

FILED
SUPREME COURT
STATE OF WASHINGTON
10/2/2019 2:59 PM
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CLERK

NO. 97452-7

(Court of Appeals No. 52371-0-II)

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

DON WESLEY WINTON,

Petitioner.

REPLY ON MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

State law expressly authorizes the Indeterminate Sentence Review Board (Board) to impose geographic restrictions as a condition of community custody, and the Board regularly imposes such conditions to reduce recidivism and risks to public safety. Here, the Board properly exercised its statutory authority, and required Winton to obtain permission before entering Clark County as a destination, to reduce risk and to protect the victims living and working in the county. The Court of Appeals, however, determined that the condition violated Winton's constitutional right to travel. By concluding that Winton had an unfettered right to travel comparative to persons not serving a criminal sentence, the Court of Appeals issued a decision that conflicts with precedent of this Court and the United States Supreme Court; precedent which recognizes that a criminal sentence necessarily qualifies a person's right to travel. Simply put, the Board may impose reasonable restrictions on Winton's travel while he serves his criminal sentence.

By preventing the Board from imposing reasonable travel restrictions while Winton serves his sentence, the decision below severely impairs the Board's ability to protect victims, and to reduce the risk posed by individuals serving terms of community custody. The Court should grant

discretionary review to resolve the conflict of authority on this important public and constitutional issue.

II. REPLY ARGUMENT

A. **The Court of Appeals Ruling Conflicts with Precedent of this Court and the Supreme Court that Holds a Criminal Sentence Necessarily Qualifies the Right to Travel**

In response to the motion for discretionary review, Winton primarily argues that review by this Court is unwarranted because the Court of Appeals decision is consistent with its own precedent. *See Answer*, at 5-7 (citing *State v. Schimelpfenig*, 128 Wn. App. 224, 115 P.3d 338 (2005); *State v. Sims*, 152 Wn. App. 526, 216 P.3d 470 (2009), *aff'd but criticized by State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011); and *In re Martinez*, 2 Wn. App. 2d 904, 413 P.3d 1043 (2018)). But Winton's argument sidesteps the point of the Board's motion for discretionary review.

The Board did not argue that the decision below conflicts with prior decisions of the Court of Appeals. The Board recognized that the court below applied its own precedent. Rather, the Board argues that the decision below, by applying prior Court of Appeals precedent to invalidate Winton's condition, conflicts with the holdings of this Court and the Supreme Court. Applying the rule that a person not convicted of a crime has the right to travel freely, and applying that precedent to invalidate the condition imposed upon a person while actively serving a criminal sentence, conflicts

with the precedent of this Court and the Supreme Court, which recognizes that a conviction necessarily qualifies the right to travel.

Winton attempts to avoid conflict by arguing that the case law applied by the Court of Appeals involved people convicted of crimes. However, like the court below, Winton fails to understand a key distinction between those cases and his. Two of the cases, *Schimelpfenig* and *Sims*, did not involve mere conditions requiring permission before entering a county. Rather, those cases involved the trial court imposing a permanent lifetime banishment order. A lifetime banishment order is just that – a permanent prohibition on the defendant ever residing in the county regardless of length of sentence and future circumstances. Such a condition applies even after the defendant has finished serving the sentence. *See, e.g., Schimelpfenig*, 128 Wn. App. at 225 (court order prohibiting the defendant from residing in Grays Harbor County for remainder of his life). Such an order by the trial court forever bans the defendant from residing in the county, regardless of when the sentence ended and regardless of whether the victims still lived in the county. In contrast, the condition at issue here merely required Winton to seek permission before entering Clark County during his term of supervision, and the Board could modify the condition if circumstances changed.

Although Winton attempts to minimize the distinction between conditions imposed by the trial court and the Board, the distinction is important. Once imposed at sentencing, the trial court generally cannot modify the judgment and sentence regardless of any change in circumstances. *See State v. Shove*, 113 Wn.2d 83, 86-89, 776 P.2d 132 (1989) (court lacked authority to alter sentence after entry); *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008) (same); *but see State v. Petterson*, 190 Wn.2d 92, 103, 409 P.3d 187 (2018) (court may modify conditions of a SSOSA sentence during term of supervision). Generally, once the court imposes a lifetime banishment order, the ban will remain in place regardless of whether the defendant has completed serving the sentence or the victims have moved from the county. Thus, the court's order would infringe upon the right to travel even after the person has completed serving the sentence.

Unlike the type of banishment order at issue in *Schimelpfenig*, the travel condition here applies only during the term of supervision. Moreover, the Board's condition here is not stagnant. As occurred in this very case, the Board may modify the condition throughout the term of supervision depending upon the circumstances of the particular situation.

The fact that lifetime banishment orders continue even after the defendant has finished serving the criminal sentence is a key distinction.

Although Winton tries to distinguish *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981), the *Jones* Court expressly distinguished the constitutional right to travel held by an individual who was not convicted of a crime, and the qualified right to travel held by an individual who has been convicted of a crime. *Jones*, 452 U.S. at 419-20. It is this distinction that the Court of Appeals failed to recognize when it equated the unqualified right to travel of a person who has not been convicted of a crime (or the unqualified right to travel once the person finishes serving the sentence) with the qualified right currently held by Winton while he serves his term of supervision. Like the individual in *Jones*, having been convicted of a crime, Winton does not have an unqualified right to travel while he serves his sentence. Like the person in *Jones*, the Board may restrict Winton's travel while Winton serves his term of supervision because the right to travel has been qualified by the conviction for a crime.

Winton's current argument that he has a right to travel equal to a person not serving a criminal sentence is exactly the error that the Court of Appeals made. The court below relied on decisions that in turn relied upon *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) and *Eggert v. City of Seattle*, 81 Wn.2d 840, 505 P.2d 801 (1973) for the general rule that conditions on travel must be narrowly tailored. But that general rule applies to people not serving a criminal sentence. The Court of

Appeals failed to recognize that *Shapiro* and *Eggert* involved the unqualified right to travel of a person who was not convicted of a crime, and who was not actively serving a sentence.

In *Jones*, the Supreme Court made this very point, holding that the case before it differed in a significant respect from prior cases, such as *Shapiro*. *Jones*, 452 U.S. at 420. The Supreme Court stressed that in all of the prior cases, “the statute at issue imposed a burden on the exercise of the right to travel by citizens whose right to travel had not been qualified in any way. In contrast, in this case, appellee’s criminal conduct within the State of Georgia necessarily qualified his right thereafter freely to travel interstate.” *Id.* at 421. The restriction on the right to travel imposed as a result of the criminal conviction placed the *Jones* case “on a different footing” from prior cases involving the right to travel. *Id.* In other words, while the Constitution guarantees the right to travel, the right is necessarily qualified once the person has been convicted of a crime.

The rule applied by the Court of Appeals equates the right to travel of a person serving a criminal sentence with the right to travel of an individual not convicted of a crime and not serving a criminal sentence. By equating the right, the Court of Appeals ignores the Supreme Court’s declaration that the right necessarily changes when the person is convicted of a crime. The Court of Appeals conclusion that Winton has an unqualified

right to travel while he serves his criminal sentence conflicts with this precedent.

Winton similarly takes issues with several other cases involving convicted individuals serving criminal sentences, arguing that none of the cases support the Board's position that a criminal sentence qualifies the right to travel. Answer, at 8. Contrary to Winton's argument, the Ninth Circuit's decision in *Bagley v. Harvey*, 718 F.2d 921 (9th Cir. 1983), expressly held, "a person's constitutional right to interstate travel was extinguished upon valid conviction and imprisonment, and is not revived by a change in status from prisoner to parolee."

Similarly, in *Morrissey v. Brewer*, 408 U.S. 471, 478, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), the Court recognized the undisputed fact that, as a condition of sentence, parolees must seek permission before traveling outside the community. The Board's condition requiring Winton to obtain prior approval before entering Clark County as a destination is entirely consistent with *Morrissey*. See also *Jones v. Cunningham*, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963) (parole involves significant restraints on person's liberty to do things which other people may freely do); *Berrigan v. Sigler*, 499 F.2d 514, 521-22 (D.C. Cir. 1974) (concluding that in considering the legitimacy of travel restrictions, parole status is inescapably

significant and it is unrealistic to consider a person's rights wholly separate and apart from the status as a parolee).

By ignoring Winton's status as a convicted sex offender serving a criminal sentence, the Court of Appeals here erred in its analysis of his right to travel. Although the court below relied upon prior decisions of the Court of Appeals, these prior decisions and the court below did not consider the distinction between a person with the unqualified right to travel and a person serving a criminal sentence. As this Court previously recognized, "a parolee, unlike the ordinary citizen, is subject to supervision and limited in his mode, manner, and place of living and travel . . . Thus he is not a free man in the commonly accepted sense." *Monohan v. Burdman*, 84 Wn.2d 922, 925, 530 P.2d 334 (1975).

The Court should grant review and reaffirm that a person serving a sentence for a criminal conviction does not have an unqualified right to travel, and that the Board may impose reasonable restrictions such as a condition requiring the person to obtain permission before entering a county where the victim lives and works.

B. The Board's Condition was Reasonable and Narrowly Tailored

The condition requiring prior approval before Winton enters Clark County is not an abuse of discretion. Winton does not live, work, or have any other ties to Clark County. However, both victims and their families

reside, work, and go to school throughout Clark County. The condition is a reasonable restriction intended to avoid risk and protect the victims.

The Board modified the condition to allow Winton to travel *through* Clark County. Appendix F. The condition requires Winton to obtain permission only before he enters Clark County as a final destination. Appendix F. The restriction is necessary because of where the victims live, work, and attend school. Appendix G. The Board determined that allowing Winton to enter Clark County and then specifying the parts of Clark County he must avoid would inform Winton of the locations of the victims' residence, employment, and school, making the victims vulnerable. Appendix G ("In determining a boundary, it became difficult to map specific areas without highlighting the victims' locations."). This was not an abuse of discretion.

Winton argues that his condition is comparable to the one invalidated in *In re Martinez*. However, like the court below, the *Martinez* court erroneously judged the validity of the condition against the right to travel of a person not convicted of a crime, rather than a person serving a sentence. *In re Martinez*, 2 Wn. App. 2d at 912-14. Moreover, the *Martinez* court questioned the validity of a condition that prohibited Martinez from entering Thurston County when the evidence indicated that the victim had moved to Texas. *Id.* at 915. In granting relief, the *Martinez* court directed

the Board to consider whether the victim had in fact moved out-of-state. *Id.* Winton's victims are in Clark County.

Finally, Winton complains that the Board did not produce evidence to support the reasonableness of the condition. However, the Board did seek to introduce such evidence prior to the Court of Appeals' decision, but the court below refused to consider the evidence. *See, e.g.*, Appendices J-L. The court below failed to consider this relevant evidence. *See Riddle v. Elofson*, 193 Wn.2d 423, 438, 439 P.3d 647 (2019) (in an original action the proper record consists of the facts necessary for the court to determine whether to issue the writ). This Court may consider the evidence. *Id.*

III. CONCLUSION

For the reasons stated above and in the Motion for Discretionary Review, the Court should grant review and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 2nd day of October, 2019.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing REPLY ON MOTION FOR DISCRETIONARY REVIEW with the Clerk of the Court using the electronic filing system which will serve the document to the following case participants as indicated below:

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

EXECUTED this 2nd day of October, 2019, at Olympia, Washington.

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October 02, 2019 - 2:58 PM

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