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MAR 15 2013

King County Prosecutor
Appellate Unit

NO. 69462-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH DOSS,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 MAR 15 PM 4:40

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

The Honorable Gregory P. Canova, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ruled it did not have the authority to correct appellant's sentence to award him all the credit he was entitled to for the time he was confined before sentencing.

2. The court erred in failing to grant appellant credit for time served before sentencing in King County's Community Center for Alternative Programs (CCAP).

3. The court erred in failing to grant appellant credit for all the time he served in confinement before sentencing.

Issues Pertaining to Assignments of Error

1. Appellant appealed from his sentence raising the issue that the combination of confinement and community custody exceeded the statutory maximum term. This Court agreed and ordered the sentencing court to correct the error. At the remand hearing appellant requested the court also correct his sentence to include credit for the time he served in CCAP and credit for the accurate number of days he was confined before sentencing. The court ruled it did not have the authority to make those corrections. Under established case law and the court rules, did the court have the authority and duty to correct the erroneous calculation of credit for time served before sentencing?

2. Before sentencing following appellant's guilty pleas, appellant was released on personal recognizance on the condition he participated in the King County CCAP. Under RCW 9.94A.505(6), RCW 9.94A.680, appellant's rights to due process, equal protection and the prohibition against double jeopardy, was appellant entitled to receive credit for time served in the CCAP?

3. Was appellant denied his right to receive credit for all the time he was confined before he was sentenced where appellant was arrested and confined for allegedly committing additional offenses while waiting trial on previously alleged offenses, those offenses were joined under one cause number, and appellant was sentenced to concurrent terms under that cause number following his guilty pleas?

B. STATEMENT OF THE CASE

On April 8, 2010, the King County prosecutor charged Elija Doss with second degree assault. CP 1-5 (cause no. 09-1-05189-1 SEA). It was alleged Doss assaulted Kimberly Doss. Id. While the case was pending, the prosecutor charged Doss with felony violation of a no contact order and tampering with a witness under cause number 09-1-07138-8 SEA. CP 46-54. The victim in the new charges was also Kimberly Doss. Id.

All the charges were subsequently joined for trial under cause number 09-1-05189-1 SEA. CP 55. The information was then amended

three times. CP 6-9, 10-12, 13-14. On August 9, 2009, the third amended information charged Doss with three counts of felony violation of a court order. RCW 26.50.110(5); CP 13-14. That same day Doss entered guilty pleas to all three counts. CP 56-78; RP 5-10.

On April 23, 2010 a sentencing hearing was held. Based on Doss' offender score, the court imposed a sentence of 60 months, the maximum term authorized on each count, and ordered the sentences to run concurrently. CP 15-23. The court additionally sentenced Doss to 12 months of community custody. CP 19.

The court also ruled Doss' was entitled to have the time he served waiting for trial and sentencing credited against his sentence. RP 36 (April 23, 2010).¹ The court ordered that Doss be credited with 166 days based on the State's unchallenged calculation. CP 18; RP 33 (April 23, 2010).

Doss appealed. He argued the combination of the term of confinement and community custody illegally exceeded the statutory maximum term for the crime. CP 28-29. This Court agreed and ordered the sentencing court to "amend the community custody term or resentence Doss consistent with RCW 9.94A.701(9)." CP 30.

¹ On March 8, 2013, appellant moved this Court to transfer the verbatim report of proceedings from the April 23, 2010 sentencing hearing from Case No. 67058-1-I, where it was filed in appellant's previous appeal.

A hearing on the remand order was held September 19, 2012. At the hearing Doss pointed out the court intended to credit him for all the time he served pre-sentence, but the 166 days awarded on the judgment and sentence did not include the 20 days he was ordered to participate in the Community Center for Alternative Programs (CCAP), and five days from November 19, 2009, when he was arrested on the felony violation of a no contact order and tampering with a witness charges, and November 24, 2009, the date he was remanded from the CAAP, which the State used as the start date to determine his pre-sentence credit. RP 6-9, 12 (September 19, 2012).

In response, the State informed the court when it calculated the 166 days of credit it included the time Doss spent in jail from August 10, 2009 to August 25, 2009, but it did not include the time Doss participated in the CCAP program. RP 12 (September 19, 2012). The State did not address whether it did or did not include the time between November 19, 2009 and November 24, 2009.

The court informed Doss that its “normal comment” when “imposing a specific length of time as credit for time served is if there’s a dispute as the number of days of which I’m giving credit, counsel should

recontact [sic] me and present evidence.² We'll have a hearing and note it up, and I'll resolve it at the time." RP 12-13 (September 19, 2012). The court stated the number of days Doss was credited for time served was based on the "best information available at the time." RP 12 (September 19, 2012).

The court believed the issue could have been raised in the prior appeal, but it noted that absent an agreement with the State a "separate evidentiary hearing" was required, and if there had been a question after the judgment and sentence was entered it would have given Doss' counsel an opportunity for a hearing to present evidence. RP 13 (September 19, 2012). And, that the opportunity to correct or change the credit for time served calculation "has gone by." RP 13 (September 19, 2012).

Doss told the court he attempted to contact counsel about the issue when he was in prison, but counsel would not return his calls. RP 13-15 (September 19, 2012). The court sympathized with Doss but reasoned, the judgment and sentence "has been approved by the Court of Appeals on all the issues that were raised to it except for the one issue that I addressed today. So I'm stuck." RP 16 (September 19, 2012). The court ruled it was not "legally allowed to change those conditions [credit] of the

² The court did not make any "comment" at the sentencing hearing that counsel could contact the court and present evidence if there was a dispute regarding the credit for time served the court awarded. RP 3-40 (April 23, 2013).

judgment and sentence.” Id. The court indicated it did not know if Doss was in fact entitled to additional credit for time served. RP 18 (September 19, 2012).

Doss requested the court afford him a hearing on the issue. RP 18 (September 19, 2012). The court refused. “I’ve explained the limitations of my authority and that’s the best I can tell you at this point.” RP 18 (September 19, 2012).

The court amended the judgments and sentence by ordering any community custody be stricken. CP 29-30. Doss timely appeals. CP 24-25.

There were 153 days between November 24, 2009 and April 26, 2010, the date Doss was sentenced. From August 10, 2009 to August 25, 2009, which the State indicated it included in calculating the number of days Doss served before sentencing, is an additional 15 days. Doss was granted 166 days. CP 39-47.

Although a complete record was never developed below, what it does show appears to support Doss’ claim. Doss was arrested on August 10, 2009. CP 31-35. He was released on August 25, 2009, on the condition he participate in the enhanced CCAP. CP 36, 37-39, 40. The State admitted the time Doss spent in the CCAP was not credited against his sentence.

It also appears that Doss was arrested on November 19, 2009 for felony violation of a no contact order and tampering with a witness. Those charges were joined for trial with the original assault charge under one cause number. CP 45, 55. On November 24, 2009 the court entered an order remanding Doss from the CCAP to jail based on a November 23, 2009 violation report alleging Doss violated a condition of the program because of the tampering with witness charge. CP 41-43.

C. ARGUMENTS

1. DOSS IS ENTITLED TO CREDIT FOR TIME SERVED IN CCAP.

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. RCW 9.94A.505(6). The failure to accurately award an offender credit for time served violates due process, equal protection, and the double jeopardy prohibition against multiple punishments. In re Pers. Restraint of Costello, 131 Wn. App. 828, 832, 129 P.3d 827 (2006). Whether to award credit for time served is a question of law that the court reviews de novo. State v. Swiger, 159 Wn.2d 224, 227, 149 P.3d 372 (2006)

A court's ultimate goal in reviewing a statute is to identify and give effect to the Legislature's intent. State v. Jacobs, 154 Wn.2d 596,

600, 115 P.3d 281 (2005). Intent is determined by first looking at the language of the statute. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998).

Confinement includes both total and partial confinement. RCW 9.94A.030(8). Confinement may also be converted to county supervised community alternative programs. RCW 9.94A.680.³ The court is authorized to credit time served by the offender in an available county supervised community option before sentencing, if the offender is convicted of a nonviolent and nonsex offense. RCW 9.94A.680(3).

³ RCW 9.94A.680 provides:

Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include the following sentence conditions that the court may order as substitutes for total confinement:

(1) One day of partial confinement may be substituted for one day of total confinement;

(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 limit of two hundred forty hours or thirty days. Community restitution hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department; and

(3) For offenders convicted of nonviolent and nonsex offenses, the court may credit time served by the offender before the sentencing in an available county supervised community option and may authorize county jails to convert jail confinement to an available county supervised community option, may authorize the time spent in the community option to be reduced by earned release credit consistent with local correctional facility standards, and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.607.

For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used.

- a. Doss Is Entitled to Credit for Time Served in CCAP Because It Constitutes Confinement Under RCW 9.94A.505(6) and Is Specifically Allowed Under RCW 9.94A.680(3).

King County established the CCAP under the auspices of RCW 9.94A.680, authorizing counties to establish alternatives to confinement for certain offenders. King County Code (KCC) §§ 2.16.122, 5.12.010. The programs in require the offender to participate in approved activities for a minimum of six hours each day. KCC 5.12.010B. These activities are either offered through or approved by the Community Corrections Division of the King County Department of Adult and Juvenile Detention. KCC 2.16.120, 2.16.122, 5.12.010.

Partial confinement is defined 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.” RCW 9.94A.030(35). The varied requirements of partial confinement programs demonstrate that the term “a substantial portion of each day” does not require a specific number of hours per day or per week. Partial confinement includes work release, work crew, home detention, and a combination of work crew and home detention. RCW

9.94A.030(35). While a work release program requires confinement for at least eight hours each night, a work crew participant may be confined to work as little as thirty-five hours per week. Compare RCW 9.94A.731 (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.) and RCW 9.94A.725 (work crew tasks shall be performed for a minimum of thirty-five hours per week.). A person on home detention is confined to the home whenever not at work or school, with presumably widely varying hours of confinement. RCW 9.94A.030. Partial confinement programs may also require affirmative conduct such as treatment or urinalysis and breathalyzer testing. RCW 9.94A.725; RCW 9.94A.731.

In addition, under RCW 9.94A.680(3) “the court may credit time served by the offender before the sentencing in an available county supervised community option...” Because the CCAP is a county supervised community option the court is specifically authorized to credit time served in the program.

Under Doss’ court-ordered participation in the CCAP he was required to report every weekday for six hours, submit to random urinalysis twice every 30 days, and participate in treatment programs. Doss indicated he participated in the program for at least 20 days. The

record shows he was ordered to participate in the program as a condition of release, and it shows he was terminated from the program. The CCAP is an institution and facility operated by county government, a county supervised community option to jail, and Doss was confined to that program for a substantial portion of each day. KCC 5.12.010. Because the program meets the definition of partial confinement, and is a county supervised community option, Doss was entitled to credit for the time he served in the program before he was sentenced. RCW 9.94A.505(6) and RCW 9.94A.680(3); see also, State v. Anderson, 132 Wn.2d 203, 212-13, 937 P.2d 581 (1997) (there is no rational reason to treat pre-sentencing and post- sentencing detention differently for purposes of awarding credit for time served).

- b. If This Court Concludes the Statutes are Ambiguous, the Rule of Lenity Requires Interpreting the Ambiguity in Doss' Favor.

The State may argue RCW 9.94A.505(6) and RCW 9.94A.680 are ambiguous regarding whether Doss is entitled to credit for time served in CCAP. Where a criminal statute is ambiguous, courts resolve the ambiguity in favor of the defendant. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P. 2d 616 (1999). If ambiguous, the statutes must be interpreted in Doss' favor.

c. The Court's Failure to Order Credit for Time Served in CCAP Violates Equal Protection.

The equal protection clauses of the state⁴ and federal⁵ constitutions require credit for time served because similarly situated persons must receive like treatment. Anderson, 132 Wn.2d at 212-13. There is no rational difference between the CCAP and other pre-sentencing partial confinement. Equal protection requires Doss receive credit for the time he spent in this program before sentencing

d. The Court's Failure to Order Credit for Time Served in CCAP Violates Double Jeopardy.

The double jeopardy clauses of the state⁶ and federal⁷ constitutions guarantee three separate protections, including the protection against multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995); State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). Because the failure to accurately award credit for time served violates the double jeopardy prohibition against multiple

⁴ Const. art. 1, § 12 provides: No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

⁵ U.S. Const. amend. 14 provides, in pertinent part: . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁶ Const. art. 1, § 9 provides: [n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense . . .

⁷ In relevant part, the Fifth Amendment to the United States Constitution provides: [n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .

punishments, the court's failure to credit Doss for time served in the CCAP before sentencing violated double jeopardy. Costello, 131 Wn. App. at 832.

2. DOSS IS ENTITLED TO CREDIT FOR TIME SERVED BASED ON HIS CONFINEMENT FOLLOWING HIS ARREST ON NEW CHARGES PENDING TRIAL.

Case law and the constitution require that an offender receive credit for all pretrial detention served. State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992). "Failure to allow such credit violates due process, denies equal protection, and offends the prohibition against multiple punishments." Costello, 131 Wn. App. at 832.⁸ These constitutional protections and rights guarantees that an offender will receive credit against his maximum sentence for time served in pretrial detention. Reanier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949 (1974); In Re Phelan, 97 Wn.2d 590, 594, 647 P.2d 1026 (1982).

Credit is ... not allowed for time served on other charges, even if the sentence is concurrent with the sentence on those charges. If, however, the offender is confined on two charges simultaneously, any time not credited towards one charge must be credited towards the other.

⁸ In Costello, this Court recognized that former RCW 9.94A.120(17) (now renumbered as RCW 9.94A.505(6)) " 'simply represents the codification of the constitutional requirement that an offender is entitled to credit for time served prior to sentencing.' " Costello, 131 Wn. App. at 833 (quoting State v. Williams, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990)).

13B Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law, ch. 36, § 3603, at 320 (2d ed.1998) (footnotes omitted).

While pending trial on the initial assault charge in cause number 09-1-05189-1, Doss was charged with felony violation of a no contact order and tampering with a witness in cause number 09-1-07138-8. The charges in both cause numbers named the same victim as the pending charge, and were joined in cause number 09-1-05189-1. The charges were subsequently amended and Doss eventually pleaded guilty to those offenses.

It appears from the record Doss was arrested on November 19, 2009 for the felony violation of a no contact order and tampering with witness charges, and on November 24, 2009, he was terminated from the CAAP. It does not appear Doss was awarded credit for the time between November 19th and November 24th. Because Doss was charged in one amended information with the three offenses, pleaded guilty to those offenses and sentenced to concurrent 60 month sentences, and was simultaneously confined before sentence on those offenses, he is entitled to credit for time served related to those offenses.

3. THE COURT HAD THE AUTHORITY AND DUTY TO CORRECT THE JUDGMENT AND SENTENCE TO GRANT DOSS THE ACCURATE CREDIT FOR TIME SERVED.

Although Doss requested the court correct the sentence to credit him with the correct time he severed both in jail and in the CCAP prior to sentencing, the court refused. The reason for the court's refusal was its belief its authority to correct the judgment and sentence was limited by this Court's remand order to the issue of the combined term of confinement and term of community custody exceeding the statutory maximum sentence. The court incorrectly ruled it did not have that authority or power to correct the erroneous credit for time served calculation.

It is established law that "[c]ourts have the duty and power to correct an erroneous sentence upon its discovery." In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001); See, State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) ("A court has the authority to correct an erroneous sentence."). Even if there is no erroneous sentencing error, the trial court has discretion to decide whether to revisit an issue, which was not the subject of appeal. State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993)

Moreover, a court may correct a clerical mistake at any time. CrR

7.8(a) provides in part:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

A clerical mistake is one that, when amended, would correctly convey the intention of the court based on other evidence. State v. Rooth, 129 Wn. App. 761, 770, 121 P.3d 755 (2005); State v. Priest, 100 Wn. App. 451, 456, 997 P.2d 452 (2000); see also, State v. Snapp, 119 Wn. App. 614, 627, 82 P.3d 252, review denied, 152 Wn.2d 1028 (2004) (same). The procedure gives the sentencing court the first opportunity to correct simple sentencing errors, avoid the potential for unnecessary punishment, and provide for a better record on review, if necessary. State v. Rowland, 97 Wn. App. 301, 305-306 983 P.2d 696 (1999).

When Doss was initially sentenced the sentencing court was not only required to credit Doss with any time he served before sentencing, it was its intention to do so. RCW 9.94A.505(6); Costello, 131 Wn. App. at 832; RP 36 (April 23, 2010). At that time Doss' counsel did not challenge the State's calculation, which the court adopted, that he was entitled to credit for 166 days. RP 33 (April 10, 2010). Doss told the court he tried to contact counsel for help to correct what he believed was a

miscalculation of the number of days of credit he was entitled to, but counsel did not respond. When he raised the issue at the hearing and requested the court address it, the court had the authority and duty to correct the error.

The State may claim this Court should refuse to address the merits of the issue because Doss did not raise the issue in earlier appellate proceedings and the trial court did not address it on remand. See, State v. Kilgore, 167 Wn 2d 28, 38, 216 P.3d 393 (2009) (addressing finality of judgment and sentence and relation to law of the case doctrine under RAP 2.5(c)(1)); State v. Traicoff, 93 Wn. App. 248, 257-58, 967 P.2d 1277 (1998) (declining to address challenge to community placement conditions raised for first time in second appeal), review denied, 138 Wn.2d 1003, 984 P.2d 1034 (1999).

In Kilgore, the Court cited Barberio, for the proposition where the trial court does not exercise its independent judgment on remand, there is no issue to review on appeal. “We held there was no issue to review on appeal because the trial court did not exercise its independent judgment on remand.” Kilgore, 167 Wn.2d at 42 (citing Barberio, 121 Wn.2d at 51).

In Barberio, the trial court declined to revisit the length of the exceptional sentence on remand. Barberio is distinguishable because the issue there, the length of an exceptional sentence, is discretionary and the

court declined to exercise its discretion. See, State v. Kolesnik, 146 Wn.App. 790, 805, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050, 208 P.3d 555 (2009) (length of exceptional sentence discretionary). Granting credit for time served before sentencing, however, is not discretionary but mandated by statute and the constitution. RCW 9.94A.505(6); Costello, 131 Wn. App. at 832. This was not a circumstance where the court had the discretion to perform an act but chose not to exercise that discretion. The court was required to credit Doss for time served before sentencing. The inaccurate calculation of that time rendered the sentence erroneous, which the court had the power and duty to correct when it was brought to the court's attention at the hearing.

Furthermore, a defendant may challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). And, this Court is obligated to correct the error, regardless of whether the error could have been brought to the trial court's attention at some earlier point in time. See, In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) ("Because the trial court herein imposed an erroneous sentence, and since the error has now been discovered, the court has both the power and the duty to correct it.").

Even if the issue is not appealable as a matter of right at this procedural juncture due to finality considerations, this Court retains the

power to reach it in the interests of justice under RAP 1.2(c). See, State v. Hathaway, 161 Wn. App. 634, 652, 251 P.3d 253 (2011) (jury fee error in judgment and sentence could not technically be appealed as a matter of right, but relief granted under RAP 1.2(c), which allows waiver of rules of appellate procedure "in order to serve the ends of justice.").

In sum, the court was required to award Doss credit for all confinement time served before the sentencing. Confinement time includes the time Doss participated in the CCAP, as well the time he was confined following is arrest on the felony violation of a no contact order and tampering with a witness. Its failure to include that time is a statutory and constitutional violation that rendered the judgment and sentence erroneous. When the error was brought to the court's attention at the remand hearing it had the authority and duty to correct the error. This Court should remand to the sentencing court to correct the credit for time served error in Doss' judgment and sentence.

D. CONCLUSION

The record supports Doss' contention that he is legally entitled to more credit for time served in confinement before the sentence than what the court ordered. Thus, this Court should remand to the sentencing court and order it to correct the judgment and sentence to grant Doss credit for the time he participated in the CCAP and for all the time he served following his arrest for felony violation of a no contact order and tampering with a witness, and to conduct a hearing, if necessary, to determine exactly the appropriate number days Doss should be credited with.

DATED this 15 day of March, 2013.

Respectfully submitted,

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