IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

RYAN MICHAEL RAY NAGEL, ANDRE DEVOUN MCKENZIE, MATTHEW JEFFREY HOLT, ANDREW JONATHAN KUNTZ, KAREN LOFGREN, Plaintiff(s) , vs. WASHINGTON DEPARTMENT OF CORRECTIONS, STEPHEN SINCLAIR, ROBERT HERZOG Defendant(s) .	Cause No: 20-2-05585-4 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON MOTION FOR EMERGENCY INJUNCTIVE AND DECLARATORY RELIEF**

PREAMBLE

On March 26th, 2020, the Court heard telephonic argument on Plaintiffs' motion for emergency injunctive and declaratory relief. Plaintiffs requested the Court direct the Department of Corrections (DOC) to provide the Court with a detailed plan related to Defendants' response to the COVID-19 pandemic. The plan sought would address, generally, the following elements:

(1) Sanitation in the facilities and disease-spread prevention among incarcerated persons.

(2) Access screening and other methodology to be employed to stop the virus from entering into the prison facility.

(3) Isolation and quarantine plans to be followed in the event of disease contraction and

disease exposure.

(4) Release of low-level offenders, elderly offenders, and offenders nearing the end of their Court-ordered confinement.

Defendant DOC responded with a detailed factual recitation of the steps that DOC had taken to demonstrate preparedness and disease prevention, including many of their practices that continued to evolve up to and through the time of the hearing. Following review of the overlength briefing submitted by the parties, along with supporting declarations, treatises and information, and having heard argument of counsel, the Court makes the following:

FINDINGS OF FACT

(1) The COVID-19 virus has reached a pandemic stage, resulting in a state of emergency having been declared by Governor Jay Inslee and President Donald Trump. Emergency orders have been issued by the Washington State Supreme Court in response to this pandemic. These orders prohibit or markedly curtail most nonessential commercial and governmental activity.

(2) The disease was first discovered in Washington State on or about January 24th, 2020, with the first COVID-19 related death confirmed on February 29th, 2020. Since then, the spread of the virus has expanded exponentially, with fulminating symptoms and high rates of morbidity and moribundity. The progress of the contagion continues to accelerate, with a corresponding negative impact on community health and community economies generally, and the criminal justice system particularly.

(3) The disease is spread by inhalation of respiratory droplets from an infected person. As the virus can survive outside of the body in some circumstances for several days, skin-to-skin contact or contact with contaminated surfaces can also spread the virus.

(4) Given the methods of transmission, preventative measures such as frequent and thorough handwashing, keeping hands away from the face, disinfecting surfaces, and proper social distancing can forestall the spread of the disease.

(5) Following exposure to or acquisition of the virus, secure quarantine or isolation practices, respectively, are necessary to arrest the spread of the contagion.

(6) Individuals in close proximity to one another, like in a prison, a homeless shelter, a school, a church, a movie theater, or similar venues are put at increased risk of contracting the disease.

(7) Of the five Plaintiffs in this case, four are incarcerated in the prison system managed by the DOC, and one remains in the Pierce County Jail managed by the Pierce County Sheriff.

(8) On February 9th, 2020, the DOC opened its Emergency Operations Center (EOC) at its Tumwater headquarters to support statewide planning efforts to counteract the spread of the virus. The EOC operated in conjunction with the Washington State Department of Health and Washington's Military Department Emergency Management Division. The EOC has operated continuously since inception, with increasing resources, to coordinate planning, implementation, and response to the COVID-19 epidemic throughout all divisions of the DOC. A publicly available website has been providing, and continues to provide, updated information regarding the DOC's response to the virus.

(9) On March 5th, 2020, the Department of Corrections sent out information to incarcerated individuals through its kiosk system. This information specified precautions which should be taken in order to avoid the spread of the virus and to maintain personal health.

(10) By March 12th, 2020, each prison had a designated command post where a specified

person has authority to make decisions related to facility-incident management. This includes, but is not necessarily limited to, mandatory staff reporting to facility management of potential onset of disease in an inmate or staff member. Exposure to persons suffering from the disease is also to be mandatorily reported to facility management.

(11) The Department of Corrections has instructed DOC staff to implement protocols issued by the Center for Disease Control (CDC) unless wholly impracticable. The current effective CDC guidelines were issued March 23rd, 2020, the day Defendants' responsive pleadings were due to the Court. This did not provide DOC adequate opportunity to inform the Court in any direct and meaningful way the extent to which the DOC is in compliance with the CDC directives of March 23rd, 2020.

(12) It is unclear in the record what specific disinfecting solution is being utilized to maintain sanitary conditions in the prison, or what schedule this disinfecting process is on. It is unclear what personal protective equipment (PPE), including gowns and masks, is available to the DOC for use in the system. Nor is it clear what measures the DOC has attempted to acquire PPE.

(13) It is not sufficiently clear to the Court that all inmates have access to soap for the purpose of frequent handwashing, the most effective and fundamental method by which disease spreading can be reduced.

(14) It is unclear how many COVID-19 test kits are available to Defendants, and what efforts have been made to acquire test kits when they become available.

(15) Other than checking for potential elevated temperature and general questioning about whether an individual is manifesting COVID-19 symptoms, it is not clear to the Court

what screening is being implemented for staff, incoming inmates, or visitors to the facility. Nor is it clear what training the screeners received.

(16) The Court does note that visitor and volunteer access to prison facilities was suspended on March 13th, 2020, and that as of March 19th, 2020, 324 prison employees have been denied facility access due to responses invoked by the enhanced screening protocols. Three employees of Defendant have testified positive for the virus. The degree to which any of these three individuals had direct inmate contact is unclear.

(17) As of March 26th, 2020, the record reflects counsel's statement that 71 inmates have been tested for the virus with 44 of those tests negative, and 27 with results pending. The record is clear that as of March 26th, 2020, no positive cases of COVID-19 virus have been confirmed in any of Washington's prisons. This fact provides strong circumstantial evidence that the DOC has been successful thus far in its efforts to keep the virus out of the DOC facilities.

(18) Due to space limitations in the physical structure of the prisons, social distancing at the recommended 6-foot separation is often not possible to achieve.

CONCLUSIONS OF LAW

(1) The Court has subject matter and *in personam* jurisdiction of this case and the litigants. RCW 2.08.010; RCW 7.40.010.

(2) To prevail on an action for injunctive relief, the Plaintiffs must demonstrate:

(1) A clear legal or equitable right to that relief;

(2) A well-grounded fear of immediate invasion of that right;

(3) That the acts complained of either are resulting in or will result in actual and substantial injury to them. See *Markoff v. Puget Sound Energy*, 9 Wn.App. 2d 833

(2019). See also RCW 7.40.020.

(3) The grant or denial, in whole or in part, of a preliminary injunction is addressed to the sound discretion of the Court. The Appellate Courts will give great weight to the Trial Court's decision. See *Brown vs. Voss*, 38 Wn.App. 777 (1984), reversed on other grounds, 105 Wn.2d 366.

(4) Preliminary injunctive relief is generally provided to prevent alteration of the status quo until full resolution on the merits of the case can occur. It is not a device designed to afford a party the affirmative relief sought without an evidentiary hearing. See *SEIU Local 925 vs. University of Washington*, 4 Wn.App. 2d 605 (2018). Here Plaintiffs seek affirmative relief by compelling DOC to take a variety of actions potentially altering the status quo. These actions are related to the use of PPE, quarantine and isolation planning and prisoner release. This is an improper use of the preliminary injunction process, and not what the process was designed to accomplish.

(5) As will be detailed with greater particularity hereinafter, the Court is not persuaded Plaintiffs are likely to prevail on the merits of their claims at law or inequity, nor that there is a well-grounded fear of immediate invasion of their legal rights.

(6) Plaintiffs here ask the Court to modify the sentences of some incarcerated offenders, potentially to serve the balance of their terms utilizing electric home monitoring or an outright release. The Trial Court simply lacks the authority to modify an offender's sentence once imposed by the sentencing court. See *State vs. Shove*, 113 Wn.2d 83 (1989). The Plaintiffs in this case were each given a determinate sentence. RCW 9.94A.030(18). Determinate sentences are imposed by the Sentencing Court and generally cannot be modified by the Sentencing Court once imposed, except following

successful appeal or grant of a personal restraint petition. While the DOC may allow an offender early release for reasons related to a specific individual's medical status, due to a lack of prison capacity, or in other rigidly defined circumstances, the Courts have no such sentence modification authority See RCW 9.94A.728.

(7) This prohibition does not leave aggrieved prisoners bereft of options. There are other authorized avenues for prisoners obtaining early release. The Governor has the power to pardon vested in Article 3, Section 9, of the Washington State Constitution. The Governor also has the power to grant clemency. See RCW 9.94A.728(d). Individual prisoners can apply for their own release through filing of a personal restraint petition. See RAP 16.4. The Secretary of DOC may also, under some circumstances, furlough prisoners. RCW 72.66.012. It is through these methods that criminal sentences may be modified or altered, not through the use of the injunctive process.

(8) Plaintiff Holt is currently incarcerated in the Pierce County Jail. Pierce County is not a named party to this action, nor has joinder of Pierce County been sought pursuant to CR 19 or CR 20. For that reason, the Court has not acquired jurisdiction over Pierce County in this case, and this decision and order is not enforceable against Pierce County.

(9) Plaintiffs' claims under the privileges and immunities clause found in Washington State Constitution Article I, Section 12, and its counterpart U.S. Constitution Amendment 14 are to be similarly analyzed insofar as the instant motion is concerned. See *Seeley v. State*, 132 Wn.2d 776 (1997). Plaintiffs have claimed, in essence, that the fundamental rights they possess as citizens of Washington State, by reason of such citizenship, have been abridged by insufficient response to the COVID-19 outbreak by DOC. Plaintiffs have acknowledged, correctly, that their claims do not implicate a fundamental right or

suspect class and consequently are not subject to strict scrutiny. The rational basis test consequently applies to determine whether Plaintiffs have in fact had a fundamental right violated by Defendants. See *Anderson v. King County*, 158 Wn.2d 1 (2006).

(10) By virtue of felony conviction, incarcerated persons lose many fundamental rights, liberty among them. *Overton v. Bazzetta*, 539 U.S. 131 (2003). In *Matter of Pino* 6 Wn. App. 2d 1039 (2018) (unpublished, cited per GR 14.1) the Court adopted the principle articulated in *Overton* (supra p.132) that "[T]he courts must accord substantial deference to the professional judgment of prison administrators, who bear significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them". The Court may possess authority to ensure that the DOC is substantially complying with its own guidelines, so as to not be acting arbitrarily. Nonetheless, the adoption and manner of implementation of those guidelines is the function of the DOC per the U.S. Supreme Court's decision in *Overton* (supra).

(11) In evaluating the application of Washington State Constitution Article I, Section 12, and U.S. Constitution Amendment 14, and accepting that Governor Inslee's emergency proclamation is equivalent to an expression of legislative intent and therefore subject to this kind of constitutional review (see State v. Zack, 2 Wn.App. 2d 667 (2018)), the Court notes that the plain language of Governor's emergency proclamation does not include prisons as locations where gathering size should be restricted. The Court finds this exclusion to be intentional. Plaintiffs are required, under the rational basis test, to overcome the presumption of rationality of this exclusion and clearly demonstrate the emergency order is arbitrary or irrational. See *American Legion Post, 149 v. Washington State Department of Health*, 164 Wn.2d 570 (2008).

(12) To pass muster under the applicable minimum scrutiny test, the implementation of the emergency order must treat all members of the class alike; establish a rational basis for distinguishing those within the class from those without the class and the distinction must be rationally related to the purpose of the legislation/order. See *O'Hartigan v. Department of Personnel*, 118 Wn.2d 111 (1991). The record supports a finding that the Governor's emergency order, as applied in this case, survives minimum scrutiny and Plaintiffs challenge on these grounds fails. All inmates receive like treatment under the order. The basis for those within the class and outside the class is based on a felony conviction. The purpose of excluding prison inmates from operation of the order is rooted in public safety concerns.

(13) Plaintiffs also claim the application of Washington State Constitution Article I, Section 14, should result in grant of their motion because the Department of Corrections' response to the COVID 19 virus constitutes cruel punishment. This Court will forgo extensive comparison between the Washington State Constitution, Article I, Section 14, and U.S. Constitution Amendment 8, since such analysis is superfluous to this decision. Utilizing the test as to whether prison conditions violate the Eighth Amendment, the criteria are:

(1) is the alleged deprivation sufficiently serious; and

(2) did prison officials have sufficiently culpable state of mind.

See *Wilson vs. Seiter*, 501 U.S. 294 (1991). As these criteria are written in the conjunctive, the prompt action of the DOC in developing and establishing protocols to address the still emerging best practices most effective in combatting the COVID 19 virus outbreak, the Court does not find a "culpable state of mind" existed related to the

DOC's response. The challenge under Washington State Constitution Article I, Section 14, fails.

Subject to the provisions later detailed in this order, Plaintiffs' emergency motion for injunctive and declaratory relief is DENIED.

Based on the foregoing, and recognizing the fluid nature of identifying hazards and developing processes to combat COVID 19 infections by the CDC and other health authorities, the Court rules as follows on the relief claimed under Plaintiffs' emergency motion for injunctive and declaratory relief:

ORDER

(1) Plaintiffs request that DOC be ordered to immediately release and furlough prisoners now serving lawful sentences is DENIED.

(2) Plaintiffs' claim that DOC improve methods of disease spreading and institutional sanitation is RESERVED.

(3) Plaintiffs' claim that screening processes for those entering the prison facility be modified and personal protective equipment provided to staff responsible for screening is RESERVED.

(4) Modification of DOC's quarantine and isolation process is RESERVED.

To ensure compliance with best practices recommended by the CDC to combat the COVID 19 virus, which Defendant DOC has cited as its objective, Defendant shall address, by filed declaration, Items 2, 3 and 4 of this Court's ruling on or before April 8, 2020. The Court requests a thorough detailing of what steps and processes are being taken to comply with the CDC protocols. This includes, but is not limited to:

(A) How soap will be made available at no cost to all inmates;

(B) How personal protective equipment in the form of masks and gowns are utilized by intake staff and food service workers, including what has been done to acquire such PPE and COVID 19 test kits;

(C) Specifying composition of disinfectant used by sanitation staff and the schedule to be followed for sanitization of facilities; and

(D) Protocol for quarantine of all individuals exposed to the COVID 19 virus, and isolation of those who have acquired the virus.

(E) How personal space considerations can best be achieved in the prison environment;

(F) Advisement of the number of COVID 19 tests performed and outcomes of those tests.

It is so ORDERED.

DATED THIS 1ST DAY OF APRIL 2020.

Judge Stanley J. Rumbaugh

FILED
DEPT 18
IN OPEN COURT
APR - 1 2020
PIERCE COUNTY, Clerk
By BM
DEPUTY