IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CORRY J. GLOVER, Appellant.	)	No. 62454-7-I DIVISION ONE UNPUBLISHED OPINION FILED: December 21, 2009

Grosse, J. — We determine whether required participation in a governmental alternative program prior to conviction can count as time served as partial confinement for purposes of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, by examining not only the ordinary meaning of the language used in the statutory provision defining partial confinement, but also related provisions, the context of the statute in which the provision is found, and the statutory scheme as a whole. Here, the defendant's participation in a King County alternative program required his attendance for a substantial portion of the day. Thus, the program meets the definition of partial confinement as defined in former RCW 9.94A.030(11) (2008). Accordingly, we remand for resentencing to apply credit for time the defendant served in the King County program before he pleaded guilty.

FACTS

On March 24, 2008, Cory Glover was charged with second degree

assault—domestic violence. On April 2, 2008, he was arraigned, released on his own recognizance, and ordered to participate in King County Community Center for Alternative Programs (CCAP). Pursuant to the court order, Glover reported to CCAP at 9:00 a.m. on April 3, 2008 and each weekday thereafter. Glover spent six hours a day (three hours on Fridays) until September 18, 2008.

On September 3, 2008, Cory Glover pleaded guilty to third degree assault—domestic violence, a class C nonviolent felony. His plea admitted to assaulting his former girl friend by strangulation.

On October 13, the trial court sentenced Glover to 60 days' work release and 24 months' of community custody. Glover was given one day of credit for the time spent in jail for this cause. No credit was given for any time that Glover spent at CCAP, from April through September 18, 2008, when he was released from the program. Glover appeals contending the trial court wrongfully denied him credit for the time he spent attending CCAP.

ANALYSIS

An offender sentenced to a term of confinement has both a constitutional and statutory right to receive credit for all confinement time served before sentencing.[1] Former RCW 9.94A.505(6) (2006)[2] 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.

[1] In re Pers. Restraint of Costello, 131 Wn. App. 828, 129 P.3d 827 (2006).
[2] The 2009 amendments to RCW 9.94A.505 did not affect subsection 6.

The failure to provide credit for time served violates due process, equal protection and the double jeopardy prohibition against multiple punishments.[3] This court reviews the decision to award credit for time served de novo.[4]

Glover argues that since he was required to spend six hours a day at the CCAP program, this amounts to partial confinement. Former RCW 9.94A.030(11) (2008)[5] provides, "'Confinement' means total or partial confinement." Former RCW 9.94A.030(35) (2008) 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.

The CCAP program is 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.
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> B. For the purposes of this section, "county supervised

[3] Costello, 131 Wn. App. at 832; but see Harris v. Charles, 151 Wn. App. 929, 939, 214 P.3d 962 (2009) (Holding persons convicted of misdemeanors are not entitled to credit for time served prior to conviction as they are not in the same situation as felons and thus a rational basis exists to treat them differently. The Harris court did note, however, that "[t]he misdemeanor courts retain discretion to give credit for time served pretrial on electronic home monitoring, but they are not obliged to do so.").

[4] State v. Swiger, 159 Wn.2d 224, 227, 149 P.3d 372 (2006).

[5] Amendments to RCW 9.94A.030, which became effective August 1, 2009, changed the numbering but not the relevant content of the definitions.

> 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.[6]

King County established CCAP under the authority of former RCW 9.94A.680 (2002),[7] which provides for the availability of alternatives to total confinement for offenders with sentences of one year or less. At the time Glover was charged, former RCW 9.94A.680 provided:

> (1) One day of partial confinement may be substituted for one day of total confinement;
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> (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 limited to two hundred forty hours or thirty days. . . .
>
> (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 . . . .
>
> For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement.

The State argues that this provision only applies to persons who are convicted of crimes and thus not applicable to Glover because he was ordered to participate in CCAP before his conviction. Glover's situation falls within the parameters of the definition of "partial confinement" found in former RCW

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[6] King County Ordinance 16246, § 2 (2008).

[7] The legislature has recently amended RCW 9.94.680 to specifically authorize the court with regard to offenders convicted of nonsex and nonviolent offenses to credit time served in a county community option prior to sentencing. See Laws of 2009, ch. 227, §1 (eff. July 26, 2009).

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, Glover 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. He was therefore partially confined within the meaning of the statute. "Statutes are to be read together, whenever possible, to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.'"[8]

The State argues that RCW 9.94A.731 requires a minimum of eight hours in order for the time to be deemed partial confinement. It is true that RCW 9.94A.731 provides:

> (1) 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 as set forth in [former] RCW 9.94A.030[(35)] and 9.94A.725. The offender shall be required as a condition of partial confinement to report to the facility at designated times. During the period of partial confinement, an offender may be required to comply with crime-related prohibitions and affirmative conditions imposed by the court or the department pursuant to this chapter.

But former 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

[8] 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 Ass'n v. Washington State Dep't of Transp., 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (alternation in original) (internal quotation marks omitted)).

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.

The State's reliance on State v. Dalseg for the proposition that a program such as CCAP is merely day reporting and not partial confinement is misplaced.[9] In Dalseg, the court sentenced the defendants to 12 months' of incarceration, followed by 12 months' of community custody, permitting the defendants to serve the sentence in a work release program that included partial confinement. The defendants served their time in a work release program that required their participation during the day, but did not have the jail component usually associated with work release. The State argued that the plea agreements were entered into "'with a classical understanding of work release being [a] night in jail, day at work.'"[10] The Dalseg court held that equity demanded that the defendants be given credit for the time served in work release under the doctrine of "'credit for time spent at liberty.'"[11] Since the State had agreed to the placement, it could not now assert that it did not mean that particular work release. Here, the State was familiar with CCAP and agreed with Glover's release, subject to his daily attendance at the CCAP program.

Glover argues that even if we were to find the SRA ambiguous as to whether he is entitled to credit for time served, the rule of lenity would require interpreting the ambiguity in his favor. We agree that if we were to hold the

[9] 132 Wn. App. 854, 134 P.3d 261 (2006).
[10] Dalseg, 132 Wn. App. at 860.
[11] Dalseg, 132 Wn. App. at 864.

statute ambiguous, that the rule of lenity would require us to construe it in favor of Glover.[12] In City of Seattle v. Winebrener, the Supreme Court held that "[i]f after applying rules of statutory construction we conclude that a statue is ambiguous, 'the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.'"[13]

Glover also argues that the trial court's failure to award credit for the time he spent in CCAP violates his constitutional rights. In Reanier v. Smith, the Supreme Court held that failure to give credit for postarrest, preconviction confinement violates constitutional principles:

> Fundamental fairness and the avoidance of discrimination and possible multiple punishment dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence. Otherwise, such a person's total time in custody would exceed that of a defendant likewise sentenced but who had been able to obtain pretrial release. Thus, two sets of maximum and mandatory minimum terms would be erected, one for those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release. Aside from the potential implications of double jeopardy in such a situation,[4] it is clear that the principles of due process and equal protection of the law are breached without rational reason.
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> FN4. This refers to the aspect of double jeopardy prohibiting multiple punishments and arises from the possibility of serving more actual time in confinement on a maximum or mandatory minimum sentence than provided by law.[14]

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[12] City of Seattle v. Winebrener, No. 81279-9, 2009 WL 3465931 (Wash. Oct. 29, 2009).
[13] Winebrener, No. 81279-9, 2009 WL 3465931, at *5 (Wash. Oct. 29, 2009) (quoting State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005)).
[14] 83 Wn.2d 342, 517 P.2d 949 (1974).

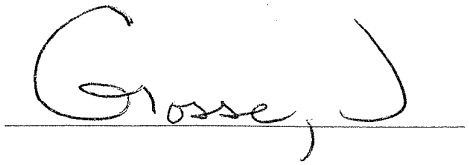
But the State argues it has a rational basis for treating pretrial and posttrial felony conviction offenders differently. The State argues that its interest in securing attendance in court and still protect the community at large by a nonconfinement option is different than a person who is convicted at trial. But such an argument fails because felons have a statutory right to credit for time served as per former RCW 9.94A.505(6). 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 postconviction home detention despite the fact that the State did not agree to his release.[15] In State v. Anderson, the defendant was convicted of a felony and was released on electronic home monitoring pending appeal.[16] The court held that because the statute permitted such credit for pretrial, there was no rational basis to distinguish between presentence and postsentence electronic home detention.[17] While the State notes that these cases involve credit for time served postconviction, their reasoning is nonetheless instructive here.

Here, because we can discern the plain meaning of this 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, we need not decide this issue on a

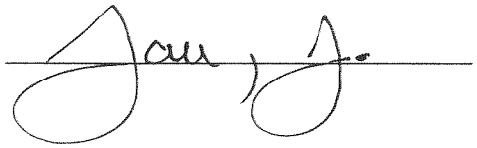
[15] 159 Wn.2d 224, 149 P.3d 372 (2006).
[16] 132 Wn.2d 203, 937 P.2d 581 (1997).
[17] Anderson, 132 Wn.2d at 213.

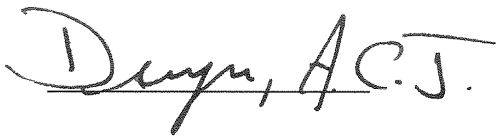
constitutional basis or based on the rule of lenity.[18] Time spent in the CCAP program met the definition of partial confinement under the SRA, such that Glover is entitled to credit for the time he served there.

Accordingly, we remand to the trial court to consider Glover's participation in CCAP as time served in partial confinement.



WE CONCUR:





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