In the Matter of the Post-Sentence Review of: Nolan L. Finch.

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UNPUBLISHED OPINION

The Department of Corrections (DOC) seeks post-sentence review under RAP 16.18 of a Walla Walla County Superior Court order confirming the duration of community custody that Nolan L. Finch must serve for his 2005 conviction upon plea of guilty to first degree child molestation. The dispositive question is whether the court erroneously reduced Mr. Finch's term of community supervision and thus modified the judgment and sentence in violation of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. We conclude the court erred and, therefore, vacate the order, grant DOC's petition, and reinstate community supervision for the unserved 68-month period.

FACTS

In 2005, Mr. Finch pleaded guilty to a first degree child molestation committed in 1995. The court granted him a 68-month suspended sentence under the Special SeX Offender Sentencing Alternative (SSOSA), conditioned on his serving 180 days of jail confinement, community custody for the length of the suspended sentence, and three years of outpatient sex offender treatment. Paragraph 4.2(c) of the judgment and sentence contained boilerplate language that Mr. Finch "shall be on community supervision/placement as of the date of sentencing." DOC Petition; Ex. 1 (Judgment & Sentence) at 4. The judgment and sentence was entered on February 14, 2005.

Mr. Finch served his 180-day confinement term (reduced by 36 days of jail good time credit) and was released to the community on July 10, 2005. He then maintained to his community corrections officer (CCO) that his jail confinement time counted toward his community custody term due to the language in the judgment and sentence that he was on community supervision as of the date of sentencing. His CCO disagreed and set a supervision end date consistent with the 68-month community custody term starting on July 10, 2005.

On June 22, 2010, Mr. Finch, through counsel, filed a motion in superior court to confirm or clarify that his 68-month community custody term had commenced on February 14, 2005-the date the judgment and sentence was entered. The DOC was not a party to the motion, but communicated its position to Mr. Finch's counsel and the county prosecutor that the 68-month community custody term was tolled during Mr. Finch's jail confinement and did not start until he was released to the community on July 10, 2005. The DOC calculated Mr. Finch's supervision end date as March 10, 2011. The superior court agreed with Mr. Finch and, on July 6, 2010, entered an order confirming that his 68-month community custody period started on February 15, 2005, and ended on August 15, 2010, as

opposed to the DOC scheduled supervision end date of March 10, 2011.[1]

On August 10, 2010, the DOC sent a letter to Mr. Finch, the prosecutor, and the superior court requesting vacation of the July 6 order on grounds that the order (1) barred the DOC from exercising its statutory duty under RCW 9.94A.171(4) to determine tolling of supervision; (2) violated the SSOSA statute, RCW 9.94A.670, by reducing the length of the mandatory community custody term by the time served in confinement; and (3) was a sentence modification not authorized by the SRA. When the DOC received no response, it timely filed this petition for post-sentence review in this court on September 29, 2010, as authorized under RCW 9.94A.585(7) and RAP 16.18. See also In re Sentence of Chatman, 59 Wn. App. 258, 796 P.2d 755 (1990). Also on that date, the DOC filed a motion to stay the July 6 order pending the outcome of this petition. Our commissioner issued a ruling denying the stay on January 12, 2011.

Community Supervision. Whether a sentencing court exceeded its statutory authority under the SRA is an issue of law we review independently. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). A court may impose only a sentence that is authorized by statute. In re Post-sentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). "After final judgment and sentencing, the court loses jurisdiction to the DOC." State v. Harkness, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008). This leaves no room for inherent authority to be exercised by the sentencing court. Murray, 118 Wn. App. at 524. A sentence imposed under the SRA may be modified only if it meets statutory requirements relating directly to the modification of sentences. Harkness, 145 Wn. App. at 685 (citing State v. Shove, 113 Wn.2d 83, 89, 776 P.2d 132 (1989)). Examples include earned early release time as determined by the DOC, authorized furlough or leave of absence, serious medical issues, clemency or pardon, partial confinement for reestablishment in the community, or reduction in sentence due to prison overpopulation. Id. A court commits reversible error when it exceeds its sentencing authority under the SRA. State v. Hale, 94 Wn. App. 46, 53, 971 P.2d 88 (1999).

Here, the applicable version of the SRA is that which was in effect when Mr. Finch committed his offense in 1995. See RCW 9.94A.345. The parties mainly apply the 2005 version of the SSOSA and tolling statutes. The 1995 and 2005 versions have no conceptual differences that would change the outcome of this petition, but there are language differences in the pertinent sections. The correct approach is to analyze the parties' contentions under the 1995 statutes because they provide the legal authority for Mr. Finch's sentence.

Applicable SSOSA/Tolling Statutes. When Mr. Finch committed his crime in 1995, the SSOSA statute was codified in former RCW 9.94A.120(7) (1994). The pertinent provisions are in former RCW 9.94A.120(7)(a):

(ii) . . . If the court determines that this special sex offender sentencing alternative is appropriate, the court shall then impose a sentence within the standard range. If this sentence is less than eight years of confinement, the court may suspend the execution of the sentence and impose the following

conditions of suspension:

(A) The court shall place the defendant on community supervision for the length of the suspended sentence or three years, whichever is greater; and

(B) The court shall order treatment for any period up to three years in duration. . . . In addition, as conditions of the suspended sentence, the court may impose other sentence conditions including up to six months of confinement. (Emphasis added.)[2]

In 1995, the supervision tolling statute was codified in former RCW 9.94A.170 (1993), which provided in pertinent part:

(2) A term of supervision, including postrelease supervision ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed.

(3) Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

(4) For confinement or supervision sentences, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision. (Emphasis added.)[3]

ANALYSIS

The issue turns on the meaning of the SSOSA and tolling statutes as applied to Mr. Finch's judgment and sentence. We review questions of statutory interpretation de novo. State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). Our primary objective when interpreting a statute is to determine the legislature's intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" Id. (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)); see State v. Gartrell, 138 Wn. App. 787, 789, 158 P.3d 636 (2007). In ascertaining the "plain meaning" of a statute, we look not only to the ordinary meaning of the language at issue but also to the general context of the statute, related provisions, and the statutory scheme as a whole. Jacobs, 154 Wn.2d at 600; see Gartrell, 138 Wn. App. at 789.

In Mr. Finch's judgment and sentence, the court erroneously referenced the 2005 version of the SSOSA statute (RCW 9.94A.670) and imposed "community custody" for the length of the suspended sentence. Ex. 1 (Judgment & Sentence) at 4. The 1995 SSOSA statute did not include "community custody" within its terms. Instead, it required "community supervision" for the length of the suspended sentence. "Community supervision" was then defined as "a period of time during which a

convicted offender is subject to crime-related prohibitions and other sentence conditions imposed by a court pursuant to this chapter." Former RCW 9.94A.030(7) (1994). Therefore, to be legally precise, Mr. Finch was required to serve "community supervision" for the length of the suspended sentence. Former RCW 9.94A.120(7)(a)(ii)(A). In any event, the question here-when Mr. Finch's 68-month period of supervision began-is the same whether it is called "community supervision" or "community custody."

The 1995 version of the SSOSA statute plainly states that when a court, in its discretion, imposes a confinement term of up to six months, it is in addition to the mandatory community supervision for the length of the suspended sentence. Former RCW 9.94A.120(7)(a)(ii)(A), (B). This dovetails with the plain language of the tolling statute that "[a]ny period of supervision shall be tolled during any period of time the offender is in confinement for any reason." Former RCW 9.94A.170(3) (emphasis added). The provision in paragraph 4.2(c) of the judgment and sentence that Mr. Finch "shall be on community supervision/placement as of the date of sentencing" does not support his argument that his period of community supervision began immediately. The quoted provision is not found in any SSOSA statute. In 1995, it was contained in former RCW 9.94A.383 (1988):

On all sentences of confinement for one year or less, the court mayimpose up to one year of community supervision. An offender shall beon community supervision as of the date of sentencing. However, duringthe time for which the offender is in total or partial confinementpursuant to the sentence or a violation of the sentence, the period ofcommunity supervision shall toll. (Emphasis added.)[4] This statute and the tolling provisions in former RCW9.94A.170(3) are consistent and not in conflict. State v. Cameron, 71Wn. App. 653, 656, 657 n.2, 861P.2d 1069 (1993).

Thus, to the extent the 2005 sentencing court in Mr. Finch's case was applying former RCW 9.94A.383 when it stated community supervision would start immediately, that statute coincides with former RCW 9.94A.120(7)(a)(ii)(A), (B) and former RCW 9.94A.170(3) to likewise require tolling of the entire 68-month community supervision period during confinement. This reasoning comports with the rule that conditions of community supervision take effect immediately upon entry of the judgment and sentence even while the offender is confined and the period of community supervision is tolled. See In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 177 P.3d 675 (2008) (tolling of offender's period of community custody did not also toll the DOC's authority to discipline offender for violating terms of community custody). Such is the case here. As argued by the DOC, the judgment and sentence gave Mr. Finch notice that he was immediately subject to the conditions of his judgment and sentence (including, for example, a victim no-contact order and a requirement to obey all laws), but his 68-month period of community supervision tolled during his jail term.

When the statutory scheme is read as a whole and in context, it plainly defeats Mr. Finch's claim that he started a period of community custody on the date his judgment was entered. Jacobs, 154 Wn.2d at 600; see also State v. Jones, No. 83451-2, 2011 WL 2571444 (Wash. June 30, 2011). Accordingly, by its July 6, 2010, order confirming that Mr. Finch's community custody term began on February 15, 2005,

and ended August 15, 2010, the court erred by reducing the mandatory 68-month period of community supervision, effectively modifying the judgment and sentence without statutory authority. The court's July 6 order is, therefore, vacated.

The DOC also correctly argues the erroneous order prevented it from tolling Mr. Finch's supervision and scheduling the end date, which is the DOC's sole province under former RCW 9.94A.170(4). Mr. Finch has, in effect, been absent from DOC supervision without its assent since the court-ordered end date of August 15, 2010. Thus, any portion of the mandatory 68-month community supervision period beginning on July 10, 2005, that he has not served due to the court's erroneous July 6 order was tolled under former RCW 9.94A.170(2). The issue is, therefore, not moot because the DOC can still obtain effective relief. We conclude that Mr. Finch's community supervision term is reinstated for the number of remaining days to serve, as calculated by the DOC in accordance with former RCW 9.94A.170(4) (now codified as RCW 9.94A.171(4)).

In light of this statutory violation and remedy afforded the DOC, we need not reach the DOC's additional contention that the superior court violated the separation of powers doctrine by setting the August 15 supervision end date. See, e.g., State v. Smith, 104 Wn.2d 497, 505, 707 P.2d 1306 (1985) (a court will not reach a constitutional issue if it can decide the case on non-constitutional grounds).[5]

Conclusion. We vacate the superior court's July 6, 2010, order, grant the DOC's petition, and reinstate community supervision of Mr. Finch for the unserved duration of the 68-month period to be calculated by the DOC.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR: Brown, J. Korsmo, J.

1. Mr. Finch now concedes mathematical error and that the end date should have been October 15, 2010.

2. The 2005 version of SSOSA was codified in former RCW 9.94A.670 (2004), which provided in pertinent part: (4) . . . If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension: (a) The court shall place the offender on community custody for the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.712, or three years, whichever is greater. (b) The court shall order treatment for any period up to three years in duration. (5) As conditions of the suspended sentence, the court may impose one or more of the following: (a) Up to six months of confinement, not to exceed the sentence range of confinement for that offense.

3. In 2005, the tolling statute was codified in RCW 9.94A.625 (2000), which provided in pertinent part: (2) Any term of community custody, community placement, or community supervision shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed. (3) Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason. (4) For terms of confinement or community custody, community placement, or community supervision, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision. The statute is presently codified in RCW 9.94A.171.

4. The statute was recodified as RCW 9.94A.545 by Laws of 2001, ch. 10, § 6. The new statute substituted the term "community custody" for "community supervision," but still contains the same tolling provision while the offender is in confinement. Thus, this version of the statute would likewise defeat Mr. Finch's argument that his "community custody" period started when the judgment was entered.

5. We also need not address the DOC's contentions that Mr. Finch's motion to confirm the duration of community custody was time-barred by the one-year limitation on collateral attacks in RCW 10.73.090(1) and that the court lacked jurisdiction to entertain it. The motion itself to confirm or clarify what the language of the judgment means is not an untimely collateral attack and is certainly within the court's jurisdiction. The timeliness issue is muddied here because the judgment and sentence applies the incorrect SSOSA statute and, therefore, has facial infirmities under RCW 10.73.090(1) that the superior court also has jurisdiction to correct. In any event, Mr. Finch received an improper remedy and the matter is resolved without resort to a strained time-bar analysis.