

FILED
OCT 04 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

28897-8-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WALDO E. WALDRON-RAMSEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENT OF ERROR

1. Did the trial court err by entering an order clarifying the judgment and sentence *ex parte*, without resentencing the defendant?

II.

ISSUE PRESENTED

- A. HAS THE DEFENDANT SHOWN ANY HARM/PREJUDICE FROM THE ENTRY OF AN ORDER CLARIFYING THE DEFENDANT'S CREDIT FOR TIME SERVED TO GIVE THE DEFENDANT TWO ADDITIONAL DAYS CREDIT?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

The defendant filed a Personal Restraint Petition seeking to add two days to his credit for time served. One day was for a leap year and the other day was the day of arrest for which the defendant was not given credit. Despite the fact that the State essentially conceded that the credit for time served calculation was incorrect and submitted an order correcting the defendant's credit for time served, the defendant has filed this appeal.

The defendant argues that he should have been present for any change in his sentence. This argument hinges on whether the *ex parte* order is deemed to be a resentencing or simply a ministerial correction.

The State does not contest the concept that a defendant is entitled to any credit for time served. Equal protection and due process considerations require that the DOC give indigent prisoners who cannot make bail good time credit for time served in county jail awaiting sentencing. *In re Mota*, 114 Wn.2d 465, 467, 788 P.2d 538 (1990). Because the right to credit for time served is so firmly established, the State approached the Superior Court for an order conceding the error on the calculation for credit for time served and granting the defendant

exactly what he asked for in his PRP. The defendant was entitled to two additional days' credit for time served.

The State argues that once the error was brought to the trial court's attention, the correction was automatic and not subject to any argument. The extra day in a leap year had not been included in the defendant's credit nor had the day of the defendant's arrest. The order to which the defendant now objects gave the defendant exactly what he asked for.

The defendant is objecting to getting what he asked for. This would lead a logical person to wonder why the defendant is raising this issue. The defendant clearly asked for an additional two days credit for time served as relief in his Personal Restraint Petition. He got those two days. What is left? Is this court to be used to provide a ride from the defendant's place of incarceration to the Spokane County Jail simply so the trial court can bless the two day addition in the defendant's presence?

It is unclear under what authority the defendant files this appeal. At this point, there has been no full resentencing. If there had been a full resentencing, the defendant would surely have noted that in his briefing. RAP 2.2 permits appeal of "final judgments". RAP 2.2(a)(1). The ministerial correction conducted in this case cannot be a "final order" as the credit for time served was part of the original judgment and sentence. As noted before, the defendant cannot show any issue that needs

resolution. He asked for two more day's credit for time served and received that credit.

Perhaps this court could grant a discretionary review but the defendant has not sought such a ruling.

CrR 7.8(a) allows for the correction of, "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

The defendant asked for an additional day of credit based on a leap year. The simple use of a calendar is all that is needed to solve that issue. The other point in the defendant's PRP is that he should have been credited for the day of his arrest. That conundrum is solved by reference to the SRA. A purely legal interpretation. Both of these additional days were added as a simple ministerial correction. Nothing in the sentence was addressed, the defendant received no additional jail time. In fact, he received less jail time.

As for "due process" claims, "Our [the court's] role is not to define due process according to "our 'personal and private notions' of fairness." "*State v. Cantrell*, 111 Wn.2d 385, 389, 758 P.2d 1 (1988) (quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044,

52 L.Ed.2d 752 (1977) (quoting *Rochin v. California*, 342 U.S. 165, 170, 72 S. Ct. 205, 96 L. Ed. 183 (1952)))” *State v. Hotrum*, 120 Wn. App. 681, 87 P.3d 766 (2004). “Instead, we decide only whether the criticized act violates those “ ‘ “fundamental conceptions of justice which lie at the base of our civil and political institutions,” ... and which define ‘the community’s sense of fair play and decency.’ ” ’ ” *Cantrell*, 111 Wn.2d at 389 (quoting *Lovasco*, 431 U.S. at 790 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791 (1935) and *Rochin*, 342 U.S. at 173)).

“[D] ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

Applied in the criminal context, due process requires that a criminal defendant be given notice prior to deprivation of a substantial right. *See State v. Fleming*, 41 Wn. App. 33, 35-36, 701 P.2d 815 (1985). The defendant claims that the State re-sentenced him without his presence and with no notice. This is not correct. There was no re-sentencing. The credit for time served was part of the original Judgment and Sentence. The order in question corrected the defendant’s (already ordered) credit for time served by two days. As pointed out above, the use of a calendar

would determine the leap year day and the failure to include the day of arrest was clearly an error not requiring argument.

“It is Hornbook law that the law does not require a useless act.”
Franklin Co. Sheriff's Office v. Cellars, 97 Wn.2d 317, 334, 646 P.2d 113 (1982). This case tests the outer limits of the above phrase.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 4th day of October, 2010.

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