

NO. 485486

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL CHRISTOPHER MILLER, JR.

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY  
The Honorable Nelson Hunt

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APPELLANT'S OPENING BRIEF

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I. ASSIGNMENT OF ERROR

The court incorrectly applied RCW 9.94A.589(1)(a) when it imposed a consecutive sentence for two current offenses.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether or not the court correctly applied RCW 9.94A.589(1)(a) when it ordered sentences for two offenses entered on the same day to run consecutively?

III. STATEMENT OF THE CASE

On August 11, 2015, Daniel Christopher Miller, Jr. (Mr. Miller) was charged with unlawful possession of firearm. He had not been sentenced on the firearm charge when, on October 4, 2015, he was found with methamphetamine and charged with unlawful possession of a controlled substance. CP 1-3.

On November 4, 2015, Mr. Miller appeared in court to be sentenced on the firearm charge and to plead guilty on the methamphetamine charge. CP 6-8; CP 9-18. The sentence range for the firearm charge was between 17 to 22 months confinement at the Department of Corrections. Based on Mr. Miller's offender score, the prosecutor recommended he serve 22 months. 11/4/15 RP 3.

For the methamphetamine charge, the prosecutor recommended Mr. Miller serve 12 months and a day for the possession charge. 11/4/15 RP 3; 11/4/15 RP 11. The prosecutor explained the sentences for the firearm and the possession charges would run concurrently, because they entered at the same time. As a result, Mr. Miller would ultimately serve 22 months. 11/4/15 RP 11.

Mr. Miller agreed with the prosecutor's recommendation and the court went through somewhat standard colloquy to assess Mr. Miller's ability to pay legal financial

obligations and to ensure he understood his rights with regard to the guilty plea. 11/4/15 RP 11-12.

Then the court did the unexpected. It explained that it had the option to choose how the sentences would run and declined to accept the agreed recommended sentence.

“It is optional for me. I’m imposing 12 plus one consecutive to the other charges. And the reason I’m doing that is that I don’t like this manipulation of the system here so that Mr. Miller, who has now committed seven or eight or nine felonies, gets the very bottom of the range on both of them. And if I go along with the prosecutor’s recommendation, that would be essentially adding a point. That’s all that would happen. So I’m not going to let that happen.”

11/4/15 RP 12.

Mr. Miller’s attorney tried to explain that if the sentences were in fact entered on different days, then the court would have the option to impose them to run consecutively. But, the court disagreed.

“Well, I think it is optional, and if we’re going to manipulate this so that we’re going to go do this on a different day or on the same day in order to avoid that, that doesn’t make any sense to me either.”

(emphasis added) 11/4/15 RP 13.

“The way this has been manipulated in my view is that this new crime doesn’t count as a current offense and you get no – for the other offense and you get no punishment for a felony offense if you are correct. And that kind of manipulation is just not right.”

(emphasis added) 11/4/15 RP 14.

Mr. Miller appealed to this court to review the court’s decision. CP 30-41.

#### IV. ARGUMENT

THE LANGUAGE IN RCW 9.94A.589(1)(a) IS MANDATORY AND REQUIRED THE COURT TO ORDER THE CURRENT OFFENSES TO BE SERVED CONCURRENTLY.

##### *Standard of review*

The way a sentencing court interprets a statute is question of law an appellate court must review de novo. State v. Swecker, 154 Wn.2d 660, 665, 115 P.3d 297 (2005). The appellate court's primary objective is to carry out the legislature's intent. State v. Young, 125 Wn.2d 688, 694, 888 P.2d 142 (1995). The court will look at the statute's language to determine intent. Id.

##### *Analysis*

a. The court misinterpreted RCW 9.94A.589(1)(a) when it ordered Mr. Miller's sentences for current offenses to be served consecutively. RCW 9.94A.589(1)(a) only applies to the original sentencing proceeding. State v. Johnson, 180 Wn. App. 92, 102, 320 P.3d 197, 202, review denied, 181 Wn. 2d 1003, 332 P.3d 984 (2014). It requires the court to impose consecutive and/or concurrent sentences for two or more current offenses. It reads, in pertinent part:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.

9.94A.589(1)(a) (emphasis added).

The language in this subsection is clear and mandatory. It states whenever a person is sentenced for two or more current offenses, “Sentences imposed under this subsection shall be served concurrently.” RCW 9.94A.589(1)(a) (emphasis added); State v. Elmore, 143 Wn. App. 185, 190, 177 P.3d 174 (2008). RCW 9.94A.589(1)(a) only authorizes a court to impose consecutive sentences under the exceptional sentence provisions in RCW 9.94A.535, which requires a jury to find certain facts before a court may depart from the sentencing guidelines and increase a defendant’s sentence beyond the standard range. RCW 9.94A.535.

b. The question then becomes: Were Mr. Miller’s offenses *current offenses* under RCW 9.94A.589(1)(a)? While the Sentencing Reform Act does not formally define *current offense*, the term is defined functionally as convictions entered or sentenced on the same day. RCW 9.94A.525(1) states, “Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.

Here, Mr. Miller’s convictions for the firearm and possession charges were entered and sentenced on the same date, which, under RCW 9.94A.589(1)(a), made them current offenses. As such, the court had no discretion. It was required to run those sentences concurrently. Even though the court believed Mr. Miller manipulated the system to receive the bottom range on both charges, it could have only imposed the consecutive sentence under RCW 9.94A.589(1)(a), if it followed exceptional sentence provisions in RCW 9.94A.535. 11/4/15 RP 12. Given that it did not follow exceptional sentence provisions in RCW 9.94A.535, the court was required to order Mr. Miller to serve those sentences concurrently.

V. CONCLUSION

We respectfully ask this court to vacate the consecutive sentence and to remand for proper resentencing under RCW 9.94A.589(1)(a).

Submitted this 6<sup>h</sup> day of June, 2016.

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## **AMENDED DECLARATION OF SERVICE**

June 8, 16

Court of Appeals Case No. 485486

Case Name: **State of Washington v. Daniel Christopher Miller, Jr.**

I declare under penalty and perjury of the laws of Washington State that on Wednesday, June 8, 16, I served a copy of the *appellant's opening brief* I filed at Division Two Court of Appeals on June 6<sup>th</sup> to:

### **LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE**

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**CANZATER LAW OFFICE**

**June 08, 2016 - 9:49 AM**

**Transmittal Letter**

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**Comments:**

Attached with the brief I filed in this case on Monday is an amended declaration of service.

Sender Name: Tanesha L Canzater - Email: [canz2@aol.com](mailto:canz2@aol.com)

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