

67757-8

67757-8

REC'D

MAY 23 2012

King County Prosecutor  
Appellate Unit

67757-8

NO. ~~67757-8~~

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

---

STATE OF WASHINGTON,

Respondent,

v.

MARIO MEDINA,

Appellant.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

---

---

BRIEF OF APPELLANT

---

---

CYNTHIA B. JONES  
CHRISTOPHER H. GIBSON  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

FILED  
COURT OF APPEALS DIV 1  
SEATTLE, WASHINGTON  
2012 MAY 23 PM 4:19

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issue Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Introduction</u> .....	2
2. <u>Procedural Facts</u> .....	3
3. <u>Substantive Facts</u> .....	5
C. <u>ARGUMENT</u> .....	9
1. IT WAS REVERSIBLE ERROR TO ALLOW THE STATE TO AMEND THE INFORMATION FIVE YEARS AFTER MEDINA HAD BEEN ARRAIGNED ON A LESSER CHARGE.....	9
2. MEDINA IS ENTITLED TO CREDIT FOR TIME SERVED IN CCAP.....	13
a. <u>Medina Is Entitled to Credit for Time Served in CCAP Because It Constitutes Confinement Under RCW 9.94A.505(6)</u> .....	15
b. <u>If This Court Concludes the SRA Is Ambiguous as to Whether Time Served on CCAP Should Be Credited, the Rule of Lenity Requires Interpreting the Ambiguity in Medina’s Favor</u> .....	18
c. <u>The Court’s Failure to Order Credit for Time Served in CCAP Violates Equal Protection</u> .....	19
d. <u>The Court’s Failure to Order Credit for Time Served in CCAP Violates Double Jeopardy</u> .....	20
D. <u>CONCLUSION</u> .....	22

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Costello</u> 131 Wn. App. 828, 129 P.3d 827 (2006).....	13
<u>In re Pers. Restraint of Hopkins</u> 137 Wn.2d 897, 976 P. 2d 616 (1999).....	18
<u>In re Personal Restraint of Andress</u> 147 Wn.2d 602, 56 P.3d 981 (2002).....	3
<u>State v. Anderson</u> 132 Wn.2d 203, 937 P.2d 581 (1997).....	17, 19
<u>State v. Gocken</u> 127 Wn.2d 95, 896 P.2d 1267 (1995).....	20
<u>State v. Jacobs</u> 154 Wn.2d 596, 115 P.3d 281 (2005).....	18
<u>State v. Kjorsvik</u> 117 Wn.2d 93, 812 P.2d 86 (1991).....	9
<u>State v. Ramos</u> 124 Wn. App 334, 101 P.3d 872 (2004).....	3
<u>State v. Ramos</u> 163 Wn.2d 654, 184 P.3d 1256 (2008).....	4
<u>State v. Swiger</u> 159 Wn.2d 224, 149 P.3d 372 (2006).....	13, 19
<u>State v. Van Woerden</u> 93 Wn. App. 110, 967 P.2d 14 (1998).....	18
<u>State v. Womac</u> 160 Wn.2d 643, 160 P.3d 40 (2007).....	20

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Ziegler</u> 138 Wn. App 804, 158 P.3d 647 (2007).....	10
 <u>FEDERAL CASES</u>	
<u>North Carolina v. Pearce</u> 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....	21
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 2.1 .....	1, 9, 10, 13
Former RCW 9.94A.310.....	12
Former RCW 9.94A.320.....	12
Former RCW 9A.32.060.....	12
King County Code §§ 2.16.120 .....	15
King County Code §§ 2.16.122 .....	15
King County Code §§ 5.12.010 .....	15, 16
Laws 1997, ch. 365, § 3 .....	12
Laws of 1997, ch. 365, § 4.....	12
Laws of 1997, ch. 365, § 5.....	12
RCW 9.94A.030 .....	13, 16, 17
RCW 9.94A.505 .....	1, 13, 15
RCW 9.94A.607 .....	14
RCW 9.94A.680 .....	14, 15
RCW 9.94A.725 .....	16, 17

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9.94A.731 .....	16, 17
Sentencing Reform Act.....	2, 18
U.S. Const. amend. V .....	20
U.S. Const. amend. XIV .....	19
Wash. Const. art. I, § 9 .....	20
Wash. Const. art. I, § 12 .....	19
Wash. Const. art. I, § 22 .....	1, 9, 10, 13

A. ASSIGNMENTS OF ERROR

1. The trial court violated Wash. Const. art. I, § 22 and CrR 2.1(d) by prejudicing the substantial rights of Appellant when it granted the State's motion to amend the information to add second-degree murder five years after Appellant was arraigned on manslaughter in the first degree.

2. The trial court erred in failing to award credit for the time Appellant served in the King County Community Center for Alternative Programs (CCAP) as required by RCW 9.94A.505(6).

Issue Pertaining to Assignment of Error

1. Was the Appellant prejudiced by amendment of the information to second degree murder five years after arraignment on first degree manslaughter when appellant likely would have pled guilty to the lesser charge but for reassurance from the prosecution at the time of the arraignment that he could not be charged with a greater offense and where a guilty plea to the lesser offense would have resulted in little or no additional incarceration time?

2. Did the trial court err when it failed to credit Appellant's time served in CCAP:

(a) where the Sentencing Reform Act requires the sentencing court "give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced" or, alternatively;

(b) where the statutory scheme is ambiguous as applied to Appellant and therefore under the rule of lenity it must be interpreted in Appellant's favor?

B. STATEMENT OF THE CASE

1. Introduction

This appeal concerns the 2011 retrial of Appellant Mario A. Medina for murder, who, along with a co-defendant, was originally charged and tried in 1998. Medina's conviction was ultimately vacated and the new trial stayed several years pending resolution of multiple issues on appeal in unrelated cases. Only 18 years old when originally charged, Medina is now 33, resides in Spanaway, Washington, works two jobs and lives with his wife and son. CP 194-203; 14RP 117.<sup>1</sup>

---

<sup>1</sup> The Verbatim Report of Proceedings is referenced as follows: 1RP - April 16, 2010; 2RP - May 19, 2011; 3RP - May 26, 2011; 4RP - May 31, 2011; 5RP - June 2, 2011; 6RP - June 6, 2011; 7RP - June 8, 2011; 8RP - June 9, 2011; 9RP - June 13, 2011; 10RP - June 14, 2011; 11RP - June 15, 2011; 12RP - June 16, 2011; 13RP - June 20, 2011; 14RP - June 21, 2011; 15RP - June 22, 2011; 16RP - June 23, 2011; 17RP - June 24, 2011; 18RP - June 27, 2011; 19RP - August 22, 2011; 20RP - September 30, 2011.

2. Procedural Facts

In 1998, Medina and Felipe Ramos were tried jointly for first degree intentional murder. CP 85. The jury acquitted both of first degree intentional murder, and answered "No" on the special verdict form asking if they acted with intent. CP 20. The jury found Medina and Ramos guilty of second degree felony murder, however, based on the predicate offense of second degree assault. Id. On appeal, this Court vacated their convictions based on In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). State v. Ramos, 124 Wn. App 334, 101 P.3d 872 (2004).

In reversing, this Court held mandatory joinder did not bar the State from filing new charges in light of the "ends of justice" exception to the rule. Ramos, 124 Wn. App. at 341-43. This Court allowed the State to bring manslaughter charges, but found "Ramos and Medina cannot be retried on the original charge ... Nor can they be retried on the lesser included offense of second degree intentional murder, because the jury expressly found that the State failed to prove they acted with intent[.]" 124 Wn. App. at 342-43.

On remand in 2005, Medina was arraigned on first degree manslaughter and advised by his trial attorney that it was the maximum charge he could face. CP 21. During pretrial proceedings in 2005, the

prosecutor made representations that were relied upon by all the parties. Specifically, the prosecutor stated there had been "an explicit acquittal to intentional murder." CP 22. The trial judge stated, "whether the Supreme Court will allow trial on manslaughter at this point is a different question." Id. The prosecutor replied, "And just to chime in on that issue, I would certainly note for the court that obviously at the conclusion of the proceedings before the Court of Appeal I think the parties have [had] the opportunity, if they wish, to take that to the Supreme Court and that was not pursued." Id.

In the interim, both Medina and Ramos moved to dismiss the manslaughter charges based on the mandatory joinder rule; Medina added double jeopardy as grounds for dismissal. State v. Ramos, 163 Wn.2d 654, 184 P.3d 1256 (2008). The trial court denied the motions and certified the matter to the Washington Supreme Court for direct review. Id. The Supreme Court held neither double jeopardy principles nor the mandatory joinder rule precluded retrial for first degree manslaughter. 163 Wn.2d at 654 (2008). The Court did not address whether the State could bring charges of second-degree murder because that issue was not before the Court. Id. at 659 n.2. Two years after the Supreme Court decision, and five years after Medina's arraignment for manslaughter, the State filed a memorandum in 2010 requesting permission to amend the

information to add second-degree murder. CP 83-84. Medina's timely objection was overruled. 1RP 28-30. A jury trial was held June 6 - 27, 2011, before the Honorable Brian Gain in King County Superior Court. 6RP 1.

3. Substantive Facts

In September 1997, Medina was living with his sister, Maria Ramos, and her boyfriend, Felipe Ramos. 13RP 41. Maria was scheduled to work the evening of September 13, 1997 at Motel 6, but she obtained preapproval from her boss Joseph Collins to arrive to work late so she could watch a pay-per-view boxing match with her friends, the McKelpins, Medina, and Ramos. 13RP 44-45. Maria left for work around 9:00 p.m. that evening but returned to the McKelpin's home a half-hour later because Collins sent her home. 13RP 46; 14RP 127. When Maria arrived at the McKelpin's she was upset and a conversation ensued between her, Ramos and Medina. 13RP 46-47; 14RP 127-128. Shortly thereafter, Ramos, with Medina following close behind, left the McKelpin's apartment to go talk to Collins about sending Maria home from work. 14RP 128-129.

Before Ramos drove to Motel 6, he and Medina stopped at the Ramos' apartment situated in the same complex as the McKelpin's but in another building. 14RP 130-133. Medina used the bathroom and when he

came out Ramos had changed from his jean shorts to all black clothing. Id. The two drove in silence to the Motel 6. 15RP 51, 88.

When they arrived at the Motel 6 property, Ramos and Medina walked the grounds looking for Collins. 14RP 136. Medina first talked to Christina Pino, who was working the front desk, but she did not tell Medina where Collins was. 14RP 136-138. Medina then talked to the security guard, Jame Flanburg, who was in the laundry room. 10RP 113. Flanburg testified that Medina asked him where Collins was and recalled Medina was in good spirits, not angry. 10RP 120. Flanburg told Medina Collins was in his apartment at the Motel 6. 10RP 116; 14RP 140.

Medina and Ramos went to Collins' apartment. 14RP 141. Medina knocked on the door and Collins answered. 14RP 142. Medina asked Collins if he had an issue with his sister, but before Collins could answer, Ramos pulled out a gun and shot Collins. 14RP 142-143; 15RP 42. Collins died immediately. 10RP 118.

Witnesses at the scene heard a gun shot. 8RP 8; 10RP 116; 13RP 109; Ex. 138.<sup>2</sup> Motel guest, David Petroy, heard a spontaneous yell: "someone call 911, I just shot Joe in the fucking head." Id. Petroy heard this statement immediately after the gunshot. Id.

---

<sup>2</sup> Exhibit 138 is attached as an appendix.

While the gun was never found, Ramos owned a gun matching the description of the weapon was used to shoot Collins. 13RP 57-58. Also, the key to Ramos' car was found near the body. 7RP 27-28, 37. And a receipt for ammunition and a box of ammunition matching the kind used to shoot Collins was found in a nearby field where Ramos and Medina ran after the shooting. 7RP 85-86, 99, 106, 107. The receipt for the ammunition was from the base in Camp Pendleton, San Diego, California, where Ramos was stationed while in the Marines. 7RP 120; 13RP 34.

Medina and Ramos were eventually taken into custody. 7RP 41-42. Medina almost immediately confessed to shooting Collins. 14RP 45. At trial, however, he testified he did so only to protect Ramos. 14RP 157-158; 15RP 15. Detective Sue Peters noted Medina avoided mentioning Ramos' name at all during his taped confession, despite the detective knowing with certainty that Ramos had been at the scene of the crime, and it was the detective who eventually brought up Ramos' name during the interrogation. 15RP 179-189. When the detective asked Medina whose idea it was to shoot Collins, he said he did not know and then stated, "I just snapped." 14RP 54, 172-173. Medina recanted his confession to Detective Sue Peters and explained he gave inconsistent statements to

protect Ramos from being implicated because he knew Ramos shot Collins. 14RP 157-158; 15RP 38, 42. Ramos did not testify.

During closing argument, the State told the jury it did not matter who shot Collins because they were both ultimately responsible. 16RP 41. Under the State's theory, both were either guilty of second degree murder or manslaughter, but implied there could not be a split in the verdict because there was no difference in their states of mind. 16RP 40-41.

The jury found Medina guilty of second-degree murder with a firearm enhancement. 18RP 2-5; CP 174-175. The jury found Ramos guilty of manslaughter in the first degree. 18RP 2-5. Medina moved the trial court for an arrest of judgment based on insufficiency of proof of intent, a material element of the crime. 19RP 2-8; CP 176. He asked the court to instead find him guilty of manslaughter in the first degree. Id. The trial court denied the motion. Id.

At sentencing, Medina requested credit for time served in the CCAP program. 20RP 17. Medina served 1,505 days in CCAP. 20RP 19. While the trial court denied Medina's request, it remarked, "I am and continue to be impressed with the behavior of Mr. Medina since I received this case after the reversal." 20RP 14. The court stated further that "I'm satisfied that [the trial lawyer] should appeal on [the CCAP] issue and I'm certainly indicating to the Court of Appeals my feeling on it ... there are

some legislative and policy questions ... I wanted the Court of Appeals to understand that if it is legal, I would give it." 20RP 17. Medina appeals. CP 193.

C. ARGUMENTS

1. IT WAS REVERSIBLE ERROR TO ALLOW THE STATE TO AMEND THE INFORMATION FIVE YEARS AFTER MEDINA HAD BEEN ARRAIGNED ON A LESSER CHARGE

A defendant has a right to timely be informed of the charges against him. State v. Kjorsvik, 117 Wn.2d 93, 101, 103, 108, 812 P.2d 86 (1991). That right flows from the protections set forth in the Wash. Const. art. I, § 22, which provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

In light of that right, CrR 2.1(d) allows for amendment of an information or bill of particulars at any time before verdict or finding, but only if the "substantial rights of the defendant are not prejudiced." A trial court's decision to allow the State to amend the charge is reviewed for

abuse of discretion. State v. Ziegler, 138 Wn. App 804, 807, 158 P.3d 647 (2007).

It is fundamental that an accused must be informed of the charge he is to meet at trial and cannot be tried for an offense not charged. State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982). While CrR 2.1(d) permits liberal amendment, it is tempered by Wash. Const. art. I, § 22, which requires that the accused be adequately informed of the charge to be met at trial. See Ziegler, 138 Wn. App at 807.

In Ziegler, the State moved to amend the information in the midst of trial and the court allowed the amendment. On appeal, this Court held allowing the additional charges was an abuse of discretion because adding them during trial affected the defendant's ability to prepare a defense. 138 Wn. App. at 811. The Court concluded the defendant's "trial strategy and plea negotiations with the State would likely have been different had he known there would be two additional child rape charges." Id.

Here, as in Ziegler, Medina was prejudiced because his "plea negotiations with the State likely would have been different" had Medina known he could face second degree murder charges on retrial. 1RP 5-7; CP 20-82. Specifically, had Medina known five years earlier during his arraignment that the State could later up the charge to second-degree murder, he likely would have pled guilty to the manslaughter charge. 1RP

5-7; CP 24. Medina would have pursued a guilty plea to the lesser charge in order to serve the significantly shorter sentence for first degree manslaughter rather than risk a conviction and sentence for second-degree murder with a firearm enhancement. 1RP 5-7; 20RP 16; CP 24.

At the 2005 pretrial proceedings, Medina's counsel relied on this Court's finding that while the State could re-prosecute for manslaughter, "Ramos and Medina cannot be retried on the original charge ... Nor can they be retried on the lesser included offense of second degree intentional murder, because the jury expressly found that the State failed to prove they acted with intent[.]" 124 Wn. App. at 342-43; CP 20-25.

Medina's counsel also relied on the prosecutor's statements at the same proceedings that there had been "an explicit acquittal to intentional murder." CP 22. The trial judge stated, "whether the Supreme Court will allow trial on manslaughter at this point is a different question." *Id.*

In 2010, five years after Medina's arraignment, the State moved to amend the information to add second degree murder. CP 20. Medina's counsel timely objected and submitted an affidavit stating he had previously advised Medina that he could not be charged with a degree of homicide greater than first degree manslaughter, and that Medina relied on this advice when he waived his right to plead guilty at the 2005 arraignment. CP 20, 75. Medina's counsel said that if he knew at the time

that the State had the ability to amend to second degree murder, he would have "strongly suggested" Medina plead guilty to the manslaughter charge and that Medina would have followed this advice. Id. In light of the prosecutor's 2005 remarks and defense counsel's advice, Medina reasonably concluded he had nothing to lose by proceeding to trial on manslaughter.

Had Medina pled guilty to first degree manslaughter his standard range sentence based on his offender score of zero would have been 78 to 102 months plus the 60 month firearm enhancement (11.5 to 13.5 years). Former RCW 9A.32.060(2) (Laws of 1997, ch. 365, § 5); Former RCW 9.94A.320 (Laws of 1997, ch. 365, § 4); Former RCW 9.94A.310 (Laws 1997, ch. 365, § 3); CP 186. Instead, Medina was sentenced to the low end of the standard range for second degree murder (123 months), plus an additional 60 months for the firearm enhancement, for a total of 183 months (15.25 years). Former RCW 9.94A.320 & .310 (supra); 20RP 16; CP 185. Thus, had Medina pled guilty to manslaughter, as his attorney attested he would have but for being advised he could face no greater charge, his sentence would have been at least 21 months less, and likely 45 months less assuming the court would have still imposed the low end standard range sentence. As such Medina would be returning to his family

much sooner following a manslaughter conviction than for a murder conviction.

The trial court abused its discretion when it allowed the State to amend the information to charge murder instead of manslaughter. This prejudiced Medina's substantial rights under Wash. Const. art. 1 § 22 and CrR 2.1(d), and reversal is therefore required.

2. MEDINA IS ENTITLED TO CREDIT FOR TIME SERVED IN CCAP.

“The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.” RCW 9.94A.505(6). The failure to accurately provide credit for time served violates due process, equal protection, and the double jeopardy prohibition against multiple punishments. In re Pers. Restraint of Costello, 131 Wn. App. 828, 832, 129 P.3d 827 (2006). Whether to award credit for time served is a question of law that the court reviews de novo. State v. Swiger, 159 Wn.2d 224, 227, 149 P.3d 372 (2006)

Confinement includes both total and partial confinement. RCW 9.94A.030(8).<sup>3</sup> Confinement may also be converted to county supervised

---

<sup>3</sup> RCW 9.94A.030(8) provides in full, “‘Confinement’ means total or partial confinement.”

community alternative programs. RCW 9.94A.680.<sup>4</sup> Medina's pre-trial confinement was converted to just such an alternative, namely, King County's CCAP- Enhanced. 20RP 19. The court's failure to credit him

---

<sup>4</sup> RCW 9.94A.680 provides in full:

Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include the following sentence conditions that the court may order as substitutes for total confinement:

(1) One day of partial confinement may be substituted for one day of total confinement;

(2) In addition, for offenders convicted of nonviolent offenses only, eight hours of community restitution may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days. Community restitution hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department; and

(3) For offenders convicted of nonviolent and nonsex offenses, the court may authorize county jails to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.607.

For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used.

for the time he served in this program violated Medina's statutory and constitutional rights to credit for time served.

- a. Medina Is Entitled to Credit for Time Served in CCAP Because It Constitutes Confinement Under RCW 9.94A.505(6).

King County established CCAP (formerly known as day reporting) under the auspices of RCW 9.94A.680, authorizing counties to establish alternatives to confinement for certain offenders. King County Code (KCC) §§ 2.16.122, 5.12.010.<sup>5</sup> All such programs in King County require the offender to participate in approved activities for a minimum of six hours each day. KCC 5.12.010. These activities are either offered through or approved by the Community Corrections Division of the King County Department of Adult and Juvenile Detention. KCC 2.16.120, 2.16.122, 5.12.010. This alternative restricted Medina's liberty to a similar extent as other partial confinement programs and he is entitled to credit for time served.

Partial confinement is defined as:

confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved

---

<sup>5</sup> See also King County Department of Adult and Juvenile Detention website at [http://www.kingcounty.gov/courts/detention/community\\_corrections/programs.aspx#ccap](http://www.kingcounty.gov/courts/detention/community_corrections/programs.aspx#ccap) (last visited May 19, 2012).

residence, for a substantial portion of each day with the balance of the day spent in the community

RCW 9.94A.030(35). Medina's court-ordered participation in CCAP meets the elements of this definition. He participated in the program for over four years or 1,505 days. 20RP 18-19. CCAP is an institution and facility operated by county government and Medina was confined to that program for a substantial portion of each day. 20RP 18-19; KCC 5.12.010.

The varied requirements of partial confinement programs demonstrate that the term “a substantial portion of each day” does not require a specific number of hours per day or per week. Partial confinement includes work release, work crew, home detention, and a combination of work crew and home detention. RCW 9.94A.030(35). While a work release program requires confinement for at least eight hours each night, a work crew participant may be “confined” to work as little as thirty-five hours per week. Compare RCW 9.94A.731 (“An offender sentenced to a term of partial confinement shall be confined in the facility for at least eight hours per day or, if serving a work crew sentence shall comply with the conditions of that sentence.”) and RCW 9.94A.725 (“Work crew tasks shall be performed for a minimum of thirty-five hours per week.”). A person on home detention is confined to the

home whenever not at work or school, with presumably widely varying hours of confinement. RCW 9.94A.030; King County Department of Adult and Juvenile Detention website (supra at note 5) (offenders are confined to their homes except when following a set schedule that may include work, school, or treatment). CCAP's required six hours of participation each weekday is a "substantial portion of each day." RCW 9.94A.030(35).

CCAP is also substantially similar to the programs mentioned in the partial confinement statute. Partial confinement programs may require affirmative conduct such as treatment or urinalysis and breathalyzer testing. RCW 9.94A.725; RCW 9.94A.731. Similarly, CCAP-Enhanced requires random drug tests to monitor for illegal drug use and consumption of alcohol and affirmative participation in assigned CCAP programs. King County Department of Adult and Juvenile Detention website (supra at note 5).

There is no rational reason to treat pre-sentencing and post-sentencing detention differently for purposes of awarding credit for time served. State v. Anderson, 132 Wn.2d 203, 212-13, 937 P.2d 581 (1997).

- b. If This Court Concludes the SRA Is Ambiguous as to Whether Time Served on CCAP Should Be Credited, the Rule of Lenity Requires Interpreting the Ambiguity in Medina's Favor.

The State may argue the SRA is ambiguous as to whether Medina is entitled to credit for time served in CCAP-Enhanced. To the extent the statute could be found ambiguous, however, under the Rule of Lenity, reversal and remand are still required. A court's ultimate goal in reviewing a statute is to identify and give effect to the Legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Intent is determined by first looking at the language of the statute. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998). Where a criminal statute is ambiguous, courts resolve the ambiguity in favor of the defendant. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P. 2d 616 (1999).

Assuming the SRA is ambiguous about whether Medina is entitled to the credits discussed above, this Court should apply the Rule of Lenity to conclude that he is so entitled. In either instance, remand is required.

c. The Court's Failure to Order Credit for Time Served in CCAP Violates Equal Protection.

The equal protection clauses of the state<sup>6</sup> and federal<sup>7</sup> constitutions require credit for time served because similarly situated persons must receive like treatment. Anderson, 132 Wn.2d at 212-13. Equal protection requires credit for time served where a person serves time pending appeal on post-trial home detention or electronic monitoring because there is no rational basis for distinguishing credit for pre-trial and post-trial detention. Swiger, 159 Wn.2d at 227-29; Anderson, at 212-13.

In Anderson and Swiger, the appellants were released on electronic home detention and GPS monitoring pending appeal. When the appeals were resolved, the defense sought credit for that time served in confinement. Swiger, 159 Wn.2d at 225-26; Anderson, 132 Wn.2d at 205-06. The State claimed home detention or GPS monitoring was different than prison confinement. The State therefore claimed there was no obligation to order credit for time served on home detention against a

---

<sup>6</sup> Const. art. 1, § 12 provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

<sup>7</sup> U.S. Const. amend. 14 provides, in pertinent part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

sentence of total confinement because the two types of confinement were different. Swiger, 159 Wn.2d at 229; Anderson, 132 Wn.2d at 207-08. In both cases, the Supreme Court rejected the State's claims, holding credit was required by constitutional equal protection guaranties. Swiger, 159 Wn.2d at 229-30; Anderson, 132 Wn.2d at 209-13. Similarly, there is no rational difference between CCAP-Enhanced and other pre-sentencing partial confinement. Nor is there any rational difference between serving a sentence converted to CCAP after sentencing and time spent in CCAP before sentencing. Therefore, equal protection requires Medina receive credit for the more than four years he spent in this program.

d. The Court's Failure to Order Credit for Time Served in CCAP Violates Double Jeopardy.

The double jeopardy clauses of the state<sup>8</sup> and federal<sup>9</sup> constitutions guarantee three separate protections, including the protection against "multiple punishments for the same offense." State v. Gocken, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995); State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). The double jeopardy clause also

---

<sup>8</sup> Const. art. I, § 9 provides: "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

<sup>9</sup> In relevant part, the Fifth Amendment to the United States Constitution provides: "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ."

requires that punishment already served be fully credited on resentencing if an initial sentence is reversed as unlawful. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

In Pearce, the court held “the 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.” Pearce, 395 U.S. at 718-19 (note omitted). Without credit for time served, an offender could be forced to serve two sentences for the same crime. Id. This is what has occurred in Medina's case. He was ordered to serve over four years in the CCAP-Enhanced program, a partial confinement program. 20RP 18-19. The court’s failure to credit him for time served violates double jeopardy. Pearce, 395 U.S. at 718-19.

The trial court erred. Indeed, the trial judge acknowledged the ambiguity and inappropriateness of not giving credit. The trial judge remarked that “I am and continue to be impressed with the behavior of Mr. Medina since I received this case after the reversal.” 20RP 14. And he further said that “I’m satisfied that [the trial lawyer] should appeal on [the CCAP] issue and I’m certainly indicating to the Court of Appeals my feeling on it...there are some legislative and policy questions...I wanted the Court of Appeals to understand that if it is legal, I would give it.” 20

RP 17. Therefore, the Court should remand to the trial court to consider Medina's participation in CCAP as time served in confinement.

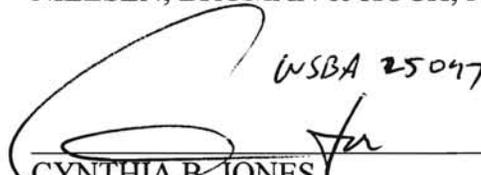
D. CONCLUSION

For the reasons stated, this Court should reverse Medina's conviction and remand for a new trial on first degree manslaughter only. In the alternative, this Court should direct that Medina be given credit for the time served on CCAP.

DATED this 23rd day of May, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
WSBA 25097  
\_\_\_\_\_  
CYNTHIA B. JONES  
WSBA No. 38120

  
\_\_\_\_\_  
CHRISTOPHER H. GIBSON  
WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant



Continuation <input checked="" type="checkbox"/> Statement <input type="checkbox"/> Officer's Witness Statement <input type="checkbox"/> Officer's Report	<p style="font-size: 1.2em; font-weight: bold;">King County Police</p> Continuation/Statement/O.R.	Incident Number 9   7   —   2   4   0   8   5   8 Date: 09/14/97      Time: 0142 HRS
Name, (Last, First, Middle) PETROY, DAVID E.		Residence Phone [REDACTED]
Residence Address [REDACTED]		Business Phone [REDACTED]
City [REDACTED]		Occupation [REDACTED]
State [REDACTED]		Race    Sex    DOB W    M    [REDACTED]
Zip [REDACTED]		Subject [REDACTED]

DET: Do I have your permission tonight sir, to tape a witness statement from you regarding what you heard go on outside of your room?

WIT: Yes you do.

DET: And I guess the place to start is, you checked in here obviously, at some point, and that was tonight at about what time?

WIT: About 7 p.m.

DET: Ok, and who, is you and your wife and a child?

WIT: Two, my two children.

DET: Your two children?

WIT: Yes, ages 3 and 1.

DET: Okay, and your room number is 263?

WIT: Yes.

DET: Okay, and this is the first night you've been staying in that room?

WIT: Yes.

DET: Ok. When did you first become aware that there was something going on outside of your room, a disturbance of some sort?

WIT: I was woken by a loud bang.

DET: Ok.

WIT: Which sounded like a gun to me, I heard it.

DET: Ok. Did it wake your wife as well? Or did you wake your wife?

WIT: She sort of, yeah, she actually woke up, slower than me though, I kind of shook her up.

DET: Ok, and what did you do after you heard the loud bang?

WIT: I sat up in bed and then I heard someone outside yell "call 911, I just, I just shot JOE in the fucking head".

DET: Did that person who was saying this sound like they had any type of an accent or any dialect, anything about their dialect that was noticeable?

WIT: No, not that I noticed.

DET: Ok. Did you just here one voice, do you remember?

WIT: Well, when it was said it sounded to me that he was definitely saying it to someone.

RAMOS 0000318

Officer(s) Reporting DET. KATHLEEN DECKER	Serial No. 03352	Unit No. 186	Supervisor Reviewing	Date	Copies to
--	---------------------	-----------------	----------------------	------	-----------

WITNESS STATEMENT  
DAVID E. PETROY

DET: Ok.

WIT: Now um, I'm not sure if I heard a response or not, 'cause when I, when I heard that statement, immediately, sort of went to the phone to try to figure out how, you know I want, I did hear a bunch of running around fuss, so I knew...

DET: Ok.

WIT: ...that whoever had done that, was, they were out running.

DET: Ok. You heard the loud bang, did you hear any other loud bangs that followed, was it just, did it sound like one bang?

WIT: One bang.

DET: Ok, anything else that you heard or that you saw, that might be a help to us?

WIT: Unfortunately, no, I mean, the only thing I can say is the way the statement was made, it seemed to me that he might have known the person, just because, you know, when he said, sort of said the name, it was almost just like he was, he was telling someone who, who wasn't there that he had shot this person that they both knew, that's sort of the way it seemed to me when I heard it.

DET: Ok. Ok, is everything you told me been true and correct to the best of your knowledge?

WIT: Yes.

DET: We'll go ahead and end at 0145 hours.

RAMOS 0000319

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67758-6-I
	)	
MARIO MEDINA,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23<sup>RD</sup> DAY OF MAY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARIO MEDINA  
22302 42<sup>ND</sup> AVENUE E.  
SPANAWAY, WA 98387

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF MAY, 2012.

x *Patrick Mayovsky*

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 MAY 23 PM 4:19