

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re Post-Sentence Review of:

DOMINC L. COMBS,

Defendant.

REPLY OF THE
DEPARTMENT OF
CORRECTIONS TO
COMBS

The Department of Corrections (DOC) replies to Combs's response to the post-sentence petition.

I. ARGUMENT

A. The Petition Raises Issues Of Law

Combs claims that the DOC is raising factual issues that were not found by the trial court. Response, at 3-13. He claims that as a result, this Court cannot review the trial court's error because it is an error of fact, and post-sentence petitions limit review to errors of law. But this assumes that the DOC is a party to the criminal action and had the power to previously file a motion in superior court to advocate for certain findings of fact, such as a finding that Combs absconded for a specific number of days. But DOC is not a party to the criminal cause, and it is not required to (and has no standing to) file a motion in the superior court. *See Sentence of Chatman*, 59 Wn. App. 258, 264, 796 P.2d 755 (1990).

Combs's argument also assumes the number of days that Combs absconded is in dispute. But it is not in dispute. The DOC, not the superior court and not Combs, has the sole authority to calculate tolling. RCW 9.94A.171(4). The superior court is not in a position to make findings of fact regarding tolling. If Combs disputes the number of days tolled, he needs to file a personal restraint petition, thereby bringing in the DOC as a party.

More importantly, the number of days tolled simply is not at issue. Nobody disputes that Combs absconded. The issue is whether a court can order credit for days that the DOC tolled. That is the legal issue at the heart of this case. That is what the DOC asks the Court to review in this case.

B. RCW 9.94A.171 Is The Controlling Statute For Crediting Time Served Upon Revocation Of A DOSA

Combs claims that the court does have authority under RCW 9.94A.660(7) to credit the offender with time served upon revocation of the DOSA. Response of Combs, at 13-24. But that argument simply does not square with RCW 9.94A.171(4), which expressly states that the entity that supervises or confines an offender is the entity responsible for tolling a sentence. A trial court cannot credit time served upon revocation without hindering the DOC's tolling calculations, or in the least, without

engaging in tolling calculations itself. Doing so violates RCW 9.94A.171(4), because the trial court is not the entity that supervises a DOSA offender or confines him or her.

Also, RCW 9.94A.660(7) does not conflict with RCW 9.94A.171(4) because RCW 9.94A.660(7) does not state that the *court shall credit* the offender upon revocation with time previously served. Rather, it simply states that the *offender shall receive credit* upon revocation for time previously served. See RCW 9.94A.660(7)(d). Contrast this to RCW 9.94A.505(6), in which the Legislature clearly gave the court the authority to credit an offender's sentence: "The sentencing court shall give the offender credit for all confinement time served before the sentencing" Because RCW 9.94A.171(4) clearly gives the DOC the role of determining tolling, the fact that language similar to that in RCW 9.94A.505(6) is not in RCW 9.94A.660(7) means the court does not have authority to credit the sentence upon revocation of a DOSA.

Combs relies on *State v. Davis*, 160 Wn. App. 471, 248 P.3d 121 (2011), in support of his contention that the trial court has authority to credit the DOSA upon revocation. But *Davis* actually supports the DOC's position, not Combs's. The offender in *Davis* contended "that the trial court lacked the authority to *expressly deny him credit* for time served while on community custody under his DOSA sentence." *Davis*, 160 Wn.

App. at 476 (emphasis added). This Court agreed. It first noted that the trial court had authority to revoke the DOSA, but that upon revocation it could impose only “the remainder of his term.” *Id.*, at 477. Although the Court in *Davis* did not specify which entity is responsible for calculating the exact length of that “remainder,” it did conclude that “the trial court erred in ordering that Davis was not entitled to credit for time served while on DOSA community custody.”

Davis thus does not conflict with the DOC’s position: The trial court is not authorized to engage in calculating the actual length of an offender’s remainder. The trial court can revoke the DOSA and impose the remainder of the term, but it is the DOC’s role to calculate the length of the remainder.

Combs also relies on RCW 9.94A.505(6). Response of Combs, at 18. That statute gives the trial court authority to credit an offender at sentencing with presentence time. However, it does not apply in the context of a DOSA revocation. Time spent prior to a DOSA revocation is post-sentence time, not presentence time. Combs claims that because the DOC does not have case law to support this contention, the Court should ignore it, but case law is not needed to support something so obvious. It is a simple fact that a person serving a DOSA sentence has already been sentenced. That time is not presentence time.

Combs argues that the trial court vacated his DOSA sentence and imposed a separate sentence. Response of Combs, at 19. That is precisely what happened in *Davis*, and that is precisely what this Court in *Davis* held was not authorized. Revocation is not supposed to result in vacating a DOSA sentence. It is merely supposed to result in sanctions—either an administrative termination of the DOSA by DOC (*see* RCW 9.94A.662(3)) or the sanction of a term of total confinement within the standard range. *See* RCW 9.94A.660(7) (“(b) If the offender is brought back to court, the court may . . . impose sanctions under (c) of this subsection. . . . (c) The court may order the offender to serve a term of total confinement within the standard range . . .”).

If the court had simply entered an order revoking Combs’s DOSA and imposing a standard-range term of 18 months of prison and 12 months of community custody, the court would not have violated any statutes. The court’s overarching mistake was in treating the revocation like a new sentence subject to statutes that apply to new sentences, such as RCW 9.94A.505(6). The court should not have used a felony judgment and sentence form applicable for amending the judgment and sentence. This was not an amendment to the judgment and sentence. It was a revocation. The court’s use of the form judgment and sentence led the court to make the mistake of giving specific credits to Combs for time he had been

absconding from DOC or time he had been in jail on other charges. Those periods are supposed to toll an offender's sentence. RCW 9.94A.171(2), - (3). Combs was not entitled to credit for those periods in calculation of his "credit for any time previously served under" the DOSA sentence. RCW 9.94A.660(7)(d). In light of the tolling rules, those periods did not constitute time previously served under the DOSA sentence.

Combs also claims that RCW 9.94A.660(8) applies in this case. See Response of Combs, at 21. In footnote 4, *Davis* incorrectly interpreted this section. *State v. Davis*, 160 Wn. App. at 477, n.4. Combs repeats this misinterpretation. That statute states, "In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program." RCW 9.94A.660(8). That simply means that once an offender's DOSA has been revoked, when he finishes his post-revocation confinement term, he will still have a full term of community custody under RCW 9.94A.701 to serve. His pre-revocation community custody will not shorten his post-revocation *community custody*. RCW 9.94A.660(8) does not have anything to do with the issue in *Davis* and in this case, which is what credits are due from pre-revocation community

custody toward the post-revocation *confinement* term under RCW 9.94A.660(7)(d).

C. The DOC Is Not Going To Provide Courts With Tolling Calculations Because Courts Are Not The Entity That Establishes Dates Of Tolling

Combs argues that the DOC should inform trial courts of tolling dates before the “sentence is imposed” if the DOC believes this information is relevant to the sentence. Response of Combs, at 22. First, it is not about whether DOC believes it is relevant. Rather, it is *required* under RCW 9.94A.660(7)(d) to credit the offender with all time served previously. Second, the DOC is not going to contact every court in every DOSA revocation case in all 39 counties and try to advocate for its position regarding what dates were tolled, just to make sure the courts give the proper credits. That is extremely inefficient and is simply is not the way the DOSA statute works and it is not the way the tolling statute works. A certain division of labor is necessary to produce accuracy in sentence calculations. The DOSA revocation context is the perfect example of when the division of labor is warranted. This is in part due to the fact that the entity that supervises an offender is the entity with the best information on what periods that offender absconded. Hence, under RCW 9.94A.171, the DOC handles tolling calculations, while under RCW 9.94A.660(7), the court is free to impose a specific confinement term.

However, what the court cannot do is hinder the DOC's tolling calculations. What the court did in this case violated the separation of powers doctrine because the court's actions hindered the DOC's tolling calculations. *See* Response of Combs, at 23.

D. The DOC Properly Calculated Dates

Finally, Combs claims the DOC's time calculation is incorrect on page two of the post-sentence petition. *See* Response of Combs, at 24. But the DOC's calculation of the time period of 158 days from May 13, 2011, to October 18, 2011, is based on a calculation that includes October 18 but does not include May 13.¹ Such computation method is consistent with court rules. *See* Civil Rule 6(a) ("In computing any period of time prescribed or allowed by . . . any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included.").

II. CONCLUSION

The DOC requests that the Court grant its petition and remand to the superior court to remove the order for credit for time served from the amended judgment and sentence. Alternatively, the DOC requests that the Court order the superior court to vacate the amended judgment and

¹ *See* <http://www.timeanddate.com/date/duration.html> (accessed on September 5, 2012).

sentence and instead enter an order revoking the DOSA that is silent on credit for time served.

RESPECTFULLY SUBMITTED this 6th day of September, 2012.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Ronda D. Larson". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below I served a true and correct copy of the foregoing REPLY OF THE DEPARTMENT OF CORRECTIONS TO COMBS on all parties or their counsel of record as follows:

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KAREN BAILEY

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September 06, 2012 - 3:33 PM

Transmittal Letter

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