

FILED
Court of Appeals
Division II
State of Washington
3/5/2018 9:45 AM

NO. 50354-9-II

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

STATE OF WASHINGTON
Respondent,

v.
JD BARTON,
Appellant.

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

The Honorable Mary Sue Wilson, Judge

APPELLANT'S OPENING BRIEF

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	4
1. THE DEPARTMENT OF CORRECTIONS MUST COMPLY WITH THE TRIAL COURT'S NEW SENTENCE ON REMAND FROM THIS COURT AND GRANT THE ORDERED CREDIT FOR TIME SERVED	4
a. Barton is entitled to good time credit for time served.....	4
D. CONCLUSION.....	6

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<i>Dress v. Department of Corrections</i> , 168 Wn. App. 319, 279 P.3d 875 (2012).....	5, 6
<i>In re Pers. Restraint of Costello</i> , 131 Wn. App. 828, 129 P.3d 827 (2006).....	4, 5
<i>State v. Broadway</i> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	5, 6
<i>State v. Speaks</i> , 119 Wn.2d 204, 829 P.2d 1096 (1992).....	4
<i>State v. Williams</i> , 59 Wn. App. 379, 796 P.2d 1301 (1990).....	5
RULES, STATUTES, AND OTHERS	
13B Wash. Prac., Criminal Law section 3603.....	5
RCW 9.94A.120.....	5
RCW 9.94A.505.....	4, 5
RCW 9.94A.585.....	6
RCW 9.95.062.....	5

A. ASSIGNMENTS OF ERROR

1. The Department of Corrections must comply with the trial court's statutorily authorized order requiring credit for time served and good time earned.

2. The most recent judgment and sentence is a new judgment and sentence rather than an amended judgment and sentence.

Issues Presented on Appeal

1. Must the Department of Corrections comply with the trial court's statutorily authorized, valid judgment and sentence, that orders credit for time served and good time earned?

2. Was DOC authorized to ignore the new judgment and sentence simply because the trial court wrote a handwritten notation "amended" to distinguish this judgment and sentence from the original?

B. STATEMENT OF THE CASE

This appeal arises from a remand from the Court of Appeals for resentencing. RP 8 (2-16-17); CP 65-111. During the new sentencing hearing the trial court accepted the state and Barton's recommendations for the new sentence in accord with the Court of Appeals decision. RP 6-9 (May 3, 2017). The trial court did not however officially vacate the prior sentence, but rather "amended" the sentence in an effort to avoid confusion with the original

sentence. CP 70-81; RP 9-10.

Additionally the prosecutor agreed that Barton should receive good time credit for time served "from the period of his initial arrest through his departure to the Department of Corrections." RP 5-7 (May 3, 2017). The Court ordered "that the additional language addressing the good time and addressing the pre-conviction time between the withdrawal of the plea is appropriate. And I'll be prepared to review that and sign off on it." RP 8 (May 3, 2017).

Since Barton was allowed to withdraw his plea,

the Department of Corrections has been treating that as post plea time for purposes of good time calculation. And since he was actually allowed to withdraw his plea, the State agrees that that time should be treated as pre -- as presentencing time. And I guess it's a small statistical difference with how they calculated good time at the Department of Corrections. So what we're proposing, Your Honor, is

.....

the Defendant shall receive credit for time served from the time between 4/21/08 through October 31 of 2008.

RP 5-7. DOC refused to comply with the trial court order requiring credit for time served. CP 68, 82-105. Barton submitted a complaint to DOC and was informed that he had to file a notice of appeal on this issue. CP 68, 82-105.



Confidential
WCC Grievance Coordinator

LOG I.D. NUMBER
17632023

MAY 15 2017

OFFENDER COMPLAINT

CHECK ONE: Initial Emergency Received in office Rewrite

RESIDENTIAL FACILITIES: Send completed form to the Grievance Coordinator. Explain what happened, when, where, and who was involved or which policy/procedure is being grieved. Be as brief as possible, but include the necessary facts. Use only one complaint form. A formal grievance begins on the date the typed grievance forms are signed by the Coordinator. Contact a Department employee to report an emergency situation or to initiate an emergency complaint. Please attempt to resolve all complaints through the appropriate Department employee(s) before pursuing a grievance.

NOTE: Complaints must be filed within 20 working days of the incident. Appeals must be filed within 5 working days of receiving the response. Include log ID # on rewrite or response being appealed.

Last Name BARTON, JD	First JONES	Middle	DOC Number 867165	Facility/Office WCC	Unit/Cell F#208
COMMUNITY SUPERVISION: Send completed copies of this form directly to: Grievance Program Manager, Offender Grievance Program, Department of Corrections, P.O. Box 41129, Olympia WA 98504-1129.					
MAILING ADDRESS: STREET OR P.O. BOX		CITY, STATE		ZIP CODE	TELEPHONE

COMPLAINT: Per the 5-3-17 Amended JES P.6 & P.12, Doc MUST credit me with ALL JAIL TIME which is 665-days of JAIL TIME & 332-days of JAIL EARLY RELEASE CREDIT for a TOTAL of 997-days JAIL CREDIT to that be subtracted from the 2,555-day BASE SENTENCE TIME. All such time Doc REFUSES to credit me AS ORDERED BY the Thurston County SUPERIOR COURT. Doc continued IMPAIRMENT of the 5-3-17 JES MAKES Doc ACTIONS & IMPACTS AN INTENTIONAL & WILLFUL MISCONSTRUCTION & AN ABUSE OF POWER THAT IS CLEARLY OUTSIDE THE SCOPE OF THE & FUNCTION OF BOTH THE EXECUTIVE & LEGISLATIVE AUTHORITY.

SUGGESTED REMEDY: That Doc immediately comply to the 5-3-17 JES directing that I be fully credited with ALL JAIL TIME CREDITS without ANY further undue delays.

Mandatory Signature: JD JONES BARTON Date: 5-10-17

GRIEVANCE COORDINATOR'S RESPONSE Your complaint is being returned because: <input type="checkbox"/> It is not a grievable issue. <input type="checkbox"/> You requested to withdraw the complaint. <input type="checkbox"/> You failed to respond to callout (sheet) on _____ <input type="checkbox"/> Administratively Withdrawn _____ <input type="checkbox"/> The formal grievance/appeal paperwork is being prepared. <input type="checkbox"/> Not accepted	Facility/Office: WCC IMU Date Received: 5/15/17
	<input checked="" type="checkbox"/> The complaint was resolved informally. <input type="checkbox"/> Additional information and/or rewriting needed. (See below.) Return within 5 working days or by: _____ <input type="checkbox"/> No rewrite received _____ <input type="checkbox"/> Sent to _____ (facility) on _____ (date).

Per WSP REcords Office, you are getting full creit based on that your prison time for this cause never stopped running while out to court order. Therefore, you are getting all the credits allowed. You can contact WSP Records office when you return to WSP as they are the ones chronicing this issue. G. Robbins

Coordinator's Name (print): _____
 Coordinator's Signature: *[Signature]*
 Date: 5/15/17

CP 68, 82-105. This timely appeal follows. Id.

C. ARGUMENT

1. THE DEPARTMENT OF CORRECTIONS MUST COMPLY WITH THE TRIAL COURT'S NEW SENTENCE ON REMAND FROM THIS COURT AND GRANT THE ORDERED CREDIT FOR TIME SERVED.

a. Barton is entitled to good time credit for time served.

DOC's refusal to comply with the trial court's order of credit for time served and good time for presentencing custody violates Barton's due process, and equal protection rights. *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992); *In re Pers. Restraint of Costello*, 131 Wn. App. 828, 832, 129 P.3d 827 (2006). Offenders are entitled to receive credit for all pretrial detention served. *Speaks*, 119 Wn.2d at 206. "Failure to allow such credit violates due process, denies equal protection, and offends the prohibition against multiple punishments." *Costello*, 131 Wn. App. at 832.

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.

The language of RCW 9.94A.505(6) is mandatory. Moreover, when a convicted defendant appeals the conviction and is unable to obtain release pending appeal, the time

the defendant has been imprisoned pending the appeal must be credited if the judgment is affirmed.13B Wash. Prac., Criminal Law section 3603 (citing RCW 9.95.062(3)).

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)).

In this case, Barton has been continuously confined on this case alone since his arrest and he has not received credit for time served for all of his jail time, even though the trial court issued an order granting Barton credit for all time served, including good time. RCW 9.95.062(3).

DOC is not authorized to either correct or ignore a final judgment and sentence that may be erroneous. *State v. Broadway*, 133 Wn.2d 118, 135, 942 P.2d 363 (1997); *Dress v. Department of Corrections*, 168 Wn. App. 319, 322, 279 P.3d 875 (2012). The Department may petition the Court of Appeals for review of an alleged error of law in a judgment and sentence within ninety days of having knowledge of the terms of such a sentence. *Dress*, 168

Wn. App. at 322.

Toward this end, the legislature designed RCW 9.94A.585 (7) to alleviate the dilemma previously facing DOC: enforcing what it considers to be an unlawful sentence or ignoring the sentence imposed by the trial court. *Dress* 168 Wn. App. at 326-27.

Here, without authority, the Department of Corrections ignored the valid judgment and sentence. If it was concerned with the validity of the judgment and sentence it could have filed a notice of appeal under RCW 9.94A.585 (7). It could not however, legally ignore the trial court's valid judgment and sentence under *Broadway*, and *Dress*. *Broadway*, 133 Wn.2d at 135; *Dress*, 168 Wn. App. at 322.

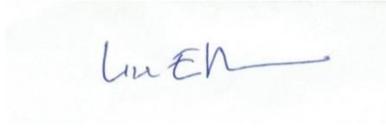
This Court must remand with express instructions that DOC grant Barton all of his credit for time served including good time.

D. CONCLUSION

J.D. Barton respectfully requests this Court order the Department of Corrections to comply with the trial court's valid judgment and sentence.

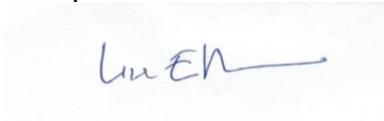
DATED this 5th day of March 2018.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurston.wa.us and JD Barton/DOC#867165, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on March 5, 2018. Service was made by electronically to the prosecutor and JD Barton by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

March 05, 2018 - 9:45 AM

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