

Summary of SC92434, *State ex rel. Zane Valentine v. The Honorable Mark Orr*

Proceeding originating in the Taney county circuit court, Judge Mark Orr

Argued and submitted May 10, 2012; opinion issued June 12, 2012

Attorneys: Valentine was represented by James C. Egan of the public defender's office in Springfield, (417) 895-6740; and the state was represented by Anthony M. Brown and Jeffrey M. Merrell of the Taney County prosecutor's office, (417) 546-7260.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A court sentenced an offender to prison in August 2011 but asked that he be placed in the department of corrections' sex offender assessment unit. The unit recommended that the offender be released on probation, finding he was amenable for treatment in his community. Following a January 2012 hearing, the court denied probation and ordered that the man serve his sentences. In a unanimous decision written by Judge George W. Draper III, the Supreme Court of Missouri makes permanent its writ mandating that the court place the offender on probation. The applicable statute here is section 559.115.3, RSMo, which requires a court to hold a hearing within 120 days of sentencing the offender to a program within the department of corrections. Here, the sex offender assessment unit is a "program" under the terms of the statute, which focuses on the length of a program rather than whether it provides treatment. Because the circuit court held its hearing more than a month after the 120-day time limit allowed by the statute, it lacked authority to hold the hearing, deny probation or order that the offender serve the sentences.

Facts: In June 2011, Zane Valentine pleaded guilty to one count of first-degree child molestation and three counts of second-degree statutory sodomy. The plea agreement provided that Valentine would be placed in the sex offender assessment unit in the department of corrections. At the plea hearing, the circuit court explained to Valentine that it would retain jurisdiction over him for 120 days while he was assessed, that the court would retain "complete discretion" to determine whether Valentine should be granted probation and that a favorable assessment did not guarantee probation. Valentine indicated he understood the terms of the plea agreement and the circuit court's retention of jurisdiction. On Aug. 25, 2011, the court sentenced Valentine to a total of 20 years in prison – concurrent terms of five years for each of the sodomy counts to run consecutively to 15 years for the molestation count. The court retained jurisdiction over Valentine pursuant to section 559.115, RSMo, and asked that he be placed in the sex offender assessment unit. It reiterated that his successful participation in the unit did not guarantee he would be placed on probation at the end of 120 days. On Dec. 13, 2011, the unit issued its assessment report recommending that Valentine be placed on probation for treatment within his community. The state opposed his release. On Jan. 19, 2012, the court held a hearing to determine whether it would be an abuse of discretion to release Valentine on probation. The court ultimately found it would be an abuse of discretion to release Valentine and ordered that the sentence be executed (that he be sent to prison pursuant to the original sentence). Valentine sought reconsideration, arguing the court failed to hold a hearing within the time limit and, therefore, lacked authority to hold the Jan. 19 hearing or deny him probation. In a second motion for reconsideration, he also argued the sex offender assessment unit was a "program" for

purposes of section 559.115. The court overruled his motion. Valentine sought relief in this Court, which granted his petition for a preliminary writ of mandamus.

WRIT MADE PERMANENT.

Court en banc holds: (1) The subsection of section 559.115 that applies here is subsection 3, not subsection 2. Subsection 2 provides that a court has power to grant probation any time up to 120 days after the offender has been delivered to the department of corrections. Pursuant to subsection 3, however, once a sentence has been imposed and the board of probation and parole timely reports that an offender has completed an institutional program, the offender must be placed on probation in the absence of an abuse of discretion by the board. If the court determines the board's decision constitutes an abuse of discretion, it is required to hold a hearing within 90 to 120 days before ordering execution of the offender's sentence. After examining the plain language of both subsections and applying them to the facts presented, it is evident that the court here sentenced Valentine under subsection 3. The judgment, the department's recommendation and the court's action all comport with the procedures set forth in section 559.115.3. Additionally, the court's use of the word "discretion" supports this conclusion because subsection 3 grants the circuit court the authority to deny probation even in light of a favorable recommendation by the department when it finds there has been an abuse of discretion.

(2) The sex offender assessment unit is a "program" for purposes of section 559.115.3. There is no dispute the unit is operated by the department and lasts 120 days, but no case has addressed directly whether it is a "program." The parties agree one of the unit's primary purposes is to assist the circuit court in determining whether the offender should be released back into the community based on the offender's risk of reoffending and amenability to treatment. Although department descriptions of the unit state that the unit does not provide treatment, the plain language of the statute does not require that a "program" be a treatment program. It merely states that the court may recommend placement of an offender in a department 120-day program. It is the length of the program, rather than its purpose, that is stated explicitly. This is bolstered by a further reading of the subsection that specifically provides that shock incarceration is a "program" although it may not involve treatment. Moreover, the judgment, the department's recommendation, and the court's action in holding a hearing and examining the issue for an abuse of discretion all demonstrate Valentine's placement in the unit was treated as a "program." Even assuming *arguendo* that a "program" must provide some form of treatment, one department document described the unit as offering "basic relapse prevention education" in conjunction with its assessment, which is a treatment component.

(3) The hearing was not held within the time required by the statute. Under section 559.115.3, the circuit court could order execution of Valentine's sentences only after conducting a hearing on the matter within 90 to 120 days of Valentine's sentence. Here, the court sentenced Valentine on Aug. 25, 2011; as such, the court's authority to order execution of the sentences expired 120 days thereafter, on Dec. 23, 2011. The court did not hold a hearing, however, until Jan. 19, 2012, nearly a month after the 120-day period set out in section 559.115.3 expired. The court, therefore, lacked authority to enter its January 2012 judgment denying Valentine probation and executing his sentences. The court is ordered to release Valentine on probation under such conditions as it deems appropriate.