

NO. 48505-2-II

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

STATE OF WASHINGTON, Respondent

v.

DMITRIY ANDREEVICH GERNEGA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-00660-6

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. The trial court properly declined to award credit for time
 served..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT..... 4

 I. The trial court properly declined to award credit for time
 served..... 4

CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

<i>City of Seattle v. Harclaoon</i> , 56 Wn.2d 596, 354 P.2d 928 (1960)	6
<i>State v. Lewis</i> , 184 Wn.2d 201, 355 P.3d 1148 (2015)	2
<i>State v. Lyskoski</i> , 47 Wn.2d 102, 287 P.2d 114 (1955)	6
<i>State v. Mason</i> , 170 Wn.App. 375, 285 P.3d 154 (2012)	5
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	6
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	6

Rules

RAP 2.5(a)	5, 6
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RESPONSE TO ASSIGNMENTS OF ERROR

I. The trial court properly declined to award credit for time served.

STATEMENT OF THE CASE

Gernega committed a series of robberies in both Clark County and in Multnomah County, Oregon, occurring in April of 2014. RP 16-17. On April 17, 2015, the Clark County prosecutor filed charges and a warrant in the Washington cases—apparently while Gernega was in jail in Oregon for the Oregon robberies. RP 39. In this case, Gernega pleaded guilty to two counts of robbery in the first degree. RP 4-14. The plea was made in concert with the guilty pleas he entered in Multnomah County, as part of a global settlement. RP 16-17. The prosecutors in both this case and in Multnomah County agreed that the 100 month prison term in Oregon could be concurrent with the 120 month prison term in Washington. Gernega began serving a prison sentence for his Oregon crimes on May 14, 2015, and was transported to Washington on this case on December 10, 2015.

At Gernega's guilty plea hearing, his attorney confirmed that he had received credit, in Oregon, for the time he served on the Oregon case following his sentencing and while awaiting transport to Washington under the Interstate Detainer Act. RP 9. Defense counsel alluded to the

idea that Gernega was under the impression that because concurrent sentences were to be imposed, that meant that he would get credit for time served on his Washington case for all the time he served in Oregon, even including the time he spent in Oregon before the Washington charge was even filed. RP 9. Defense counsel told the court that he advised Mr. Gernega that might not be the case. RP 9. The court confirmed with Gernega that he nevertheless wished to enter the guilty plea, even without that issue resolved. RP 10-11. Gernega went forward with the guilty plea. RP 13. The matter was set over for sentencing. RP 13-14.

At sentencing, defense counsel expressed that Gernega was irritated that following the commencement of his sentence in Oregon (beginning on May 14, 2015) it took longer than he wanted for him to be brought to Washington under the Interstate Detainer Act. RP 30-31. Although he didn't make a specific request for a period of time he was asking to be awarded as credit for time served, he appeared to argue (the argument is quite unclear) that in order for the Washington sentence to be concurrent with the Oregon sentence, Gernega had to be awarded an amount of credit for time served to cover all of the time he was in Oregon. RP 31-35. But as the trial court noted, citing to *State v. Lewis*, 184 Wn.2d 201, 355 P.3d 1148 (2015), concurrency of sentences has nothing to do with credit for time served. RP 32-36. (Later in the hearing the deputy

prosecutor further explained that concurrency of a sentence begins at the point of the imposition of the sentence, and advised the court that the State never agreed to any scenario in which “we would back date the concurrency to when he was sentenced in Oregon.” Defense counsel agreed, saying “I agree there is no legal principle. The State of Washington never made any representation to me...about credit for time served.” RP 36.) In addition to the trial court’s earlier unchallenged observation that Gernega received credit for time served on his Oregon case for all of the time he spent in Oregon, the trial court noted that once Gernega was sentenced for his offenses in Oregon on May 14, 2015, he would not have been eligible for credit for time served on his Washington case in any event. RP 31-36. The trial court awarded Gernega zero days credit for time served because he was under a sentence in Oregon. RP 36. Following the court’s pronouncement of sentence, defense counsel asked the court to award Gernega 41 days of credit for time served reflecting the amount of time he spent in the Clark County jail on this case awaiting his plea and sentencing, in spite of the fact that he was serving his sentence on his Oregon cases during that entire period. RP 38. The court again denied the request. RP 38.

At a hearing seven days after the sentencing hearing, defense counsel asked the trial court to reconsider its decision not to award credit

for time served. RP 39. Instead of asking for credit for the 41 day period in which Gernega was in the Clark County jail while serving his Oregon sentence (which defense counsel now agreed should *not* be awarded as credit for time served), defense counsel asked the court to award credit for the time period between April 17, 2015 and May 14, 2015. RP 39-42. April 17, 2015 was the day Washington filed its charges and no bail warrant. RP 39-42. Gernega was in jail in Oregon at that time. RP 39-44. In denying the request, the court noted that Gernega received credit for time served on his Oregon sentence for this time period. RP 44. Defense counsel did not dispute this claim. RP 44. Gernega filed a timely notice of appeal. CP 73.

ARGUMENT

I. The trial court properly declined to award credit for time served.

In this appeal, Gernega does not renew the first argument he made at the trial court—that he was entitled to double-dip credit for time served for the 41 days he spent in the Clark County jail while serving a sentence (and receiving credit) on his Oregon convictions. Rather, he makes an argument he did not make below: That it is “possible” he did not actually receive credit for time served in Oregon for the 29 days between the date Washington filed its charges (April 17, 2015) and the date he pled guilty

to his Oregon charges (May 14, 2015). The corollary of this argument is that if Gernega *did* receive credit for this 29 day period on his Oregon sentence, he is not entitled to double-dip credit on his Washington sentence. Thus, Gernega's argument is premised entirely on speculation. He asks this Court to either assume, without any factual support in the record, that Gernega did not receive credit for time served on his Oregon sentence, or to order a new hearing (as though this were a personal restraint petition) in which one party (Gernega doesn't say which) would have the burden of establishing (by an unknown standard of proof) that Gernega did not receive credit for time served. Gernega cites no authority to support either of these requests, and as such this Court should disregard them. *State v. Mason*, 170 Wn.App. 375, 384, 285 P.3d 154 (2012).

Gernega also ignores the fact that if he did not receive credit for time served from the Oregon court or the Oregon Department of Corrections on his Oregon sentence, his dispute is with the State of Oregon and his remedy must be sought from Oregon. Gernega needs to file an appeal or a post-conviction petition in Oregon to redress this speculative grievance.

Also, this argument cannot be raised under RAP 2.5(a) because it was not preserved below. Gernega could have asked the trial court for more time to investigate the claim he now makes—that it is “possible” he didn't receive credit for time served in Oregon—but instead he readily

agreed that he *had* received credit for time served in Oregon. RAP 2.5(a) disallows a party from raising an issue for the first time on appeal unless the claimed error is one of constitutional magnitude.

It has long been the law in Washington that an “appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); *State v. Lyskoski*, 47 Wn.2d 102, 108, 287 P.2d 114 (1955). The underlying policy of the rule is to “encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. See *City of Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960).

State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

Gernega has not shown that this claimed error is one of constitutional magnitude. Indeed, his true claim is one of statutory violation—that if he did not receive credit for time served in Oregon, the SRA would require him to receive credit for time served in Washington. As noted above, even if there has been a statutory violation in this case, which is entirely speculative, the violation occurred in Oregon.

The State respectfully asks this Court to affirm Gernega's sentence.

CONCLUSION

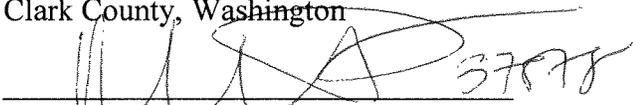
The court should affirm Genega's sentence.

DATED this 20th day of October 2016.

Respectfully submitted:

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