

NO. 68347-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TAD JARED VANKIRK,

Appellant.

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

THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether VanKirk's claim that he should be given credit for CCAP should be rejected because the relevant statutes and clear evidence of legislative intent demonstrate that VanKirk should not be given such credit.

B. STATEMENT OF THE CASE

The defendant, Tad Jared VanKirk, was charged with robbery in the first degree for robbing another male at gunpoint (the male had met with VanKirk with the intention of buying marijuana from him). CP 17, 18. VanKirk pled guilty to that charge under an agreement that the State would recommend the low end of the standard range. CP 9-19. Under the plea agreement, VanKirk was free to request an exceptional sentence downward at sentencing. CP 13. The trial court sentenced the defendant to the low end of the standard range. CP 128-35.

C. ARGUMENT

THE TRIAL COURT CORRECTLY RULED THAT VANKIRK WAS NOT ENTITLED TO CREDIT FOR TIME SPENT ON CCAP PRIOR TO TRIAL.

VanKirk argues that he is entitled to credit against his prison sentence for the time he spent in the King County Community Center for Alternative Programs ("CCAP")¹ prior to trial. This claim should be rejected. The trial court correctly denied VanKirk's request for CCAP credit finding it was not required under the Sentencing Reform Act.

Statutory interpretation is a question of law, which courts review *de novo*. Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship, 156 Wn.2d 696, 698, 131 P.3d 905 (2006). The reviewing court's primary duty in interpreting a statute is to "discern and implement the intent of the legislature." Id.

When construing a statute, all statutory language must be given effect, with no part of the statute rendered meaningless or superfluous. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002); State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196

¹ King County has two types of CCAP programs: Basic (which merely requires the participant to call in once a day) and Enhanced (explained below). The discussion of CCAP in this brief refers to the CCAP-Enhanced program, as VanKirk does not contend that he deserves credit for time spent in CCAP-Basic.

(2005). Moreover, the meaning of a particular part of a statute is not gleaned from that part alone; the purpose is to ascertain the legislative intent of the statute as a whole. Davis v. Dep't of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999).

There is one rule of statutory construction that "trumps every other rule": the court must not construe the statutory language in a way that results in absurd consequences. Davis, 137 Wn.2d at 971; *see also* State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) ("Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided").

RCW 9.94A.680 specifically provides that only offenders who are convicted of "nonviolent and nonsex offenses" and are sentenced to "one year or less" may receive credit for "time served by the offender in an available county supervised community option" such as CCAP. RCW 9.94A.680(3). Its plain language categorically prohibits giving VanKirk credit for CCAP against his 41-month prison sentence for robbery in the first degree. The current version of the statute, which became effective on July 26, 2009 (almost four months before this crime was committed), also provides strong evidence of legislative intent with respect to which

offenders should receive credit for CCAP (as will be discussed further below). RCW 9.94A.680.

The SRA provides that offenders should be given credit “for all confinement time served before the sentencing[.]” RCW 9.94A.505(6). “Confinement” is defined as “total or partial confinement[.]” RCW 9.94A.030(8). “Partial confinement” is then defined as follows:

“Partial confinement” means *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 or home detention has been ordered by the department as part of the parenting program, 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.

RCW 9.94A.030(35) (emphasis supplied).

What constituted “confinement” in “a facility or institution” for “a substantial portion of each day” for purposes of “partial confinement” is not further defined in the SRA. However, in the statute that defines a “*term of partial confinement*” when imposed as part of an offender’s sentence, the legislature specified that “[a]n offender sentenced to a term of partial confinement shall be *confined* in the *facility* for *at least eight hours per day*[.]” RCW

9.94A.731(1) (emphasis supplied). Given that statutory schemes are to be construed as a whole, this statute evidences a legislative intent in that “partial confinement” should confine the offender in a facility or institution for a minimum of eight hours.

The King County Code provision that defines CCAP states that CCAP is available only “for offenders convicted of nonviolent and non-sex offenses with sentences of one year or less as provided in RCW 9.94A.680,” and it specifies that CCAP is “an *alternative to confinement* program in which an offender must *participate for a minimum of six hours per day[.]*” KCC 5.12.010 (emphasis supplied). Accordingly, by its very terms, CCAP does not qualify as “partial confinement” under the SRA for the following reasons: 1) CCAP is specifically designated as an “*alternative to confinement*” rather than “confinement,” whether partial or otherwise; and 2) it requires the offender to “participate” in the program for a minimum of six hours per day (and only three on Friday) rather than to be “confined” in a “facility or institution” for a minimum of eight hours per day.

In sum, VanKirk is not entitled to credit for time spent in CCAP prior to sentencing because CCAP does not meet the definition of “partial confinement” under the SRA. Indeed, VanKirk

should not have been placed in CCAP in the first place; he is categorically ineligible for this “alternative to confinement” program because he was charged with and convicted of first-degree robbery – a “violent” offense. RCW 9.94A.030(54)(a)(i).

Put bluntly, it would lead to absurd consequences that the legislature plainly did not intend if this Court were to award VanKirk credit against his prison sentence for a robbery conviction based on an “alternative to confinement” program designed for nonviolent offenders facing sentences of one year or less. The relevant statutes should be interpreted in a manner that avoids these absurd consequences, and VanKirk’s claim should be rejected.

Nonetheless, VanKirk argues that the rule of lenity, equal protection, and double jeopardy require that he be given credit for CCAP. App. Br. at 8-11. These arguments are also without merit.

First, the rule of lenity applies only when statutes are ambiguous, meaning that they are subject to more than one reasonable interpretation and there is no discernible evidence of legislative intent. In re Personal Restraint of Bowman, 109 Wn. App. 869, 875-76, 38 P.3d 1017 (2001), rev. denied, 146 Wn.2d 1001 (2002). As explained above, the statutes do not support VanKirk’s argument that CCAP constitutes partial

confinement, and the legislative intent demonstrates that the legislature does not intend that offenders charged with and convicted of robbery receive credit for CCAP. Accordingly, the rule of lenity does not apply here.

Second, in support of his equal protection argument, VanKirk cites State v. Anderson, 132 Wn.2d 203, 937 P.2d 581 (1997), and State v. Swiger, 159 Wn.2d 224, 14 P.3d 372 (2006), neither of which is on point. In Anderson, the defendant was placed on electronic home detention (“EHD”) while his appeal was pending, and he was denied credit for the time he served on EHD when that appeal proved unsuccessful. The relevant statutes in the SRA specifically awarded credit for pre-conviction home detention, but said nothing regarding post-conviction home detention. The Anderson court held that there was no rational basis to treat pre-conviction and post-conviction EHD differently, and that equal protection required giving the defendant credit for EHD served during the appeal. Anderson, 132 Wn.2d at 206-13. In Swiger, the situation was identical to Anderson, except insofar as the court required the defendant to be monitored via a global positioning system (“GPS”) rather than EHD pending appeal. Thus, the Swiger

court awarded credit for post-conviction GPS monitoring in accordance with Anderson. Swiger, 159 Wn.2d at 227-31.

But in this case, unlike in Anderson and Swiger, the issue is not whether pre-conviction and post-conviction CCAP are the same for equal protection purposes. Rather, the issue is whether CCAP qualifies as “confinement” at all (it does not), and whether the legislature intends for violent offenders to receive credit for CCAP under any circumstances (it does not). VanKirk’s equal protection claim is unavailing.

Lastly, VanKirk cites North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) and Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974), in sole support of his argument that the failure to give credit for CCAP violates double jeopardy. But the issue in Pearce was whether a defendant who had successfully challenged his conviction on appeal was entitled to credit for the time he had already served in prison when he was ultimately convicted a second time. Pearce, 395 U.S. at 716-18. And in Reanier, the issue was whether defendants were entitled to credit for the time they had served in jail pending criminal charges. Reanier, 83 Wn.2d at 343-44. CCAP is not remotely analogous to prison or jail, and thus, Pearce and Reanier are not on point.

In sum, the statutes should be reasonably interpreted to affirm the trial court's ruling that VanKirk is not entitled to credit for CCAP against his prison sentence for robbery in the first degree. Such an interpretation is consistent with the legislature's clearly-stated intent that only nonviolent and non-sex offenders are eligible for credit for CCAP, and avoids absurd results that the legislature did not intend.

D. CONCLUSION

For the reasons set forth above, this Court should affirm VanKirk's conviction for robbery in the first degree conviction for murder in the second degree.

DATED this 6 day of November, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. TAD JARED VANKIRK, Cause No. 68347-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date