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COURT OF APPEALS
DIVISION II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

11 JUL 15 PM 12:32

STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN RE THE PERSONAL) NO. 41166-1-II
RESTRAINT PETITION OF) SUPPLEMENTAL
AARON GREEN) RESPONSE TO PERSONAL
RESTRAINT PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Petitioner is currently in the custody of the Washington Department of Corrections pursuant to a sentence of 60 months imposed following a plea of guilty to one count of felony violation of post-conviction no contact order (domestic violence) on November 13, 2009, cause No.09-1-01372-5. [CP 15-24] This sentence is running concurrent to a DOSA sentence imposed in Thurston County Superior Court Cause No. 09-1-00995-7 on August 11, 2009. [CP 40-49]

II. STATEMENT OF PROCEEDINGS

The State accepts the Statement of Supplemental Facts

presented in Green's supplemental brief.

III. RESPONSE TO ISSUES RAISED

Green is not serving a hybrid sentence under Cause No. 09-1-1372-5. He has applied the wrong section of RCW 9.94A.589 to the sentence imposed in that cause number. Further, he was granted an exceptional sentence as permitted under RCW 9.94A.535.

Following pleas of guilty, Green was sentenced on three counts of violation of a post-conviction no contact order (domestic violence). On August 11, 2009, the court granted him a DOSA sentence of 30 months of confinement and 30 months of community custody. [CP 40-49] On the same day, following sentencing, he committed another violation of a post-conviction no contact order (domestic violence) to which he pleaded guilty. [CP 5-11; Appendix A, copy of probable cause certification] . On November 13, 2009, he was sentenced to 60 months, which the court ran concurrently to the DOSA sentence imposed in the earlier case by making it an exceptional sentence. [CP 17, 19]

Green argues that this second sentence is a hybrid sentence similar to that disapproved in State v. Smith, 142 Wn. App. 122, 173 P.3d 973 (2007), and State v. Grayson, 130 Wn. App. 782, 125 P.3d

169 (2005). He applies RCW 9.94A.589(3), which reads as follows:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony *that was committed while the person was not under sentence for conviction of a felony*, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively. (Emphasis added.)

By its plain language, this subsection does not apply. Green was under sentence for another felony, Cause No. 09-1-00995-7, when he committed the second felony. For this reason, Green's reliance on Grayson is misplaced. In Grayson, the defendant committed two drug related felonies (felony A). While he was awaiting trial on those charges, he committed two other drug felonies (felony B). He was convicted of felony B in September of 2000 and of felony A in October of 2000. He was sentenced first for felony B. When he was sentenced a month later on felony A, his situation did fall under RCW 9.94A.589(3), because he committed felony A—indeed both felonies—at a time he was not under a felony sentence. The sentencing judge there made the sentence part concurrent, part consecutive. Grayson, 130 Wn. App. at 783.

On appeal, the Court of Appeals held that while the statute gives a sentencing judge “unfettered discretion” to impose a sentence either concurrent with or consecutive to a prior sentence, it does not permit a mixture of the two. Id., at 786. But that is not what happened here. Apart from the fact that Green was under a felony sentence at the time the challenged sentence was imposed, the court in his case simply made the entire sentence concurrent with his earlier sentence. The fact that they happen to overlap does not convert it to a hybrid sentence.

The factual situation in Smith was also much different. Smith pleaded guilty in 2005 to first degree possession of stolen property. He failed to appear for his sentencing hearing, and the following day committed two more crimes—first degree possession of stolen property and possession of cocaine. Those offenses were charged under a second cause number, and he was found guilty by a jury in May of 2006. On July 18 and 19, 2006, Smith was sentenced for all offenses. Smith, 142 Wn. App. at 124. The court sentenced him to a non-DOSA sentence on the first offense and a DOSA sentence on the second two offenses. The two sentences were to run concurrently.

Because the in-custody portion of the DOSA sentence was less than the term of confinement on the non-DOSA sentence, he would not begin the community custody portion of the DOSA sentence until he had finished the non-DOSA sentence. *Id.*, at 124-26.

The Court of Appeals agreed with Smith that because parts of his two sentences ran concurrently and parts ran consecutively, it constituted a hybrid sentence not permitted by RCW 9.94A.589(3). Again, this is not the subsection which applies to Green. Smith had not been sentenced yet when he committed the second offenses, and all of his offenses were sentenced on the same day. Green was under a felony sentence when he committed the second offense, and his sentences occurred several months apart. He was sentenced under RCW 9.94A.589(2), which requires consecutive sentences.

The portion of the statute which applies to Green is RCW 9.94A.589(2), which reads as follows:

(a) Except as provided in (b) of this subsection, whenever a person *while under sentence for conviction of a felony* commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms. (Emphasis added.)

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior

sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

Because Green was under a felony sentence (albeit by only a few hours), he falls within this section of the sentencing statute and the court was required to run his second sentence consecutive to the earlier sentence. However, an exceptional sentence can be reached by way of making it concurrent with another sentence.

A. Exceptional Sentence

A sentencing court is permitted to go outside the standard range under certain conditions. RCW 9.94A.535 provides, in part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

.
A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this

section, and may be appealed by the offender or the State as set forth in RCW 9.94A.585(2) through (6).

.....
(1) Mitigating Circumstances – Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

.....
The statute then goes on to list a number of mitigating factors.

In Green's case, the court made the findings of fact and conclusions of law to impose an exceptional sentence down. [CP 17]

The difficulty here is that the court relied on a factor which supports an exceptional sentence above the standard range, not one below.

That factor, set forth in RCW 9.94A.535(2)(a), is as follows:

(2) Aggravating Circumstances – Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the State both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

.....
The court, in fact, crossed out language on the judgment and

sentence indicating that this finding is for an exceptional sentence above the standard range and interlineated the word "below" instead.

[CP 17]

As noted above, however, RCW 9.94A.535 does not make the list of mitigating circumstances exclusive. There does not appear to be any reason why the court could not use such a finding to justify an exceptional sentence down. If it is valid to support a sentence above the standard range, it should be valid to support a sentence below the standard range. The State has not located any authority that prohibits this result.

Under the circumstances of Green's case, his sentence for the non-DOSA sentence is governed by RCW 9.94A.589(2). RCW 9.94A.535 provides that the court may depart from the standards of RCW 9.94A.589(1) and (2) but that such departure is an exceptional sentence. RCW 9.94A.535 further provides that an exceptional sentence must be justified by substantial and compelling reasons. The factor relied on by the court here is such a reason for justifying an exceptional sentence up, and the State contends there is no authority to prevent it from being used to justify an exceptional sentence down.

A reviewing court will reverse an exceptional sentence only if the record does not support the reasons relied upon by the sentencing court using a “clearly erroneous” standard, if the reasons do not support an exceptional sentence under the de novo standard of review, or if the sentence is clearly excessive or too lenient using the abuse of discretion standard. State v. Murray, 128 Wn. App. 718, 722-23, 116 P.3d 1072 (2205). Green has not challenged his sentence on any of these grounds.

In Murray, the sentencing court imposed a DOSA sentence, but with a period of confinement much shorter than the midpoint of the standard range. Id., at 720. The Court of Appeals reversed, finding that to be a hybrid sentence not permitted by statute.

The sentencing court may impose an exceptional sentence downward based on substantial and compelling reasons, or it may impose a DOSA standard range sentence when appropriate for rehabilitation. It is not authorized under the SRA to impose a hybrid of both.

Id., at 726.

This is not what happened in Green’s case. The second court imposed an exceptional sentence; it was made exceptional by the fact that it was made to run concurrent with a DOSA sentence. There are

two separate sentences imposed by two different judges on two separate dates, the second for a crime that had not been committed when the first crimes were sentenced. The fact that the net result is an overlap of time to be served does not convert the second sentence into a hybrid.

Should this court disagree that the non-DOSA sentence was properly entered as an exceptional sentence down, then the remedy is that Green must be resentenced under RCW 9.94A.589((2)(a), and his second sentence must run consecutively to the DOSA sentence. This means that when he has finished the 30 months of confinement under the DOSA sentence he must serve the 60 months of the non-DOSA sentence before he can begin the community custody portion of the DOSA sentence, rather than the 30-month overlap under the sentence as currently imposed.

Being subject to consecutive sentences is the consequence a defendant suffers for committing a felony while serving a sentence for a different felony. The court in the second case attempted to ameliorate those consequences for Green. That judgment and sentence does not create a hybrid sentence. Indeed, it is not clear

how one judge could create a hybrid sentence with another imposed by a different judge. Green's argument is without merit and the judgment and sentence should stand as currently imposed.

IV. CONCLUSION

Green's non-DOSA sentence is a valid exceptional sentence which did not create a hybrid sentence. However, should this court find that the result is sufficiently similar to hybrid sentences disallowed in Smith and Grayson, then Cause No. 09-1-01372-5 should be remanded for imposition of a sentence consecutive to the sentence in Cause No. 09-1-00995-7, pursuant to RCW 9.94A.589(2).

RESPECTFULLY SUBMITTED this 12th day of July, 2011.

JON TUNHEIM
Prosecuting Attorney



CAROL LA VERNE, WSBA#19229
Deputy Prosecuting Attorney

APPENDIX A

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

09 AUG 20 AM 10:52

NO. 09-1-41372-5 BETTY J. GOULD, CLERK

BY _____ DEPUTY

CERTIFICATION OF PROBABLE
CAUSE

1
2 **IN THE SUPERIOR COURT OF WASHINGTON**
3 **IN AND FOR THURSTON COUNTY**

4 STATE OF WASHINGTON,

Plaintiff,

5 vs.

6 AARON JAY GREEN,

Defendant.

7 STATE OF WASHINGTON)
8) ss.
9 COUNTY OF THURSTON)

10 1. I am a Deputy Prosecuting Attorney for Thurston County, Washington and I am familiar with the
11 police reports and investigation conducted in this case;

12 2. Based upon information provided through that investigation there is probable cause to believe
13 that the defendant committed the crime(s) of FELONY VIOLATION OF POST CONVICTION
14 NO CONTACT ORDER/DOMESTIC VIOLENCE, supported by the following facts and
15 circumstances:

16 On July 30, 2009, in Thurston County, Washington, Judge Pomeroy revoked the defendant's
17 phone privileges based upon the Thurston County Sheriff's report that the defendant has called Ms.
18 Beasley, the victim, on numerous occasions in violation of a valid no-contact order.

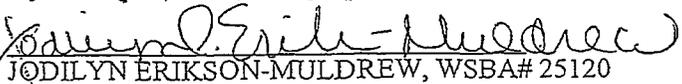
19 On August 11, 2009, the defendant pled guilty to three counts of violation of a post conviction
20 no-contact order/domestic violence. The victim was Amber Dawn Beasley. At the time of sentencing, a
21 post conviction no-contact order was signed by the defendant and entered into court on that same day
22 and listed Ms. Beasley as the protected party. Later that same day on August 11, 2009, after the plea,
23 the defendant called Ms. Beasley from one of the Thurston County jail telephones which are monitored
and recorded. The defendant told Ms. Beasley that he received a DOSA sentencing and that he will
have someone call her later for him.

The next day, August 12, 2009, another inmate calls Ms. Beasley, towards the end of the
conversation Ms. Beasley asks the caller an question. The caller, not knowing the answer, is heard
asking "Aaron which one went to jail?" Then the caller says to Ms. Beasley "he says to keep up on your
appointments and get a calendar. He says he is worried about you. Do you want to tell him anything?"
Both calls are in violation of the no-contact order that had just been entered the previous day.

On August 14, 2009, the defendant was transported into DOC custody to start serving his
sentence.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing
is true and correct to the best of my knowledge.

Signed and dated by me this 18th day of August, 2009, at Olympia, Washington.


JODILYN ERIKSON-MULDREW, WSBA# 25120
Deputy Prosecuting Attorney

CERTIFICATION OF PROBABLE CAUSE

EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3358

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Supplemental Response to Personal Restraint Petition, on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid

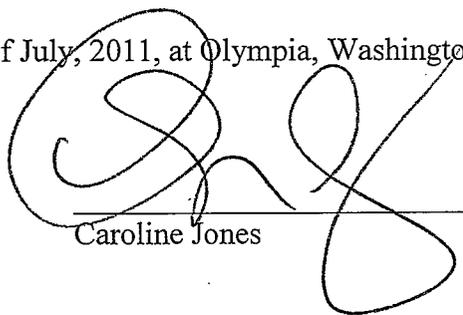
DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

AND TO: PETER B. TILLER
THE TILLER LAW FIRM
PO BOX 58
CENTRALIA, WA 98531-0058

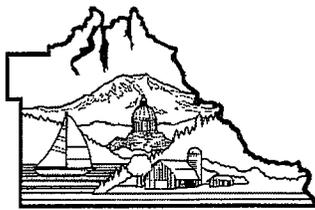
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of July, 2011, at Olympia, Washington.



Caroline Jones



THURSTON COUNTY
WASHINGTON
SINCE 1852

BETTY J. GOULD
COUNTY CLERK

and Ex-Officio Clerk
of Superior Court

Linda Myhre Enlow
Chief Deputy Clerk

July 13, 2011

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JUL 15 2011

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Re: **State of Washington vs. Aaron Jay Green**
Superior Court No. 09-1-00995-7
Court of Appeals No. 41166-1-II

Dear Mr. Ponzoha:

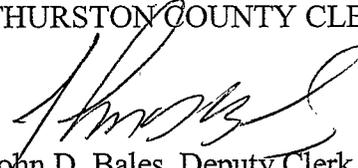
We wish to advise you that we are forwarding to your office the following materials:

0 volume(s) of Clerk's Papers as previously designated by Peter Tiller, counsel for Defendant(s) in the above cause.

Thanks for your assistance in this matter.

Very truly yours,

BETTY J. GOULD
THURSTON COUNTY CLERK


John D. Bales, Deputy Clerk

jdb

Enclosures



IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION II	
STATE OF WASHINGTON, vs. AARON GREEN	Respondent, Appellant.

No. 41166-1-II

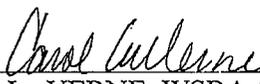
NOTICE OF APPEARANCE

TO: DAVID C. PONZOHA
COURT CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY
TACOMA, WA 98402-4454

AND TO: PETER B. TILLER
THE TILLER LAW FIRM
PO BOX 58
CENTRALIA, WA 98531-0058

PLEASE TAKE NOTICE that counsel for the State of Washington shall be Carol La Verne, Deputy Prosecuting Attorney for Thurston County, 2000 Lakeridge Drive SW #2, Olympia, WA 98502, and all further pleadings and papers shall be served upon said attorneys at the stated address.

Submitted this 12th day of July, 2011.



CAROL La VERNE, WSBA #19229
Deputy Prosecuting Attorney,

JON TUNHEIM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3358

NOTICE OF APPEARANCE

THURSTON COUNTY PROSECUTOR

July 12, 2011 - 3:28 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 41166-1

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: NOA

Sender Name: Caroline Jones - Email: jonescm@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:

ptriller@tillerlaw.com