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APR 25 2012

King County Prosecutor  
Appellate Unit

NO. 68015-3-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE HODGES,

Appellant.

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

The Honorable Bruce W. Hilyer, Judge

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BRIEF OF APPELLANT

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COURT OF APPEALS  
STATE OF WASHINGTON  
ERIC J. NIESLEN

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A. ASSIGNMENTS OF ERROR

1. The judgment and sentence is invalid because it denies appellant presentence custody earned early release time.

2. The court erred in denying appellant's motion to correct the judgment and sentence to reflect appellant's right to presentence custody earned early release time is not restricted.

Issues Pertaining to Assignments of Error

Appellant pleaded guilty to a gross misdemeanor. The court's judgment and sentence imposed 364 days imprisonment in the county jail. The 364 days were suspended, in part, on the condition that appellant serve 305 days. When appellant was sentenced he had already served 305 actual days in presentence custody. The judgment and sentence credited appellant with the 305 days he actually served but it did not credit him for any early release time he earned while serving those 305 days. Appellant moved to modify the judgment and sentence arguing the judgment and sentence was invalid because it illegally restricted his right to any earned early release time while in presentence custody. The court denied the motion.

1. Is the judgment and sentence invalid by denying appellant the right to any presentence custody earned early release time?

2. Did the court err when it denied appellant's motion to modify the judgment and sentence?

B. STATEMENT OF THE CASE

The State initially charged Lawrence Hodges with two counts of first degree child molestation. CP 1-8. The information was amended to one count of communication with a minor for immoral purposes and one count of first degree child molestation. CP 11-12.

Hodges and the State negotiated a plea agreement. Hodges agreed to plead guilty to the communication of a minor for immoral purposes charge in exchange for the State dismissing the child molestation charge, and recommending a sentence that included, in part, a maximum sentence of 364 days suspended on the condition Hodges serve 305 days with credit for 305 days he served while the case was pending. CP 21. On October 14, 2011, Hodges pleaded guilty to the communication of a minor for immoral purposes charge and the State dismissed the molestation charge. CP 13-20; RP 2-14 (October 14, 2011).

On October 28, 2011 a sentencing hearing was held. Consistent with the plea agreement, the State recommended, among other terms, that the court sentence Hodges to a suspended sentence of 364 days on the condition he serve 305 days and that he be given credit for 305 served. RP 5 (October 28, 2011). The court agreed with the State's recommendation.

RP 19 (October 28, 2011). The court entered a judgment and sentence. The form judgment and sentence imposed a suspended sentence of 364 days imprisonment in the King County Jail on the condition Hodges serve 305 days, among other conditions. CP 22-26. The court noted on the judgment and sentence the “jail term satisfied.” Id.

On November 16, 2011, Hodges moved to modify the judgment and sentence to rescind or clarify some of its terms and conditions. Part of his request was that he be sentenced to the full 364 days. RP 3 (November 16, 2011). Hodges argued the judgment and sentence was illegal on its face because by only crediting him with the 305 he actually served presentence it denied him any early release time he earned while serving those 305 days. Id.

The State argued that in the plea agreement the State agreed it would recommend 305 days credit for time served in presentence custody. That by entering into that plea agreement Hodges waived his right to any earned early release or “good time” while in presentence custody. RP 7 (November 16, 2011).

The court granted Hodges motion, in part. It modified some the terms of the judgment and sentence but it denied his request to modify that part that credited him with 305 days served. By denying the request the court foreclosed Hodges from receiving any presentence custody earned

early release time he may have been entitled to. CP 29; RP 9 (November 16, 2011). The court stated, “I’m going to stick with State’s analysis on the 305 days.” RP 9 (November 16, 2011).

C. ARGUMENT

THE COURT EXCEEDED ITS SENTENCING AUTHORITY BY DENYING HODGES’ MOTION TO MODIFY THE JUDGMENT AND SENTENCE, WHICH EFFECTIVELY RESTRICTED HODGES’ RIGHT TO ANY EARNED EARLY RELEASE TIME WHILE IN PRESENTENCE CUSTODY

Hodges pleaded guilty to communicating with a minor for immoral purposes. Communication with a minor for immoral purposes is a gross misdemeanor. RCW 9.68A.090(1). The maximum term of imprisonment for a gross misdemeanor, when not fixed by statute, is 364 days. RCW 9.92.020.

Under RCW 9.92.151(1), when a person is confined in a county jail, their sentence “may be reduced by earned release credits in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction.” The earned early release time “shall be for good behavior and good performance as determined by the correctional agency having jurisdiction.” RCW 9.92.151(1). And, “[a]ny program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration.” Id.

The court sentenced Hodges to 364 days. The sentence was suspended on the condition Hodges serve 305 days. The judgment and sentence credited Hodges for the 305 days he served in presentence custody with a notation “jail term satisfied.” It did not, however, credit Hodges for any “good time” or earned early release time he was entitled to while serving those 305 days. The judgment and sentence, and the court’s subsequent denial of Hodges’ motion to modify the judgment and sentence to credit him with any earned early release time, effectively restricted Hodges’ right to any of the early release time he earned while in custody.

A trial court commits reversible error when it exceeds its sentencing authority. In re West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005). In West, the State charged West with first degree robbery and if convicted he could have been sentenced to life without the possibility of parole as a persistent offender. Id. at 207. West entered into a plea agreement. The State agreed to reduce the charge to first degree theft and in exchange West agreed to plead guilty, stipulate to an exceptional sentence of 10 years, and waive any right to earned early release time. Id. West was sentenced to 10 years, the statutory maximum, and on the judgment and sentence it was noted, “defendant stipulates to flat time—no earned early release.” Id. at 208.

The West Court held that under former RCW 9.94A.150(1), only the correctional agency having jurisdiction over the offender determines earned early release time. In re West, 154 Wn.2d at 212. That statute read in pertinent part that a person’s sentence “ may be reduced by earned early release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned early release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction.”

The West Court found that former RCW 9.94A.150 provided no authority for the superior court to grant or deny early release time. In re West, 154 Wn.2d at 212 (citing In re Mota, 114 Wn.2d 465, 478, 788 P.2d 538 (1990)). It also found the purpose of good time or earned early release time serves important disciplinary goals. Id. (citing In re Williams, 121 Wn.2d 655, 661, 853 P.2d 444 (1993)). The Court reasoned that under the plain language of the statute, and the purpose for earned release time, a sentencing court has “no authority to restrict the imposition of earned early release time.” Id. at 213. The Court ruled that because the sentencing court did not have authority to restrict the imposition of earned early release time, the judgment sentence, which stated West was not entitled to earned early release time, was fundamentally defective and

justified collateral relief. Id. at 213. The Court remanded for correction of the invalid judgment and sentence.

The West court also rejected the State's arguments that West waived any right to earned early release time as part of the plea agreement and that West invited any error. "This court has repeatedly held that 'an individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law.'" In re West, 154 Wn.2d at 213 (citing In re Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004)). "Washington courts have held that even where a defendant clearly invited the challenged sentence by participating in a plea agreement, to the extent that he or she 'can show that the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review.'" Id. at 214 (citing State v. Phelps, 113 Wn.App. 347, 354, 57 P.3d 624 (2002)).

The West Court's reasoning and holding are applicable. The language in RCW 9.92.151(1), governing earned early release for person's confined in the county jail, is almost identical to the former RCW 9.94A.150(1), the statute in West, and serves the same purpose. The sentencing court here exceeded its sentencing authority in the same way as the sentencing court in West. By only crediting Hodges for the 305 days

he actually served, the judgment and sentence effectively denied Hodges any earned early release time he was entitled to while serving that time.<sup>1</sup>

Moreover, when Hodges moved to modify the judgment and sentence to remedy the defect, the court denied the request, agreeing with the State's argument that Hodges waived his right to earned early release under the terms of the plea agreement. Under the holding in West the terms of a plea agreement do not waive the right to earned early release time. In re West, 154 Wn.2d at 213-214.

As in West, by restricting any early release time Hodges may have earned while in presentence custody, the court exceeded its sentencing authority. This Court should remand and instruct the court to correct the invalid judgment and sentence.

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<sup>1</sup> The record does indicate if Hodges actually earned any early release time. But, if he did, he was entitled to be credited for that time. See, In re Talley, 172 Wn.2d 642, 260 P.3d 868 (2011) (a person is entitled to early release time actually earned on any presentence custody in a county jail).

D. CONCLUSION

For the above reasons, this Court should remand and instruct the sentencing court to correct Hodges' judgment and sentence.

DATED this 25 day of April, 2012.

Respectfully Submitted,

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Attorneys for Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON	)	
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Respondent,	)	
	)	
vs.	)	COA NO. 68015-3-1
	)	
LAWRENCE HODGES,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LAWRENCE HODGES  
125 182<sup>ND</sup> STREET SW  
BOTHELL, WA98012

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF APRIL 2012.

x *Patrick Mayovsky*

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