

68347-1

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No. 68347-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TAD JARED VANKIRK,

Appellant.

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

The Honorable Leroy McCullough

BRIEF OF APPELLANT

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2012 SEP 12 PM 4:39
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to credit Mr. Vankirk for the time he served awaiting trial in King County's Community Center for Alternative Programs (CCAP).

2. The trial court's failure to award Mr. Vankirk credit for his CCAP participation denied his constitutionally protected rights to equal protection and to be free from double jeopardy.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a statutory and constitutional right to credit for time served in confinement or partial confinement awaiting trial. At arraignment, Mr. Vankirk was released on personal recognizance on the condition he participate in the King County alternative to detention program, CCAP-enhanced. Mr. Vankirk completed 206 days in CCAP-enhanced, but the trial court refused to award credit for the 206 days, finding CCAP-enhanced did not meet the definition of partial confinement. Did the trial court err in its analysis of RCW 9.94A.030(35), defining partial confinement to include programs such as CCAP-enhanced, requiring this Court to award the 206 days of credit for time served?

2. Did the trial court's failure to award Mr. Vankirk credit for the time he served violate his constitutional rights to equal protection and protection against multiple punishment under the double jeopardy clause, requiring this Court to award credit for time served in CCAP-enhanced?

C. STATEMENT OF THE CASE

Tad Vankirk was charged with one count of first degree robbery. CP 1. At arraignment, Mr. Vankirk was released on personal recognizance on the condition he apply for entry into, and participation in, "CCAP-enhanced."¹ CP Supp ___, Sub Nos. 3, 4. Prior to trial, Mr. Vankirk pleaded guilty to the count of first degree robbery. CP 9-19. Mr. Vankirk spent a total of 206 days participating in the CCAP-enhanced program awaiting trial and sentencing. CP Supp ___, Sub No. 133 at 6.

¹ "CCAP, formerly Day Reporting, holds offenders accountable to a weekly itinerary directed at involving the offender in a continuum of structured programs. The goal of CCAP is to assist offenders in changing those behaviors that have contributed to their being charged with a crime. CCAP provides on-site services as well as referrals to community-based services. Random drug tests are conducted to monitor for illegal drug use and consumption of alcohol. Offenders participating in CCAP receive an individual needs assessment and are scheduled for a variety of programs." http://www.kingcounty.gov/courts/detention/community_corrections/programs.aspx#ccap.

At sentencing, Mr. Vankirk moved for credit for the time he spent participating in the CCAP-enhanced program awaiting trial and sentencing. CP Supp ___, Sub. No. 133; 2/21/2012RP 3-4. Mr. Vankirk submitted that CCAP constituted “partial confinement” as that term is defined in RCW 9.94A.030(35). 2/21/2012RP 4. The trial court refused to award credit, finding that CCAP does not meet the criteria of partial confinement under the statute:

I’m denying the motion without prejudice. I think that it is something that the parties probably can brief. I am looking at quickly the definition of partial confinement under RCW 9.94A.030, it does indicate that partial confinement includes work release, it doesn’t say that it excludes CCAP Enhanced. But it doesn’t give the Court reading with 680 the confidence that CCAP Enhanced is in the same category as these other items.

2/12/2012RP 7.

D. ARGUMENT

MR. VANKIRK WAS ENTITLED TO CREDIT FOR
PRETRIAL PARTICIPATION IN CCAP-
ENHANCED

1. A defendant is entitled to credit for time spent awaiting trial. A defendant sentenced to a term of confinement has both a constitutional and statutory right to receive credit for all confinement time served prior to sentencing. *In re Personal Restraint of Costello*, 131 Wn.App. 828, 129 P.3d 827 (2006).

RCW 9.94A.505(6) provides:

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.

The failure to award credit for time served violates due process, equal protection and the double jeopardy prohibition against multiple punishments. *Costello*, 131 Wn.App. at 832. This court reviews the decision to award credit for time served *de novo*. *State v. Swiger*, 159 Wn.2d 224, 227, 149 P.3d 372 (2006).

“Confinement’ means total or partial confinement.” RCW 9.94A.030(8). RCW 9.94A.030(35) defines “partial confinement” 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 residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

Confinement may also be converted to county supervised community alternative programs. RCW 9.94A.680(3).

Mr. Vankirk’s pretrial confinement was converted to such a community alternative: King County’s CCAP-enhanced. Thus, the trial court’s failure to award him day for day credit for the time he served in the CCAP-enhanced program violated his statutory and constitutional rights to credit for time served.

2. Mr. Vankirk's participation in CCAP constituted confinement under RCW 9.94A.505(6). The CCAP program was established under King County Code section 5.12.010:

Supervised community option for certain offenders.

A. The community corrections division of the department of adult and juvenile detention shall provide a county supervised community option for offenders convicted of nonviolent and non-sex offenses with sentences of one year or less as provided in RCW 9.94A.680.

B. For the purposes of this section, "county supervised community option" means an alternative to confinement program in which an offender must participate for a minimum of six hours per day of structured programs offered through, or approved by, the community corrections division. The structured programs may include, but are not limited to: life management skills development; substance abuse assessment and treatment services; mental health assessment and treatment services; counseling; basic adult education and related services; vocational training services; and job placement services.

King County Ordinance 16246, § 2 (2008). This program was established under the auspices of RCW 9.94A.680, which authorizes counties to establish alternatives to confinement for certain offenders. King County Code (KCC) §§ 2.16.122, 5.12.010.

The CCAP programs require the offender to participate in approved activities for a minimum of six hours each day. KCC § 5.12.010. The activities are either approved or offered 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. Participation in CCAP restricted Mr. Vankirk's liberty to a similar extent as other partial confinement programs and as a result, he is entitled to credit for the time he served in the program awaiting trial.

Mr. Vankirk's situation falls within the parameters of the definition of "partial confinement" found in former RCW 9.94A.030(35). That definition states that confinement can be at a "facility or institution operated or utilized under contract by the state or any other unit of government . . . for a substantial portion of each day." Here, Mr. Vankirk was required to attend a program for six hours a day (three hours on Friday) at a facility operated by the State, and because a warrant would issue for failure to do so, his participation was compelled. CP Supp ___, Sub No. 133 at 4. He was therefore partially confined within the meaning of the statute.

Contrary to the trial court's conclusion, RCW 9.94A.030(35) does not restrict the term "partial confinement" to only work release, home detention, or work crew. The statute lists jail alternatives of a kind similar to CCAP. A person in CCAP is ordered by the court to be at a specific location, performing a supervised activity, for a significant period of time, under monitoring, just like the programs detailed in the statute.

3. To the extent RCW 9.94A.030(35) is ambiguous as to whether CCAP constitutes partial confinement, the rule of lenity requires interpreting the ambiguity in Mr. Vankirk's favor.

"Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.'" *American Legion Post # 149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008), quoting *State ex rel. Peninsula Neighborhood Association v. Washington State Dep't of Transportation*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (alternation in original) (internal quotation marks omitted).

This Court discerns the plain meaning of a statutory provision from the ordinary meaning of the language used, as well as from

the context of the statute in which the provision is found, and from related provisions and the statutory scheme as a whole.

City of Spokane v. Rothwell, 166 Wn.2d 872, 215 P.3d 162 (2009).

According to the plain meaning of RCW 9.94A.030(35), time spent in the CCAP program met the definition of partial confinement under the SRA, such that Mr. Vankirk is entitled to credit for the time he served there.

To the extent the provisions of the SRA applicable here are ambiguous as to whether Mr. Vankirk is entitled to credit for time served, the rule of lenity would require interpreting the ambiguity in his favor. *City of Seattle v. Winebrener*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009). Thus, should this Court find the statutory scheme ambiguous, it must construe it in Mr. Vankirk's favor.

4. The failure to award credit for Mr. Vankirk's CCAP participation violates equal protection. The Equal Protection Clauses of the United States and Washington Constitutions require similarly situated persons receive the same treatment. *State v. Anderson*, 132 Wn.2d 203, 212-13, 937 P.2d. 581 (1997).

Equal protection requires a defendant receive credit for serving time pending appeal on post-trial home detention or electronic monitoring because there is no rational basis for distinguishing between pre-trial and post-trial detention. *Swiger*, 159 Wn.2d 227-29; *Anderson*, 132 Wn.2d at 212-13.

The decisions in *Swiger* and *Anderson* are instructive here. In *State v. Swiger*, the court found that the defendant's global positioning system (GPS) home monitoring constituted home detention, and thus he was entitled to credit for the time spent in such post-conviction home detention despite the fact that the State did not agree to his release. 159 Wn.2d 224. In *State v. Anderson*, the defendant was convicted of a felony and was released on electronic home monitoring pending appeal. 132 Wn.2d 203. The court held that because the statute permitted such credit for pretrial monitoring, there was no rational basis to distinguish between presentence and post-sentence electronic home detention. *Id.* at 213.

Similarly, here there is no rational difference between CCAP-enhanced and other pre-trial partial confinement. As a

result, equal protection requires Mr. Vankirk receive credit for all time in CCAP awaiting trial.

5. The failure to award credit for participation in CCAP violates the double jeopardy prohibition against multiple punishments. Double jeopardy principles require that “punishment already exacted must be fully ‘credited’” against a defendant’s sentence. *North Carolina v. Pearce*, 395 U.S. 711, 718-19, 89 S.Ct. 2089, 23 L.Ed.2d 656 (1969). Thus, double jeopardy demands that all defendants receive credit for time spent in incarceration prior to sentencing. *Reanier v. Smith*, 83 Wn.2d 342, 351-52, 517 P.2d 949 (1974). Failure to give credit violates double jeopardy because one incarcerated pending trial may serve a sentence longer than the maximum imposed if credit is not given. *Id.*

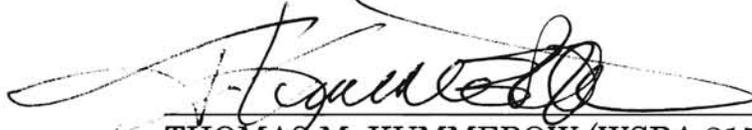
Here, Mr. Vankirk spent 206 days on CCAP-enhanced awaiting trial. Without an award of credit for that time, Mr. Vankirk runs the risk of doing those days again at the Department of Corrections, thus constituting multiple punishment for the same offense. This would violate his right to be free from double jeopardy.

E. CONCLUSION

For the reasons stated, Mr. Vankirk requests this Court award him day for day credit for the time he spent in CCAP awaiting sentencing.

DATED this 12th day of September 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

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STATE OF WASHINGTON,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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