

NO. 48505-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

DMITRIY GERNEGA,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

The Honorable Daniel Stanhke, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The sentencing court erred in failing to give Mr. Gernega credit for time served from the date he was charged in this case until the date he was sentenced in Oregon.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Is Mr. Gernega entitled to receive credit for time served from April 17, 2015 to May 14, 2015, where he was incarcerated in Oregon but had not yet been sentenced, and was also being concurrently held on a warrant issued by Washington?

C. STATEMENT OF THE CASE

Dmitriy Gernega was held in custody in Multnomah County, Oregon following his arrest on suspicion of having committed several bank robberies in that county. Report of Proceedings (RP) (1/20/16)¹ at 16-17. While awaiting trial in Oregon, he was charged by Washington authorities on April 17, 2015 with two counts of first degree robbery, stemming from robberies of Cascade Federal Credit Union on April 9 and April 15, 2014. RP (12/21/15) at 12-13; Clerk's Paper's (CP) 1. Mr.

¹ The Verbatim Report of Proceedings consists of the following hearings: December 21, 2015, January 20, 2016, and January 27, 2016.

Gernega's Washington and Oregon attorneys reached an agreement in which he would plead guilty to the Washington charges after pleading to the Oregon charges. Under the terms of the agreement, his Oregon conviction would be included in his criminal history, resulting in an offender score of "8." Under the terms of the agreement, the Washington prosecutor would recommend a sentence of 120 months for each count, to be served concurrently, and that the sentence imposed in Washington would be served concurrently to his Oregon sentence, followed by 18 months of community custody. RP (12/21/15) at 9; RP (1/20/16) at 16-17. Mr. Gernega was sentenced on May 14, 2015 to 100 months for the Oregon robberies. RP (1/20/16) at 30, 34. Due to a significant delay caused by Oregon authorities, who were apparently mistaken regarding Mr. Gernega's identity, he was not transported to Washington until December, 2015. RP (1/20/16) at 35. He entered guilty pleas to two counts of first degree robbery on December 21, 2015. RP (12/21/15) at 4-14; CP 15.

At sentencing on January 20, 2016, defense counsel requested credit for 41 days served. RP (1/20/16) at 28. The state noted that it had not agreed to "backdate" concurrency to the date that Mr. Gernega was sentenced in Oregon. RP (1/20/16) at 36. Judge Daniel Stanhke,

apparently relying on *State v. Lewis*, 185 Wn.App. 338, 344 P.3d 1220 (1998), a case in which he was reversed, denied the defense request for credit for 41 days that Mr. Gernega served after being transported from Multnomah County, Oregon to Clark County. RP (1/21/16) at 37, 38. The court stated that Mr. Gernega “was under sentence in Oregon” and that because he was ineligible to bail out on the Washington charges, he was therefore not entitled to credit for time served. RP (1/20/16) at 32, 35. The judge stated “the minute you were convicted in Oregon, you no longer have the ability to bail on any Washington charges so you get no credit [for] time served.” RP (1/20/16) at 35.

The court accepted the agreed recommendation of 120 months and ordered that each count be served concurrently, and also ordered that both counts be served concurrently with his 100-month sentence in Oregon. RP (1/20/16) at 37. The judgment and sentence provides the counts are “[t]o be served concurrent to his Multnomah County, Oregon case #14CR13714/2301173.” CP 42.

A post-sentencing hearing was held January 27, 2016. Mr. Gernega, who had been transported to Oregon, did not attend. RP (1/27/16) at 39-45. Defense counsel clarified that Mr. Gernega wanted to appeal the entirety of the denial of his request for credit for time served.

Defense counsel argued that he should get credit for time served between the filing of the Washington charges on April 17, 2015 and the sentencing on May 14, 2015, a period of 27 days. RP (1/27/16) at 39, 40. After hearing argument, the court stated that Mr. Gernega had received credit in Oregon from the time served from April 17 to May 14, that he was unable to bail out in the Clark County charge, and therefore was ineligible for credit for time served. RP (1/27/16) at 44.

Timely notice of appeal was filed January 27, 2016. CP 73. This appeal follows.

D. ARGUMENT

1. MR. GERENA IS ENTITLED TO RECEIVE CREDIT IN THIS CASE FOR THE TIME SERVED BETWEEN APRIL 17, 2015 AND MAY 14, 2015

A defendant sentenced to a term of confinement has both a constitutional and statutory right to receive credit for all confinement time served prior to sentencing. *State v. Medina*, 180 Wn.2d 282, 287, 324 P.3d 682 (2014); *In re Personal Restraint of Costello*, 131 Wn.App. 828, 129 P.3d 827 (2006). Offenders are entitled to receive credit for all pretrial detention served. *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992). "Failure to allow such credit violates due process, denies

equal protection, and offends the prohibition against multiple punishments." *In re Costello*, 131 Wn. App. at 832. In *Costello*, the court stated former RCW 9.94A.120(17) (now renumbered as RCW 9.94A.505(6)) "simply represents the codification of the constitutional requirement that an offender is entitled to credit for time served prior to sentencing." *Costello*, 131 Wn. App. at 833 (quoting *State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990)).

RCW 9.94A.505(6) provides:

The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

Appendix A.

Failure to award credit for time served violates due process, equal protection and the double jeopardy prohibition against multiple punishments. *Costello*, 131 Wn.App. at 832. This court reviews de novo the decision to award credit for time served. *State v. Swiger*, 159 Wn.2d 224, 227, 149 P.3d 372 (2006)."Confinement' means total or partial confinement." RCW 9.94A.030(8).

Credit is not allowed for time served on other charges. *In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 597, 647 P.2d 1026 (1982). If,

however, the offender is confined on two charges simultaneously, any time not credited towards one charge must be credited towards the other. *In re Schaupp*, 66 Wn. App. 45, 49-50, 831 P.2d 156, 158-59 (1992).

Despite the sentencing court's assurance that Mr. Genega received credit for the time he served in Oregon, it is not clear from this record whether that is actually the case. Oregon Revised Statute 137.370 provides, in part:

(2) Except as provided in subsections (3) and (4) of this section, when a person is sentenced to imprisonment in the custody of the Department of Corrections, for the purpose of computing the amount of sentence served the term of confinement includes only:

(a) The time that the person is confined by any authority after the arrest for the crime for which sentence is imposed[.]

(4) A person who is confined as the result of a sentence for a crime or conduct that is not directly related to the crime for which the sentence is imposed . . . shall not receive presentence incarceration credit for the time served in jail towards service of the term of confinement.

ORS 137.370 (emphasis added). Appendix A.

In *Curry v. Thompson*, 156 Or.App. 537, 967 P.2d 522 (1998), a defendant was found to not be entitled to credit in his Oregon case for time served in Washington during presentence incarceration during which time he was also held concurrently on charges in Washington and on Oregon charges. *Curry*, 156 Or. App. at 542. The court found that although *Curry* was held concurrently during parts of his incarcerated periods for Oregon and

Washington charges, his incarceration was not solely the result of the Oregon charges or the conduct that gave rise to those charges, and therefore he was not entitled in his Oregon case to credit for time served while in Washington. *Id.* The court found that because Curry “was not being held solely as a result of the charge or the conduct that gave rise to the charge for which he was later sentenced, he is not entitled to credit for those periods.” *Curry*, 156 Or.App at 542.

Although in *Curry's* case the defendant was held in Washington and requested credit for that time to apply to his Oregon conviction, Mr. Gernega submits that *Curry* is illustrative of the point that it is not a foregone conclusion that he will receive credit in Oregon for time that he was being held on concurrent charges. Mr. Gernega was in custody in Multnomah County pending adjudication of his robbery charges. While in custody he was served with an information charging him with two counts of first degree in Clark County, Washington. CP 1. *Curry* is instructive in that it shows that it is possible that Mr. Gerenga will in fact not receive credit for his presentence time in Oregon between April 17 and May 14, 2015, because he was not being held solely on the Oregon charges during that period and because there is no evidence that the Washington charges gave rise to the charges to which he was sentenced on May 14.

As in *Schaupp* Mr. Gernega was confined on multiple charges. The court denied his request for credit for time served, saying that Mr. Gernega was receiving credit for the time he served in his Oregon case. However, it is not possible to tell from this record whether Mr. Gernega was in fact given credit for the time after he was charged by Washington on April 17, 2015, since he was no longer being solely held on the Oregon charges.

State v. Lewis, the case to which the court referred several times during sentencing, is not controlling. In *Lewis*, this Court held that for the time that Lewis was serving for burglary and assault charges he was not entitled to credit for time imposed for failing to register as a sex offender because he was not serving time “solely” on the former charges and would therefore receive a double credit. *Lewis*, 185 Wn.App. at 347. Here, the court’s reliance on *Lewis* creates a potential situation where both Washington and Oregon could decide that Mr. Gernega is not “solely” being held on their respective charges and give him no credit for the concurrent time served.

If Mr. Gernega is not given credit for that time, under *Phelan* and *Schaupp* he is entitled to receive credit for the time he served since he was charged in Washington. The trial court herein has no control over whether the Oregon court gives Mr. Gernega credit for the time he was being held on their warrants while he faced the Washington charges. Under *Curry* it is thus

conceivable that unless he receives credit for time served on these Washington charges, he might not receive credit for any of the charges on which he was being held.

Therefore, in accordance with *Schaupp*, Mr. Gernega either should be given credit for the time served since the issuance of the warrant in the Washington charges and prior to May 14, 2015, or the matter should be remanded to the trial court for further hearing to determine if Oregon has credited Mr. Gernega for time served while held on the Washington warrant but prior sentencing on May 14, 2015.

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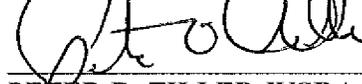
E. CONCLUSION

For the reasons set forth above, Mr. Gernega respectfully requests this Court reverse his sentence and remand to the trial court for an evidentiary hearing, with Mr. Gernega present, ascertain whether he has received credit in that cause number for the period after April 1, 2015 and to give credit for time served in his Washington case if it is determined that the time has not been included in his Oregon sentence.

DATED: June 30, 2016.

Respectfully submitted,

THE TILLER LAW FIRM



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Of Attorneys for Dmitriy Gernega

CERTIFICATE OF SERVICE

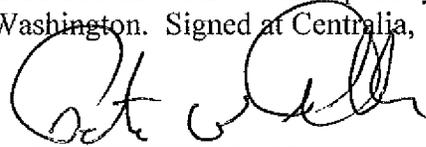
The undersigned certifies that on June 30, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to the e-mail address below and a copy was mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 30, 2016.



PETER B. TILLER

APPENDIX A

RCW 9.94A.505

Sentences.

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517;

(ii) RCW 9.94A.701 and 9.94A.702, relating to community custody;

(iii) RCW 9.94A.570, relating to persistent offenders;

(iv) RCW 9.94A.540, relating to mandatory minimum terms;

(v) RCW 9.94A.650, relating to the first-time offender waiver;

(vi) RCW 9.94A.660, relating to the drug offender sentencing alternative;

(vii) RCW 9.94A.670, relating to the special sex offender sentencing alternative;

(viii) RCW 9.94A.655, relating to the parenting sentencing alternative;

(ix) RCW 9.94A.507, relating to certain sex offenses;

(x) RCW 9.94A.535, relating to exceptional sentences;

(xi) RCW 9.94A.589, relating to consecutive and concurrent sentences;

(xii) RCW 9.94A.603, relating to felony driving while under the influence of intoxicating liquor or any drug and felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

(b) If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9.94A.702 not to exceed one year; and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement and a community custody term under RCW 9.94A.701 if the court finds reasons justifying an exceptional sentence as provided in RCW 9.94A.535.

(3) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail

administrators may schedule court-ordered intermittent sentences as space permits.

(4) If a sentence imposed includes payment of a legal financial obligation, it shall be imposed as provided in RCW 9.94A.750, 9.94A.753, 9.94A.760, and 43.43.7541.

(5) Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(7) The sentencing court shall not give the offender credit for any time the offender was required to comply with an electronic monitoring program prior to sentencing if the offender was convicted of one of the following offenses:

(a) A violent offense;

(b) Any sex offense;

(c) Any drug offense;

(d) Reckless burning in the first or second degree as defined in RCW 9A.48.040 or 9A.48.050;

(e) Assault in the third degree as defined in RCW 9A.36.031;

(f) Assault of a child in the third degree;

(g) Unlawful imprisonment as defined in RCW 9A.40.040; or

(h) Harassment as defined in RCW 9A.46.020.

(8) The court shall order restitution as provided in RCW 9.94A.750 and 9.94A.753.

(9) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. "Crime-related prohibitions" may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.

(10) In any sentence of partial confinement, the court may require the offender to serve the partial confinement in work release, in a program of home detention, on work crew, or in a combined program of work crew and home detention.

O.R.S. § 137.370

137.370. Commencement and computation of term of imprisonment; concurrent sentences

(1) When a person is sentenced to imprisonment in the custody of the Department of Corrections, the term of confinement therein commences from the day the person is delivered to the custody of an officer of the Department of Corrections for the purpose of serving the sentence executed, regardless of whether the sentence is to be served in a state or federal institution.

(2) Except as provided in subsections (3) and (4) of this section, when a person is sentenced to imprisonment in the custody of the Department of Corrections, for the purpose of computing the amount of sentence served the term of confinement includes only:

(a) The time that the person is confined by any authority after the arrest for:

(A) The crime for which sentence is imposed;

(B) A lesser included or greater inclusive offense of the crime for which sentence was imposed; and

(C) Any other crime constituting a violation of Oregon law within the same county designated by the sentencing court in the judgment as having been committed as part of the same criminal episode as the crime for which sentence was imposed; and (b) The time that the person is authorized by the Department of Corrections to spend outside a confinement facility, in a program conducted by or for the Department of Corrections.

(3) When a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, a lesser included or greater inclusive offense of the crime, or any crime constituting a violation of Oregon law within the same county designated by the sentencing court in the judgment as having been committed as part of the same criminal episode as the crime, the period of detention and imprisonment theretofore served shall be deducted from the maximum term, and from the minimum, if any, of the new sentence.

(4) Unless the court expressly orders otherwise, a person who is confined as the result of a sentence for a crime or conduct that is not directly related to the crime for which the sentence is imposed, or for violation of the

conditions of probation, parole or post-prison supervision, shall not receive presentence incarceration credit for the time served in jail toward service of the term of confinement.

(5) Unless the court expressly orders otherwise, a term of imprisonment shall be concurrent with that portion of any sentence previously imposed that remains unexpired at the time the court imposes sentence. This subsection applies regardless of whether the earlier sentence was imposed by the same or any other court, and regardless of whether the earlier sentence is being or is to be served in the same penal institution or under the same correctional authority as will be the later sentence.

(6) As used in this section, "criminal episode" has the meaning given that term in ORS 131.505.

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Transmittal Letter

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