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2011-11-21
STATE OF WASHINGTON
CLERK OF COURT

No. 40689-6-II
(Consolidated)

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

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER MAHONE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Bryan Chushcoff, Judge

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A. ASSIGNMENT OF ERROR

The trial court erred and acted outside its statutory authority when it imposed two consecutive 60-day terms in custody for each of four violations of the conditions of Sylvester Mahone's community supervision/placement because RCW 9.94B.040(3)(c) only authorized a maximum of 60 days for each violation regardless how many cause numbers are involved.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 9.94B.040(3)(c) provides that the court may impose a sanction for violations of the terms of supervision/placement "not to exceed sixty days for each violation." In State v. Taplin, 55 Wn. App. 668, 670-71, 779 P.2d 1151 (1989), the Court examined identical language in the predecessor to RCW 9.94B.040 and held that the language plainly allowed only one 60-day period for "each violation," not for each cause number. The trial court in this case imposed two 60-day terms for each of four violations, one for each of the two cause numbers for which Mr. Mahone was serving community custody/supervision. The court also ran the terms consecutively, for a total of 480 days for the four violations.

Did the trial court err and act without statutory authority in imposing two 60-day terms for each violation and must 240 days of the sanctions be stricken as not authorized by RCW 9.94B.040(3)(c)?

C. STATEMENT OF THE CASE

1. Relevant Procedural Facts

Appellant Sylvester Mahone was charged with second-degree rape

in Pierce County in 1993 and, in 1994, entered an Alford¹ plea to a lesser charge of third-degree assault. CP 1-8; RCW 9A.44.050(1)(a).² On April 7, 1994, he was ordered to serve a sentence of 62 days in confinement and 24 months of community supervision. CP 17-24.

Mahone had served all of his time in confinement and part of his community supervision when, in 1995, also in Pierce County, he was separately charged with second-degree murder. CP 49-56, 138-39; RCW 9A.32.050(1)(a); RCW 9A.32.050(1)(b). He entered an Alford plea to the new charge and, on October 24, 1995, was sentenced to serve 178 months in prison. CP 144-44, 149-59. Although the original judgment and sentence did not indicate a term of community supervision or placement, on November 18, 2005, a “correction” was entered to the judgment and sentence, ordering two years of community placement. CP 148-59, 308-21, 325-26.³

Sometime before March of 2009, Mahone was released from custody on the murder conviction and began serving his community supervision/placement for both the assault and the murder. See CP 109-14; see RP 5.

On April 23, 2010, the Honorable Judge Bryan Chushcoff heard

¹An Alford plea, so named after the case of North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), is a plea in which a defendant does not admit guilt but instead accepts a “deal” from the prosecution as part of an evaluation of the risks of the relevant options available to him.

²Although the plea form refers to an amended information charging this lesser offense, no such information was apparently filed in the court file by the prosecution and as a result it cannot be designated to this Court.

³Mahone’s appeal of this “correction” was unsuccessful. See CP 484-93.

allegations and ultimately concluded that Mahone had committed four violations of the terms of community supervision. RP 4, 15-17; CP 125-26, 510-11. The judge then ordered Mahone to serve two 60-day terms for each of the four violations; one on each cause number before the court, for a total of 240 days on the murder cause number and 240 days on the assault, to be served consecutively. CP 125-25, 510-11.

Mahone appealed in each cause number and this Court consolidated the appeals. See CP 127-29, 512-14. This pleading follows.

2. Facts relevant to issues on appeal

At the April 23, 2010 hearing, the prosecutor detailed the alleged violations contained in the corrections officers' "violation reports." RP 4-5. Those allegations were that Mahone had committed the following violations: 1) consuming cocaine on March 22, 2010, 2) consuming methamphetamine or amphetamines on March 26, 2010, 3) "a violation regarding his GPS instructions from April 6th to April 8th," and 4) an "additional GPS violation from April 9th." RP 4.

A corrections officer identified only by his last name, "Frank," was sworn in and told the court that Mahone had reported to Frank's office and given urine samples in March of 2010 several times and one sample came back positive for cocaine while another was positive for amphetamine and methamphetamine. RP 5. Frank also told the court that Mahone had agreed to wear a GPS monitoring bracelet after he had self-reported as homeless and DOC had been concerned about keeping track of him. RP 6. According to Frank, Mahone had "chosen not to maintain his GPS unit to be charged even though he has been afforded the opportunity"

to do so at Frank's office. RP 6.

Officer Frank's report indicated that the urine tests "show[] positive for amphetamines" on March 26th and "cocaine and cocaine metabolite" on March 22. RP 7-8. The court also received not only a monitoring agreement for GPS that had Mahone's signature on it but also what Frank described as "the actual printouts from the computer that shows when he was not charging it." RP 9.

Ultimately, Mahone admitted that he had consumed cocaine and methamphetamine in a "backslide" due to the stress of being out of custody after being in so long. RP 10. Mahone pointed out that the consumption had not involved "victims" and said he had been experiencing "emotional trauma." RP 10. Mahone also admitted not charging his GPS unit as often as the officers wanted him to but said it was hard for him to try to get it charged as a homeless man. RP 10-11. He admitted that he had sometimes forgotten to charge the unit or not gotten around to doing so sometimes. RP 11.

In entering an order modifying the sentences on both the assault and murder cause numbers, the court first declared that it had found Mahone guilty of the four alleged violations. RP 15. The court then imposed 60 days for each of the four violations to be served on the murder cause number and a further 60 days for each of the four violations to be served on the assault cause number. RP 15-16; CP 125-26, 510-11. The total time to be served on each cause number was 240 days and the court ordered the time for each cause number to run consecutively, for a total time in custody of 480 days. CP 125-26, 510-11.

D. ARGUMENT

THE TRIAL COURT DID NOT HAVE THE AUTHORITY
UNDER RCW 9.94B.040(3)(c) TO IMPOSE TWO
CONSECUTIVE TERMS OF 60 DAYS FOR EACH OF THE
FOUR VIOLATIONS

RCW 9.94B.040(3)(c) provides a trial court's authority to impose sanctions against a defendant who is in violation of the terms of a sentence, such as a term of community supervision or placement. See State v. Nason, 168 Wn.2d 936, ___ P.3d ___ (2010 WL 2306426) (slip Op. at 4). Under the statute, the court may impose further punishment or modify a judgment and sentence as a criminal sanction added to the original sentence. Id.; see RCW 9.94B.040(1). The authority to impose confinement, however, is not unlimited, and the statute provides, in relevant part:

If the court finds that the violation has occurred, it may order the offender to be confined for a period not to exceed sixty days for each violation[.]

RCW 9.94B.040(3)(c).

RCW 9.94B.040(3)(c) is just the latest iteration of the same statute on the same topic which has been renumbered several times. It was RCW 9.94A.634(3)(c) in 2002. See, e.g., Laws of 2002, ch. 175, § 8. In 1998, it was still RCW 9.94A.200(3)(c). See Laws of 1998, ch. 260, § 4.

Despite the number changes, the relevant grant of authority has stayed the same. In each incarnation, the relevant statutes have provided that a court having found a violation may “order the offender to be confined for a period not to exceed sixty days for each violation.” RCW 9.94B.040(3)(c); former RCW 9.94A.634 (3)(c)(2002); former RCW

9.94A.200(3)(c)(2001); see State v. Woodward, 116 Wn. App. 697, 702 n. 1, 67 P.3d 540 (2003) (noting the statute was “substantially unchanged” when renumbered in 2002).

Taplin, supra, specifically addressed the very same issue present in this case - what authority the trial court is granted under this language when the defendant is serving community custody or supervision for more than one cause number. In Taplin, the defendant entered separate pleas under separate cause numbers which were later sentenced together. 55 Wn. App. at 669. The sentences were ordered to run concurrently, as were the terms of community supervision. RP 669. The defendant was later accused of having violated two conditions of the terms of community supervision. 55 Wn. App. at 669. After finding the defendant guilty of those two violations, the lower court imposed “60 days jail time ‘per violation’ in each case,” i.e., 60 days for each of the two violations on one cause number (120 days) and 60 days for each of the two violations on the other (120) days, for a total sanction of 240 days for the two violations. Id.

On appeal, the defendant argued that the trial court erred in imposing two 60-day terms for each of the violations - one under each cause number. 55 Wn. App. at 669. He pointed to the plain language of former RCW 9.94A.200(3)(c) as focusing on “each violation,” arguing that this meant the trial court was limited to a total of 60 days for each act violating the terms of community supervision, regardless of how many cause numbers were involved. Id.

The Court of Appeals agreed. Rejecting the prosecution’s claim

that the statute allowed multiple 60-day terms for violation conditions of each concurrent sentence, the Court found no ambiguity in the statute's "clear focus" on "each violation": not on each sentence." 55 Wn. App. at 670. Because there were only two violations involved, the maximum term which could be imposed by the trial court was 120 days, even though the defendant was effectively serving two terms of community supervision. Id.

In addition, the Court held, even if the statute's language regarding "each violation" was not deemed "plain" it was "at best" ambiguous. Id. With an ambiguous statute, the Court noted, the rule of lenity applies. Id. As a result, the Court held, even if there was some "ambiguity" about what the statutory language meant, it would still have held that 60 days per violation was the maximum, regardless how many cause numbers were involved. Id.

Taplin controls this case. The very same language that was interpreted in Taplin is at issue here. Further, the facts of Taplin and this case are essentially the same - a trial court imposing multiple 60-day terms for the same violation simply because there was more than one cause number for which the defendant was serving community supervision or custody. The holding of Taplin that the maximum of sixty days per violation is not multiplied by the number of cause numbers under which the supervision is occurring applies here.

Neither the trial court in Taplin nor the trial court here had the authority to impose multiple 60-day terms for the same violations even though the defendants were serving multiple terms of supervision.

Instead, the court here was limited to 60 days total for each violation, for no more than 240 days in custody. Because the trial court did not have the authority to impose multiple 60-day terms for the same violations on different cause numbers, 240 days of the punishment imposed in these consolidated cases must be dismissed. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand with instructions for 240 days of the 480 days imposed in the orders amending the sentences be stricken because the trial court did not have the authority to order Mr. Mahone to serve more than 60 days in custody on each violation, not 60 days per violation per cause number, as the trial court erroneously ordered.

DATED this 31st day of July, 2010.

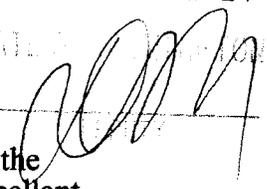
Respectfully submitted,



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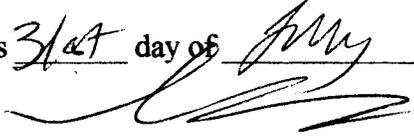
STATE OF WASHINGTON
BY: 

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Sylvester Mahone, BKG 2010113031, 910 Tacoma Ave. S.,
Tacoma, WA. 98402.

DATED this 31st day of July, 2010.


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