

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.

FILED
COURT OF APPEALS
DIVISION TWO
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STATE OF WASHINGTON
BY 

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

THE PROSECUTION’S ARGUMENTS MISSTATE THE ISSUE, IGNORE THE PLAIN LANGUAGE OF THE STATUTE AND THE HOLDING OF STATE V. TAPLIN¹ AND ARE UTTERLY WITHOUT MERIT

In its response, the prosecution quotes the relevant language of RCW 9.94B.040(3)(c) but then attempts to avoid the mandates of that language and the holding of Taplin by first misstating the issue before the Court and then trying to claim that Taplin can somehow be distinguished. Response, at 3-6. Both of these efforts should be summarily rejected.

First, the prosecution’s efforts to cast the issue on appeal as something other than what it is betray either a startling lack of understanding of the actual facts of the case or a wholly improper attempt to distract this Court from the real issue.

The prosecution begins by trying to paint this appeal as somehow involving an improper attempt by Mahone to amend the original sentences. Response, at 5. Indeed, the prosecution faults Mahone, claiming he “has cited no case law and no authority that authorizes a court to effectively change the very structure of two judgment and sentences by ordering what have always been consecutive sentences to run concurrently.” Response, at 5. Further, the prosecution states, there is no authority authorizing a trial court “to essentially amend a judgment and sentence in this manner.” Response, at 5.

But Mahone is not asking this Court to amend the “consecutive/concurrent” nature of the original judgments and sentences.

¹55 Wn. App. 668, 670-71, 779 P.2d 1151 (1989).

Brief of Appellant (“BOA”) at 1-9. Nor did he ask for such relief below. RP 1-15.

Instead, Mahone is appealing from the trial court’s order of two separate 60-day terms for each of the same four violations. BOA at 1-9. In that appeal, he is simply asking this Court to examine whether the trial court had the statutory authority to order those multiple sanctions for the very same violations. BOA at 1-9. That is a far cry from what the prosecution tries to claim.

And in fact, the prosecution’s declaration that the trial court had no authority to amend the judgments and sentences if it had so desired is simply wrong. Indeed, the statute itself so provides. See RCW 9.94B.040(1); see also State v. Partee, 141 Wn. App. 355, 170 P.3d 60 (2007). But again, that authority is completely irrelevant here, because the trial court did not amend the judgments and sentences, nor was it - or this Court - asked to do so by Mahone.

The prosecution’s effort to paint Mahone as seeking some improper amendment to the consecutive/concurrent nature of the original judgments and sentences is nothing more than a smokescreen to try to distract from the real issue - the trial court’s lack of authority to enter multiple sanctions for the very same violations simply because there was more than one cause number involved.

Indeed, the prosecution’s efforts to mislead do not stop with misstating the issue but also continue with regard to the authority it cites and its attempts to claim that Taplin does not apply. The prosecution cites RCW 9.94A.589(2)(b) as if that somehow answers the question of the

limits of the trial court's authority. See Response at 3-4. According to the prosecution, under that subsection, the two terms of community custody for two consecutively imposed sentences "run at the same time but they are still consecutive." Response, at 4. Thus, the prosecution appears to claim, because the terms of community supervision imposed at the original sentencings were consecutive, sanctions for violations of the conditions of community supervision should also be consecutive.

But again, the prosecution is ignoring the real issue. Mahone is not disputing that the trial court may order time for multiple violations to be served consecutively. BOA at 1-9. He is arguing that, regardless whether they are ordered to run consecutive or concurrent to each other, the trial court is only authorized to order one term of 60 days for the same violation under RCW 9.94B.040(3)(c), even if more than one cause number is involved. BOA at 1-9.

And again, the prosecution is wrong on the law. RCW 9.94A.589(2)(b) does not provide, as the prosecution declares, that terms of community supervision run both "concurrently and consecutively." Instead, it simply allows a trial court the authority to require that the same "conditions of community supervision contained in the second or later sentence begin during the" first, if it so chooses. RCW 9.94A.589(2)(b). As a result, a trial court can ensure that conditions it feels are necessary for supervision of the offender are not delayed but can be required to be served even if they were not imposed for the first term. Id.

But that is completely irrelevant to the question here - whether the trial court can order multiple sanctions for the very same violations,

simply because there are two cause numbers involved.

Finally, the prosecution's attempts to try to distinguish Taplin are unfathomable. The prosecution claims that Taplin is different because that case involved two cause numbers sentenced at the same time, with sentences ordered to run concurrently. Response at 5. The apparent implication is that Taplin somehow relied on the concurrent nature of the two cases in holding the trial court did not have the authority to impose multiple sanctions for the same violation, i.e., sanctions for the same violation under each cause number.

The problem for the prosecution is that Taplin did not use that reasoning. Instead, Taplin relied on the plain language of the statute authorizing imposition of the sanctions - the same statute which applies here and the same language the prosecution is here attempting to avoid. That language clearly limits the trial court's authority, providing:

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) (emphasis added).

Taplin looked at that language - the same language applicable here - and found that it plainly limited the trial court to imposing a maximum of 60 days for each *violation*, regardless of how many cause numbers were involved. 55 Wn. App. at 669. Instead of being allowed to impose 60 days for each violation under each cause number, the trial court could only impose 60 days total for each act amounting to a violation of the terms of community supervision, under the plain language of the statute. 55 Wn. App. at 669. Indeed, the Court of Appeals specifically rejected

the same claim the prosecution made here - that there should be multiple 60-day terms allowed for each violation because there was more than one cause number involved. 55 Wn. App. at 670. There was no ambiguity in the statutory language, the Court found, which had a “clear focus” on “each violation”: not on each sentence.” 55 Wn. App. at 670.

Notably, the Court held, even if the statute’s language regarding “each violation” was not deemed “plain” it was “at best” ambiguous, so that, under the rule of lenity, only 60 days per violation would be authorized, regardless how many cause numbers were involved. Id.

Taplin was not decided based upon the concurrent nature of the terms of community supervision being served. It was decided by looking at the plain language of the statute - the very same language which applies here. The prosecution’s attempts to persuade otherwise fall with the barest scrutiny.

Instead of conceding based upon the clearly controlling precedent of Taplin and the plain language of the statute specifically limiting the trial court’s authority in this case, the prosecution has chosen instead to try to mislead this Court about both the real issue in the case and the real holding of Taplin. This Court should not be swayed by the improper tactics and should strike the unauthorized extra 240 days of sanctions the trial court imposed.

B. CONCLUSION

For the reasons stated herein and in appellant's opening brief, 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 15th day of Sept, 2010.

Respectfully submitted,



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STATE OF WASHINGTON

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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 Reply 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. Melody Crick., 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 14 day of September, 2010.


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