phelan, 97 Wash.2d 590, 647 P.2d 1026 (1982) (Phelan I). *See also* State v. Vasquez, 75 Wn.App. 896, 881 P.2d 1058 (1994) (no constitutional arguments made in unsuccessful attempt to obtain credit against jail sentence where defendant was released to his home, ordered to be there when not at work and subject only to occasional visits from the police).

Under any definition, EHD qualifies as detention and punishment.

Our statutes require that persons charged and convicted of felonies get credit for time served on pretrial and post-conviction electronic home detention. RCW 9.94A.505(6); RCW 9.94A.030(11), (30). Furthermore, credit for time served on pretrial and post-conviction electronic surveillance is given to certain defendants convicted of DUI. SMC 11.56.025; RCW 46.61.5055.

While the court below denied Harris' claim, that same court recently held electronic home detention falls within the statutory definition of "imprisonment" for purposes of misdemeanor sentencing. State v. Anderson, 212 P.3d 591 (August 3, 2009) (the term "imprisonment" used to describe the

minimum mandatory sentences for DWLS First Degree includes electronic home detention). As the court itself noted, the Legislature recognizes and intends electronic monitoring to be “a proper and cost-effective method of punishment and supervision” for community custody violators. Slip Opinion at 10, note 4.

Harris was sentenced to the statutory maximum of 90 days for a DWLS 3rd degree charge. He was required to post \$5,000 bail in addition to the electronic detention to secure his release from total confinement. EHD was used not only to control his movement, but was also used to monitor his use of alcohol. He completed 140 days of pretrial electronic home detention and was initially not given any credit for time served. Under the original sentence, not only did Mr. Harris not get credit for any time served on electronic home detention, but he also served 50 days more than necessary. This is “dead time,” not credited towards any jail sentence.

Equal protection requires Harris be given credit for time served for pre-trial electronic home detention on his sentence. State v. Anderson, 132 Wn.2d 203, 213, 937 P.2d 581 (1997). Where the law permits credit for

pretrial electronic surveillance, then equal protection requires that credit be given for post-trial home detention. The Supreme Court of Washington held in *Anderson* that, "the equal protection clause requires defendants under post-trial electronic home monitoring to likewise receive credit for time served." Anderson, 132 Wn.2d at 213, 937 P.2d 581.

While the status of each group may be different in terms of their presumption of innocence, the condition of each group-being subject to electronic home detention-is identical. Additionally, the reasons for placing a defendant from either group under electronic detention are indistinguishable. Since the Legislature has chosen to grant jail time credit to those who serve pretrial electronic home detention... equal protection requires the same credit to be granted to those who serve electronic home detention after their conviction and pending their appeal." Id.⁵

The Court of Appeals rejected this court's authority in *Anderson* simply because Harris was convicted of a simple misdemeanor that is punishable by only 90 days in jail. In such circumstances, *Anderson* has greater, not lesser, application.

⁵Clearly, if a defendant convicted of a DUI can be given time served for electronic home surveillance, then a defendant who is charged with a simple misdemeanor should be afforded the same right. Where the applicable law does not require a term of imprisonment in jail, a person serving a DUI sentence is eligible to receive credit for electronic home detention. City of Bremerton v. Bradshaw, 121 Wn.App. 410, 88 P.3d 438 (2004).

There is no rational reason to distinguish between confinement on post-conviction electronic home detention for a felony charge and confinement on pre-trial home detention for a simple misdemeanor charge. If the Supreme Court of Washington makes no distinction between defendants who are constitutionally presumed innocent while serving time on electronic home detention prior to trial and defendants who have been convicted of a crime pending appeal, then certainly the equal protection clause tolerates no distinction between such persons on home surveillance for a felony charge and pretrial defendants on electronic home detention for a misdemeanor charge. All defendants should be given credit for time served on pretrial home monitoring unless prohibited by statute.

The Court of Appeals held that misdemeanants and felons are not similarly situated with respect to sentencing because felons generally have a "significant amount of confinement left to serve." Slip Opinion at 9, 8-11. This is not a meaningful distinction. Most person convicted in courts of limited jurisdiction are charged with gross misdemeanors, leaving a substantial portion of the sentences left to serve if convicted. As the court

pointed out, there are a number of felony offenses with low standard range sentences comparable to misdemeanor sentences. Slip Opinion at 9, note 3. While such felonies “may be viewed by the legislature as having less impact on public safety than some misdemeanors,” there are many misdemeanor offenses that have even less impact on community safety than most felonies. Also, the court’s holding inexplicably ignores the fact electronic home detention is a significant deprivation of liberty the Legislature classifies as both punishment and imprisonment. See Slip Opinion at 10, note 4; State v. Anderson, 212 P.3d 591 (August 3, 2009). Finally, the court’s rationale undermines the holdings in *Reanier* and *Phelan (I and II)*, as persons held in jail pending the resolution of their misdemeanor case will also eat away at the time available for post-conviction punishment. Similarly, the Court of Appeals’ citation to an 8th Amendment case does not support its claim that felons and misdemeanants are not similarly situated vis-a-vis pretrial electronic home detention. Wahleithner v. Thompson, 134 Wn.App. 931, 941, 143 P.3d 321 (2006).

In support of its holding, the Court of Appeals relied in part upon,

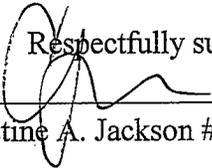
State v. Bowen. *Bowen* supports Harris' position.

Bowen held that misdemeanants were not entitled to equal protection of SRA standard range sentences imposed for the felony that corresponded to a particular misdemeanor. State v. Bowen, 51 Wn.app. 42, 45-47, 751 P.2d 1226 (1988). But presumptive SRA sentences are not guaranteed; the determinative sentencing scheme still requires judges to exercise discretion in choosing the sentence. "While the SRA structures the discretion to sentence, it does not eliminate it. RCW 9.94A.010. The court has discretion to impose a sentence outside the presumptive range 'if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence'. RCW 9.94A.120(2). Thus, since discretion may still be exercised, the felon is not guaranteed a sentence within the presumptive range." Bowen, 51 Wn.App. at 46.

But neither state law nor the constitution delegates to the judges' discretion the decision to grant or deny felons credit for time served on pre- or post-trial electronic home monitoring. Also, electronic home detention bears a greater relationship to the rehabilitative goals of misdemeanor

sentencing, than it does to the primary goal under the SRA, punishment. Electronic home detention with breathalyzer will assist the court's efforts to rehabilitate the offender by restricting access to high crime areas and deter the use of alcohol that may induce objectionable or criminal behavior. These retributive and deterrent purposes are evidence of a criminal penalty. *See Metcalf*, 92 Wn.App. at 178.

Also, misdemeanants and felons are similarly situated for purposes of imposing electronic home detention as a condition of pretrial release. The court rules governing pretrial conditions of release are the same for both groups. CrRLJ 3.2; CrR 3.2. The same constitutional limitations also apply. *Butler v. Kato*, 137 Wn.App. 515, 521, 154 P.3d 259 (2007); *State v. Rose*, 146 Wash.App. 439, 191 P.3d 83 (2008). The court below was concerned that giving credit for pretrial EHD might "influence the court's decision . . . to grant pretrial release." Slip Opinion at 9. The factors governing that decision are listed in the rules; the length of the potential jail sentence is not one of them. Respectfully submitted this 24th day of September, 2009,


Christine A. Jackson #17192, Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JOSHUA HARRIS,)	NO. 61629-3-I
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
HONORABLE EDSONYA CHARLES,)	
Director of King County Adult Detention)	
and CITY OF SEATTLE,)	
)	
Petitioners.)	FILED: August 31, 2009

BECKER, J. — A statute entitles felons detained before trial on electronic home monitoring to be credited for the time served. No statute entitles misdemeanants to the same credit. In view of the differences between felony and misdemeanor sentencing, we hold this distinction is rational and does not violate the Equal Protection Clause.

FACTS

Respondent Joshua Harris was charged in Seattle Municipal Court with one count of Driving While License Suspended in the third degree (DWLS Third) and one count of operating a vehicle without an ignition interlock device. He posted bail of \$5,000 and began electronic home monitoring on October 22, 2007, as a condition of pretrial release. On January 7, 2008, Harris pleaded guilty to both charges.

On March 7, 2008, the court sentenced Harris to 90 days in jail on the first count, consecutive to a 90-day suspended sentence on the second count. He had served 140 days on electronic home monitoring and asked to be credited for that time. The municipal court denied his request.

Harris was to report to jail on April 9. On March 31, he filed a petition in superior court for a writ of habeas corpus, asking on equal protection grounds that the municipal court be ordered to give him credit for his time on electronic home monitoring, as is required by a statute when sentencing felons. Over the City's objection that felons and misdemeanants are not similarly situated, the superior court granted the writ: "I find that the rule albeit for felonies shall apply here." The municipal court complied with the writ by giving Harris 90 days of credit against his 90-day sentence on the charge of DWLS Third.

The City appeals the superior court's order granting the writ.

HABEAS CORPUS—WHAT CONSTITUTES RESTRAINT

The City initially argues that the superior court should not have granted Harris relief in a habeas corpus proceeding because he was not physically restrained when he petitioned for a writ. He had been sentenced, but he had not yet reported to the jail. The City contends that a person may not employ the habeas corpus statute to challenge a sentence he has not yet begun to serve.

RCW 7.36.010 provides: “Every person restrained of his liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.” The petition must specify by “whom the petitioner is restrained of his liberty, and the place where.” RCW 7.36.030(1). If the petitioner shows that his restraint is illegal, the court must discharge him. RCW 7.36.120.

In support of the proposition that restraint must be physical, the City relies on an old case, In Re Powell, 191 Wash. 152, 153, 70 P.2d 778 (1937). Modern cases demonstrate that, contrary to the City’s argument, being under physical restraint is not a prerequisite for obtaining habeas relief, nor is it necessary that the authority to whom the writ is issued be in a position to physically deliver the petitioner from a place of confinement to the court. Monohan v. Burdman, 84 Wn.2d 922, 925, 530 P.2d 334 (1975); Born v. Thompson, 154 Wn.2d 749, 766, 117 P.3d 1098 (2005). In Born, the court considered older cases holding that a

writ should not issue if it will not have an effect on the petitioner's custodial status, but found that such cases "do not state the present function of the writ of habeas corpus." Born, 154 Wn.2d at 766. Release from confinement is no longer the sole function of the writ.

A petitioner is under restraint when he is subject to significant adverse consequences. Born, 154 Wn.2d at 763. Born challenged a trial court's finding that he was charged with a violent act. As a consequence of the trial court's finding, if Born were to be charged with a misdemeanor in the future and then found to be incompetent, a statute would require that he be committed for competency restoration. The Supreme Court concluded that the potential adverse consequences of the finding were sufficiently significant to conclude that Born was under present restraint. Born, 154 Wn.2d at 764. Harris' sentence of 90 days in jail for DWLS Third was a certainty, not a mere possibility. He was sufficiently restrained to seek relief under the habeas statute.

EXPECTATION OF FINALITY

By challenging the superior court's order in this appeal, the City seeks to take away the 90 days of credit Harris received for time served on electronic home monitoring. Harris argues that the City's appeal should be dismissed as moot because re-imposing the 90-day jail term would violate the constitutional prohibition against double jeopardy. An appeal is moot if the court cannot grant

relief. State v. Veazie, 123 Wn. App. 392, 397, 98 P.3d 100 (2004); State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

The double jeopardy clause of the Fifth Amendment to the United States Constitution prohibits a second attempt by the State to increase a sentence if, despite an erroneous sentence, the defendant had a legitimate expectation of its finality. State v. Hardesty, 129 Wn.2d 303, 310-11, 915 P.2d 1080 (1996). A defendant may acquire a legitimate expectation of finality in an erroneous sentence if the sentence has been substantially or fully served, unless the defendant was on notice that the sentence might be modified. Hardesty, 129 Wn.2d at 312.

Harris argues that he had a legitimate expectation of finality because, once the municipal court complied with the writ and gave him credit for 90 days on electronic home monitoring, he had completed his sentence. He points out that 90 days is the maximum amount of jail time the court can impose for third degree driving with a suspended license.

While the federal cases cited in Hardesty hold that completion of a sentence ordinarily gives rise to a legitimate expectation of finality, they also indicate that there is no finality until the time for review has expired. See, e.g., United States v. Rico, 902 F.2d 1065, 1068 (2d Cir. 1990), cited in Hardesty, 129

Wn.2d at 312. "So long as a sentence can be increased on appeal, defendant has no expectation of its finality." Rico, 902 F.2d at 1068.

The City filed a timely appeal. We conclude Harris did not have a legitimate expectation of finality, and re-imposing the original sentence will not violate double jeopardy. The City's appeal is not moot.

EQUAL PROTECTION

The City's main contention on appeal is that Harris was not entitled to the writ of habeas corpus because there was no violation of his constitutional rights. See RCW 7.36.130(1). This court reviews writ actions of the superior court de novo. Butler v. Kato, 137 Wn. App. 515, 521, 154 P.3d 259 (2007).

The equal protection clauses of the state and federal constitutions guarantee that persons situated similarly with respect to the legitimate purpose of the law must receive like treatment. State v. Manussier, 129 Wn.2d 652, 672, 672 P.2d 473 (1996). Equal protection is denied if a valid law is administered in a way that unjustly discriminates between similarly situated persons. State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). Before a court will scrutinize an equal protection claim, the defendant must establish that he is situated similarly to others in a class. Handley, 115 Wn.2d at 289-90.

Harris contends that, as a person who served time on electronic home monitoring before being sentenced, he is in the same class with felons who

under the Sentencing Reform Act must be credited for all “confinement” before sentencing if the confinement is served solely in regard to the offense for which the offender is being sentenced. Former RCW 9.94A.505(6) (2009).¹ The Sentencing Reform Act defines “confinement” as including “partial confinement,” and “home detention” is defined as a form of “partial confinement.” Former RCW 9.94A.030(11), (30), and (35) (2008).²

Harris argues that he is situated similarly to felons because no statute prohibits misdemeanants from being credited for time spent on electronic home monitoring. According to Harris, the legislature must afford the same treatment to all defendants who are subjected to electronic home monitoring as a condition of pretrial release.

We apply the “rational basis” test for analyzing an equal protection claim when, as here, a classification does not involve a suspect or semi-suspect class and does not threaten a fundamental right. Manussier, 129 Wn.2d at 673. Under that test, a law will be upheld if it rests upon a legitimate state objective and is not wholly irrelevant to achieving that objective. Manussier, 129 Wn.2d at 673. The person challenging the classification must show that it is “purely arbitrary.” Omega Nat’l Ins. Co. v. Marquardt, 115 Wn.2d 416, 431, 799 P.2d

¹ The 2009 amendments to RCW 9.94A.505 did not affect § 6.

² Amendments to RCW 9.94A.030, which became effective August 1, 2009, changed the numbering but not the relevant content of the definitions.

235 (1990). According to Harris, there is no rational basis for the legislature to require that credit for time served on electronic home monitoring be given to felons but not misdemeanants.

This argument fails. The sentencing systems for felonies and misdemeanors are significantly different. See Wahleithner v. Thompson, 134 Wn. App. 931, 941, 143 P.3d 321 (2006) (comparing misdemeanor and felony sentences was of limited utility in determining whether misdemeanor sentences constituted cruel and unusual punishment). Pertinent to this case, one significant difference is that felons typically face much higher maximum penalties. State v. Bowen, 51 Wn. App. 42, 46-47, 751 P.2d 1226 (1988). A felon may be sentenced to a life sentence without parole, or even death. RCW 9.94A.510. In contrast, the maximum punishment for a person convicted of a misdemeanor is 90 days in the county jail, a fine of one thousand dollars, or both. RCW 9.92.030; RCW 9A.20.021(3). In general, the maximum punishment for a person convicted of a gross misdemeanor is a year in the county jail, a fine of five thousand dollars, or both. RCW 9.92.020; RCW 9A.20.021(2); RCW 3.50.440.

Typically, a felon who receives credit for time served on electronic home monitoring will still have a significant amount of confinement left to serve. See

RCW 9.94A.510 (sentencing grid).³ The same is much less likely to be true in misdemeanor sentencing. If the court were required to credit the sentence ultimately imposed upon a misdemeanor defendant with time served on electronic home monitoring as a condition of pretrial release, a defendant like Harris who serves more than 90 days could avoid serving any jail time. The potential for this outcome could influence the court's decision whether or not to grant pretrial release to a defendant like Harris who has a history of criminal convictions for driving under the influence. Rather than lose the option of ensuring that jail time is included in the sentence for such a defendant, the court might well decide to hold him in jail pending trial. But if giving credit for time served on electronic home monitoring remains discretionary with the court, the court need not hesitate to use this relatively secure and economical form of

³ We recognize there is a small group of felony crimes for which the expected length of sentence is comparable to a misdemeanor sentence. See RCW 9.94A.515 (seriousness level I and II felonies include crimes less threatening to public safety, such as false verification for welfare, unlawful issuance of checks, unlicensed practice of a profession or business, and computer trespass). However, such felonies may rationally be viewed by the legislature as having less impact on public safety than some misdemeanors and, therefore, as not requiring that the sentencing court retain the option of denying credit for pretrial detention time served in partial confinement such as electronic home monitoring.

pretrial release.⁴ Considering the differences between felony and misdemeanor sentencing, it is not arbitrary to limit the court's discretion in one system and leave it unrestricted in the other.

This court reached the same result in Bremerton v. Bradshaw, 121 Wn. App. 410, 88 P.3d 438 (2004). And our decision is not inconsistent with State v. Anderson, 132 Wn.2d 203, 937 P.2d 681 (1997), the case upon which Harris principally relies. In Anderson, the defendant was convicted of a felony and was released on electronic home monitoring pending appeal. On equal protection grounds, he argued that he was entitled to be credited for time served post-trial on electronic home monitoring. In view of the statutory provision that allows such credit to felons for electronic home monitoring served pretrial, the court agreed. Anderson, 132 Wn.2d at 213. Unlike Anderson, Harris is a misdemeanant. We hold there is a rational basis for treating misdemeanants differently from felons in this context. The misdemeanor courts retain discretion to give credit for time served pretrial on electronic home monitoring, but they are not obliged to do so.

⁴ The legislature acknowledged the utility of electronic home monitoring in 2005 when it amended RCW 9.94A.737, which relates to community custody violations. See Laws of 2005, ch. 435, § 1 ("The legislature believes that electronic monitoring, as an alternative to incarceration, is a proper and cost-effective method of punishment and supervision for many criminal offenders. The legislature further finds that advancements in electronic monitoring technology have made the technology more common and acceptable to criminal justice system personnel, policymakers, and the general public.")

Harris argues that due process, as well as equal protection, entitles him to credit for time served on electronic home monitoring, but that argument fails for the same reason; the decision of the district court was not arbitrary or unfair. See State v. Handley, 115 Wn.2d 275, 290 n.4, 796 P.2d 1266 (1990).

DOUBLE JEOPARDY

Finally, Harris argues that to deny credit for pretrial electronic home monitoring is a violation of the constitutional prohibition against double jeopardy. The issue here is whether electronic home monitoring is enough like jail to be considered a form of punishment.

The constitutional protection against multiple punishments for the same offense, along with the rights to equal protection and due process, guarantees that an offender will receive credit against his maximum sentence for time served in pretrial detention. Reanier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949 (1974); In Re Phelan, 97 Wn.2d 590, 594, 647 P.2d 1026 (1982). But credit is not constitutionally mandated for probation time served outside jail. Phelan, 97 Wn.2d at 598. No case has held that electronic home monitoring is a form of detention or punishment that triggers the constitutional mandate for credit. On the contrary, this court held that home detention is more analogous to probation time than to jail time and, as a result, the constitution does not require that it be credited against the sentence ultimately imposed. State v. Speaks, 63 Wn. App.

5, 7-8, 816 P.2d 95 (1991), rev'd on other grounds, State v. Speaks, 119 Wn.2d 204, 829 P.2d 1096 (1992). Recognizing that the Sentencing Reform Act expressly makes electronic home monitoring a form of confinement that must be credited, the Supreme Court reversed the Court of Appeals decision in Speaks on statutory grounds. But the Supreme Court acknowledged the likelihood that this court was correct in concluding that such credit is not constitutionally mandated. Speaks, 119 Wn.2d at 207.

The double jeopardy clauses protect against multiple punishments for the same offense. State v. McClendon, 131 Wn.2d 853, 862, 935 P.2d 1334 (1997). To determine whether an action is punishment, we look to legislative intent. In re Pers. Restraint of Metcalf, 92 Wn. App. 165, 178, 963 P.2d 911 (1998). If there is no explicit or implicit indication that an action was intended to be punishment, we consider whether its purpose or effect nevertheless is so punitive that it amounts to a criminal penalty. Metcalf, 92 Wn. App. at 178.

The court rules governing pretrial release, promulgated by the Supreme Court, identify electronic home monitoring as a permissible condition that may be imposed when a court determines that an accused is not likely to appear for trial if released on personal recognizance and there is no less restrictive alternative. CrR3.2(b)(6); CrRLJ 3.2(b)(6). Harris has not provided analysis or evidence showing that electronic home monitoring, when used as contemplated by these

rules, was intended to be punishment or that the effect is so punitive that it amounts to a criminal penalty. While electronic home monitoring is not complete freedom, it is certainly free of many of the hardships of staying in jail while awaiting trial.

Harris fails to establish that he was constitutionally entitled to have his 90-day sentence for DWLS Third credited for the time he served on electronic home monitoring. The superior court erred in granting the writ. On remand, the municipal court in its discretion may reimpose the 90-day sentence.

Reversed.

WE CONCUR:

Dwyer, A.C.J.

Becker, J.

Azid, J.