

NO. 38359-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY FELLAS,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00403-3

BRIEF OF RESPONDENT

DEBORAH KELLEY
Prosecuting Attorney

BRIAN PATRICK WENDT
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

SERVICE

Nancy P. Collins
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 4, 2009, Port Angeles, WA *Deborah Hamrick*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Did the superior court err when it refused to credit the Defendant's misdemeanor sentence with the time he served on a concurrent felony sentence that was ultimately reversed and dismissed?
2. Did the trial court have the authority to enforce the Defendant's term of probation that was part of his misdemeanor sentence?

II. STATEMENT OF THE CASE

On August 25, 2006, Port Angeles police arrested the Defendant, ANTHONY FELLAS (Fellas), on an outstanding warrant and subsequently discovered that he possessed both methamphetamine and a dangerous weapon.¹ CP 51, CP 73.

Fellas pleaded guilty to Possession of a Dangerous Weapon, and a jury convicted him for Possession of Methamphetamine. On December 1, 2006, the trial court imposed two concurrent sentences: (1) 12 months confinement for the Possession of Methamphetamine,² and (2) 180 days confinement (with 185 days suspended) and 24 months probation for the Possession of a Dangerous Weapon. CP 61. Fellas appealed. CP 51.

With respect to the gross misdemeanor, the 180 days of active confinement expired no later than February 21, 2007.³ See CP 61, 73. After the gross misdemeanor confinement period expired, Fellas remained in DOC

¹ In violation of RCW 69.50.4013(1) and RCW 9.941.250.

² The trial court later amended the judgment and sentence to include 6 months of community custody for the felony conviction. CP 59.

³ This calculation does not account for any earned early release Fellas may have accrued.

custody on his concurrent felony sentence. See CP 61.

On March 11, 2008 the Court of Appeals, Division II, reversed the felony conviction and remanded for a new trial.⁴ CP 51. On April 4, 2008, DOC released Fellas from confinement. On May 29, 2008, the State dismissed the charge of Possession of Methamphetamine. CP 42.

The superior court then issued a minute order, correcting the original judgment and sentence. CP 41. The superior court reduced the legal financial obligations that Fellas owed, but ordered that the original conditions on his supervised probation remain in place. CP 41; 6/06/08 RP 4-7; 6/20 RP 6.

Fellas objected to the continued probation conditions.⁵ 6/10/08 RP 9; 9/26/08 RP 8-15. When Fellas violated the conditions of his supervised probation, he received an administrative sanction. CP 34. Fellas appealed.

III. ARGUMENT

A. **THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO CREDIT HIS MISDEMEANOR SENTENCE WITH THE TIME THAT HE SERVED ON THE FELONY SENTENCE THAT WAS REVERSED AND DISMISSED.**

When a person is convicted of two or more offenses which arise from a single act or omission, the imposed sentences runs concurrently; unless the superior court expressly orders the sentences to be consecutive.

⁴ This Court reversed the conviction due to the State's improper questioning of a key witness regarding the Defendant's right to remain silent. CP 51.

⁵ However, the Defendant does not challenge these conditions in the present appeal. Appellant's Brief at 1-2, 9.

RCW 9.92.080(2). A sentence begins to run on the date that the individual is confined in relation to the specific offense. See RCW 9.95.060. An offender is entitled to release when the maximum sentence expires, less any time credits. See *United States v. Addonizio*, 442 U.S. 178, 189, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979).

In the present case, the superior court originally imposed two concurrent sentences: one a felony, and one a gross misdemeanor. CP 61, 73. As a result, the superior court imposed two distinct confinement periods: 12 months for the felony, and 180 days for the misdemeanor. CP 61. Because Fellas remained in the Clallam County Jail after his arrest on August 25, 2006, his two concurrent sentences started to run from that date. See CP 61, 73. Without any earned release credit, the gross misdemeanor confinement term expired on February 21, 2007. CP 61. After February 21, Fellas was serving time only on a felony sentence. CP 61.

Despite the fact that his active confinement for the gross misdemeanor expired after 180 days, Fellas asks this Court to find that he actually served 18 months confinement for the Possession of a Dangerous Weapon.⁶ See Appellant's Brief at 7-9. In support of this conclusion, Fellas cites *State v. White*, 123 Wn. App. 106, 97 P.3d 34 (2004). See Appellant's Brief at 8-9. Fellas argues that his sentence was one "interrelated term," and that when the superior court imposed a concurrent sentence it had an "obligation to accord

⁶ This is contrary to RCW 9.92.020, which states that the maximum confinement term for a gross misdemeanor is one year.

[him] credit for all time served on the felony offense toward the 365-day term imposed on the gross misdemeanor.” See Appellant’s Brief at 9. This Court should find that *State v. White* does not apply in the instant case.

In *White*, the issue on appeal addressed whether a sentencing court could be collaterally estopped from altering certain provisions of a sentence. 123 Wn. App. at 109. In *White*, the appellate court had vacated and remanded the defendant’s sentence, which the trial court entered on separate judgment and sentence forms under the same case number, for three felonies and two misdemeanors. 123 Wn.App. at 109-10. Originally, the trial court had included a drug offender sentencing alternative (DOSA), but on remand declined to grant a DOSA. *Id.* In addition, the trial court originally had imposed a sentence without separate probation terms on the misdemeanor, but on remand it added probation. *Id.* The Defendant argued that the trial court was collaterally estopped from adding probation or removing the DOSA. *Id.* The appellate court affirmed, holding that collateral estoppel did not apply because the original sentence was not a final judgment. *Id.* at 112. The appellate court reasoned, due to the incorrect offender score, it was required to reverse the entire *sentence* because the felony and non-felony sentences were interrelated and concurrent with each other. *Id.* (emphasis added). Because *White* is not on point, this Court should find that it is not dispositive of the present appeal.

If an offender is actively confined on two charges simultaneously, any time not credited toward one charge must be credited toward the other. See

In re Schaupp, 66 Wn. App. 45, 49-50, 831 P.2d 56 (1992). However, this principle does not apply in the present case because Fellas was not simultaneously confined for the gross misdemeanor beyond February 21, 2007. Because Fellas does not cite to any authority that is dispositive of the present appeal, this Court should hold that the trial court did not err when it refused to credit the time Fellas spent on the felony sentence toward his gross misdemeanor sentence.

B. THE TRIAL COURT HAD AUTHORITY TO IMPOSE PROBATION BECAUSE THE MISDEMEANOR CONFINEMENT TERM DID NOT EXCEED ONE YEAR.

An individual who is guilty of a gross misdemeanor shall not serve a confinement sentence in excess of one year. RCW 9.92.020. RCW 9.95.210 gives the superior court discretion to suspend a portion of a misdemeanant offender's sentence and place him or her on probation. The suspension "may continue upon such conditions and for such time as [the superior court] shall designate, not exceeding the maximum term of sentence or two years, whichever is longer." RCW 9.95.210(1).

In the present case, the superior court ordered Fellas to serve 180 days in jail (with 185 days suspended). When the 180 days for the gross misdemeanor expired on February 21, 2007, Fellas no longer was confined under that specific sentence. Because Fellas had not served the maximum statutory period of confinement for a gross misdemeanor, the superior court still had the authority to impose and enforce the 24 month term of probation.

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See RCW 9.92.020; RCW 9.92.210.

Fellas cites *State v. Stanley*, 47 Wn. App. 715, 737 P.2d 296 (1987), to support his claim that the superior court exceeded its authority when it enforced the probationary term. In *Stanley*, the defendant was convicted of two counts of first degree theft. 47 Wn.App. at 716. After the Defendant served 165 days in the county jail, the superior court suspended the balance of the jail term and ordered her release. *Id.* Subsequent to release, the State filed a probation revocation notice and alleged that the Defendant failed to comply with her probation conditions. *Id.* The trial court found that the Defendant had violated her probation and ordered the Defendant to serve a full year in prison, but it did not credit the 165 days she had served already on the same offense. *Id.* The appellate court held that the trial court erred when it imposed the one year jail sentence without giving appellant credit for time served. *Id.* at 720.

In the present case, unlike *Stanley*, the record shows that the superior court imposed a 60-day sentence for the probation violation rather than a full year in prison term in addition to the time served.⁷ 8/8/08 RP 5; CP 34. Because the superior court originally imposed a 180 day jail sentence for the gross misdemeanor, the trial court did not extend the sentence beyond the statutory maximum when it subsequently imposed another 60 days confinement for the probation violation. The superior court has not exceeded

⁷ Fellas's Community Correction Officer recommended that the superior court impose a 60 day sentence for each violation. CP 34.

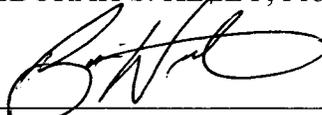
its authority under RCW 9.92.020 and RCW 9.95.210 . This Court should affirm.

IV. CONCLUSION

Based on the foregoing, this Court should hold that Fellas's gross misdemeanor confinement sentence did not exceed the statutory maximum. The State respectfully requests that this Court affirm the superior court's authority to enforce the present term of probation.

RESPECTFULLY SUBMITTED this 4th day of May, in Port Angeles, Washington.

DEBORAH S. KELLY, Prosecuting Attorney



BRIAN PATRICK WENDT WBA 40537
Deputy Prosecuting Attorney