

**FILED**

APR 10 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 29967-8-III**

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

FRANK WILLIAM HAVENS,

Defendant/Appellant.

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**BRIEF OF RESPONDENT  
STATE OF WASHINGTON**

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GREGORY L. ZEMPEL  
KITTITAS COUNTY PROSECUTING ATTORNEY  
FOR THE STATE OF WASHINGTON

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## I. INTRODUCTION

In this appeal, Defendant/Appellant Havens seeks dismissal of his court-ordered restitution and other legal financial obligations (LFOs) related to Kittitas County Cause Number 92-1-00094-5.<sup>1</sup> Havens claims that the trial court lacked authority on December 31, 2002 to enter a 10-year extension of his LFO order in Cause No. 94-5, because the order was entered two months beyond the 10-year anniversary of the court's imposition of sentence and orders of restitution.

This argument has no merit. The trial court's original 10-year jurisdiction was still in progress and had not expired on December 31, 2002. The statute governing restitution, RCW 9.94A.753(4), provides that for offenses committed prior to July 1, 2000, LFO orders may be enforced during the 10 years following the offender's release from total confinement or within 10 years of entry of judgment and sentence, whichever period ends later.

Here, Havens was released from confinement for his crime in Cause Number 94-5 one year after he was sentenced. CP 26; CP 12; CP 15. Therefore the 10-year limitation period would not expire until 10 years after he was released from confinement resulting from that crime, on or

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<sup>1</sup> For ease of reference herein, the term "LFO Order" or equivalent is used to designate both restitution and other legal financial obligations.

about October 5, 1993. Accordingly, the LFO extension order of December 31, 2002 was timely entered. This Court should uphold the trial court's order, deny Havens' claim, and dismiss Havens' appeal.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

1. **RESPONSE TO ASSIGNMENT OF ERROR NUMBER ONE:**

The trial court correctly denied Havens' motion to dismiss.

2. **RESPONSE TO ASSIGNMENT OF ERROR NUMBER TWO:**

The trial court correctly and timely extended jurisdiction because, irrespective of whether the LFO and restitution jurisdictional statutes could be tolled, the initial 10-year period governing LFO orders was still in progress at the time the order of extension was entered on December 31, 2002.

## **III. RESTATEMENT OF ISSUES ON APPEAL**

1. Was the trial court's order extending LFO jurisdiction for a second 10 years timely in that the initial 10-year period authorized by RCW 9.94A.753(4) was still in progress on December 31, 2002? YES.

2. Was due process sufficient in Havens' absence when the trial court entered its extension order on December 31, 2002? YES.

3. Was the trial court empowered to correct a nonsubstantive error *nunc pro tunc*? YES.

**IV. COUNTER STATEMENT AND  
PROCEDURAL HISTORY OF THE CASE**

Havens was charged with two counts of assault in the third degree in Kittitas County Superior Court Cause No. 92-1-00119-4 (“119-4”), and also with two counts of assault in Superior Court Cause No. 92-1-00094-5 (“94-5”). CP 23; CP 81-82; CP 83; CP 88.

In **Cause No. 94-5** – the case at issue in this appeal -- Havens was charged in Count 1 with fourth degree assault pursuant to RCW 9A.36.041 (a gross misdemeanor), and in Count 2 with third degree assault under RCW 9A.36.031(1)(a) (a Class C felony). CP 81-82; CP 83; CP 88.

On October 5, 1992, Havens entered a guilty plea to both counts of third degree assault in Cause No. 119-4, and to the second count of third degree assault in Cause No. 94-5. CP 84-87; CP 23-27.<sup>2</sup> The first count of assault in the fourth degree for Cause No. 94-5 was dismissed at the time he entered his plea. CP 25. Havens was sentenced to one year in prison, which he served, on Count 2 in Cause No. 94-5. CP 12, 15, 22, 26, 63, 89.<sup>3</sup>

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<sup>2</sup> A third case, Kittitas County Superior Court Cause No. 93-1-184-2 was also addressed at the hearing held on January 28, 2011 after receipt of Havens’ motion to dismiss. VRP 3. Sentence was imposed in Cause No. 184-2 on October 25, 1993, so there is no issue concerning timeliness of the trial court’s extension of jurisdiction in that case. CP 95. The LFO extension order in Cause No. in 119-4 was dismissed by the court’s oral ruling of January 28, 2011 and subsequent order. VRP 5-6; CP 52. Accordingly, neither Cause No. 184-2 nor Cause No. 119-4 are at issue in this appeal.

<sup>3</sup> In **Cause No. 119-4** Havens was sentenced to 17 months on each count of third degree assault, with both sentences to run concurrently with the additional 12 month sentence imposed in **Cause No. 94-5**, the conviction here at issue. CP 12. Credit was given for

On October 26, 1992, the trial court ordered Havens to pay legal financial obligations including restitution.<sup>4</sup> On November 5, 1992, the trial court entered its order of restitution. CP 90-92.

The court having imposed sentence on October 5, 1992, the period for collection of LFOs under RCW 9.94A.753(4) was to expire within 10 years of entry of the judgment and sentence (October 5, 1992), **or** on or about October 5, **1993**, within 10 years following Havens' release from total confinement for that crime, whichever was later.

On December 31, 2002, the trial court extended the court's 10-year LFO jurisdiction for the second 10 years, as allowed by RCW 9.94A.753(4). CP 32. At the time, Havens was on warrant status and was absent from the jurisdiction. VRP 1-3; CP 12, 16, 21, 22, 29, 62-63. Consequently Havens did not appear at the hearing to extend jurisdiction to enforce payment of his restitution and LFOs. VRP 2.

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187 days served. CP 26. Defendant served the one year prison term imposed for **Cause No. 94-5**. CP 12, 15, 22, 63, 95.

Even should one assume that the 187 days credit for time served was deductible from his first 12 months of incarceration in **Cause No. 94-5**, this still would place his release from total confinement for the conviction in **Cause No. 94-5** at 187 days from the time of his sentencing on October 5, 1992. Even under that calculation, defendant's release from confinement for the conviction in **Cause No. 94-5** would have occurred approximately 5.93 months after October 5, 1992 – or up to late March 1993. Therefore, even under such an assumption, this would place the trial court's continuing LFO jurisdiction well past the December 31, 2002 date of its LFO extension order.

<sup>4</sup> The trial court imposed LFOs of \$610.00 and restitution of \$3,885.68. CP 25, CP 90-92. Havens acknowledges he was ordered to pay restitution of \$3,885.68, plus additional fees and costs. CP 12, 15, 24, 25, 28, 55, 61.

On January 10, 2011, Havens filed a motion to dismiss in the trial court, asserting that the trial court's order extending LFO jurisdiction was entered two months too late, because entry of the extension order came more than 10 years after his October 5, 1992 sentencing.<sup>5</sup> Havens asked the trial court to discharge his financial obligations for Cause No. 94-5 and to cancel the outstanding bench warrant in that case. CP 15-17.<sup>6</sup>

On January 28, 2011, at the hearing on Havens' motion to dismiss the order extending LFO jurisdiction, the State argued that issuance of a bench warrant in Cause No. 94-5 on October 6, 1999 tolled the jurisdictional period, and that the order extending jurisdiction had therefore been timely entered. CP 38; VRP 2-4. However, neither the trial court nor the State at that time focused on the wording and case law interpretation of the LFO statute itself, RCW 9.94A.753(4), which provides that the 10-year period runs from entry of the judgment and sentence or from the date following the offender's release from total confinement on the crime for which he was sentenced, whichever is later.

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<sup>5</sup> Havens at times states that the 10 years would have begun to run on October 26, 1992 (the date of his restitution hearing), but the statute says that the time begins to run at sentencing, or immediately following the offender's release from total confinement, whichever is later. RCW 9.94A.753(4); *State v. Gossage*, 165 Wn. 2d 1, 7; 195 P.3d 525 (2008); *State v. Spires*, 151 Wn. App. 236, 241; 221 P.3d 437 (2009).

<sup>6</sup> Havens also filed an Amended Motion to Dismiss on January 27, 2011. CP 53.

At the January 28, 2011 hearing on Havens' motion to dismiss the LFO extension order, there was also discussion about Havens' non-appearance in court at the hearing on December 31, 2002, due to Havens being in warrant status and his incarceration and absence from the state. The perfunctorily drafted order of December 31, 2002 incorrectly reflected that Havens had appeared on that date, whereas that was not the case. VRP 1-4. To correct this administrative error, on April 4, 2011 the trial court entered an amended order *nunc pro tunc*, amending the LFO extension order of December 31, 2002 to truthfully reflect that Havens was not present in court at that time. VRP 5; CP 49. However, the order *nunc pro tunc* did not change any of the original LFO terms and conditions – it merely corrected the inaccurate recitation that the defendant had been in court, when in fact he was not in court on December 31, 2002. CP 78.

Consequently, the trial court correctly extended the 10-year jurisdiction for Cause No. 94-5 (mistakenly based on grounds that Havens was in warrant status and absent from the jurisdiction as of October 6, 1999), but erroneously dismissed Havens' restitution and LFO obligations under Cause No. 119-4. Neither the trial court nor the State recognized that the original 10-year jurisdiction was still in progress for both matters. Instead, both the trial court and the State erroneously believed that since Havens appeared in Cause No. 119-4 on January 19, 1999 and was not in

warrant status for that cause number, the court's LFO extension order for Cause No. 119-4 should be dismissed if justification for the order was Havens' being in warrant status at the time. VRP 5-6; CP 52. The trial court also quashed the warrant in Cause No. 94-5. VRP 6; CP 46-47.

Havens' appeal followed on June 10, 2011. He still seeks dismissal of the order extending LFO jurisdiction in Cause No. 94-5. CP 61.<sup>7</sup>

## V. ARGUMENT

1. **The trial court's order extending LFO jurisdiction for a second 10 years was timely in that the initial 10-year period authorized by RCW 9.94A.753(4) was still in progress on December 31, 2002.**

At the trial court hearing on January 28, 2011, the State and the trial court mistakenly focused on whether Havens was in warrant status on December 31, 2002 when the court extended its LFO jurisdiction another 10 years. This was an erroneous ground on which to base the court's conclusion. Any error, however, was harmless. See, e.g., *State v. Besabe*, 271 P.3d 387, 392 (2012), citing *State v. Allen*, 50 Wn. App. 412, 419-420, 749 P.2d 702 (1988).<sup>8</sup>

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<sup>7</sup> On August 12, 2011, this Court pursuant to RAP 18.1(b) entered an order denying its motion to dismiss Havens' appeal as untimely.

<sup>8</sup> Any error was harmless because (a) the LFO extension order was timely entered; (b) defendant's due process rights were not violated; and (c) no additional terms of punishment were imposed when the order was extended.

Where the trial court's reasoning was erroneous but still reached the correct result, this Court may affirm the trial court's decision based on the record sufficiently developed to fairly consider the ground. RAP 2.5(a); *State v. Baker*, 162 Wn. App. 858, 863, 256 P.3d 463 (2011). A superior court decision will not be reversed where the reason given is erroneous if the judgment or order is correct. *Ertman v. City of Olympia*, 95 Wn. 2d 105, 107-108, 621 P.2d 724 (1980).

Here, the record is sufficient to reflect when the judgment and sentence was first entered in Cause No. 94-5, and to indicate that Havens was sentenced to one year in prison for Count 2 of Cause No. 94-5, which Havens acknowledges.

Havens was sentenced to 17 months in prison for the three assault charges to which he pled guilty on October 5, 1992. CP 26, 89. The Department of Corrections ("DOC") Notice of Probation Violation dated November 1, 1996 identifies Havens' termination date for his incarceration stemming from Cause No. 94-5 to be December 4, 2005 (approximately three years and three months after sentencing). CP 95.

However, assuming that Havens served all 12 months on Cause No. 94-5, and not considering (a) the additional two assault charges to which he pled guilty in Cause No. 119-4, or (b) any probation violations or continuing supervision by DOC beyond the 12-month period for Cause

No. 94-5, this would put the trial court's original 10-year LFO jurisdiction expiring on or about October 5, 2003, or 10 years following the offender's release from total confinement on or about October 5, 1993.

RCW 9.94A.760(4) provides:

All other legal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's **release from total confinement** or within ten years of entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend the criminal judgment an additional ten years for payment of legal financial obligations including crime victims' assessments. (Emphasis added).<sup>9</sup>

RCW 9.94A.753(4) – addressing pre-existing restitution requirements -- provides:

For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's **release from total confinement** or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. (Emphasis added).

Irrespective of whether Havens violated probation on Cause No. 94-5 and was in warrant status beginning October 6, 1999, the trial court

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<sup>9</sup> Former RCW 9.94A.145(4) (1991), in effect when Havens was sentenced for his crimes committed in 1992 on Cause Numbers 119-4 and 94-5, was recodified as RCW 9.94A.760 (Laws of 2001, ch. 10, sec. 6).

correctly concluded that as of December 31, 2002 the court had jurisdiction to extend the LFO collection order for another 10 years. *State v. Olson*, 148 Wn. App. 238, 245, 198 P.3d 1061 (2009); *Personal Restraint Petition of Spires*, 151 Wn. App. 236, 244, 211 P.3d 437 (2009). This is because the initial 10-year period began on or about October 5, 1993 (12 months after defendant entered his plea and was sentenced on October 5, 1992), and continued to run until October 5, 2003. Hence, the initial 10-year period was still in progress at the time the extension order was entered on December 31, 2002, approximately 10 months before the court's jurisdiction would have lapsed.

In *Olson*, the defendant was sentenced on July 18, 1986 and was released from confinement for that crime on November 19, 1986. This Court held that the defendant's 10-year restitution jurisdiction extended until November 19, 1996, or 10 years after the defendant was released from confinement for the underlying crime, and excluding any periods of subsequent incarceration related to nonpayment of LFOs or other probation violations. *Olson*, 148 Wn. App. at 245.

In *Spires*, the defendant was sentenced to three concurrent sentences of 13 months for three crimes committed in February 1992, and was ordered to pay restitution. Spires was released from confinement on December 13, 1992. *Id.*, 151 Wn. App. at 239. When Spires did not pay

his LFOs, a bench warrant issued and remained outstanding through July 13, 2009 at the time the Court of Appeals case was decided. *Id.*

The issue on appeal was whether Spires' probation violations or failure to pay restitution could extend the 10-year time limit. In accord with *Olson*, the Court held that "the 10-year time limit began when [the defendant] was released from his initial period of 'total confinement' on December 13, 1992." *Id.* at 241-242.

Thus both the *Olson* and *Spires* courts ruled that the 10-year time limit began to run when the defendant was released after completing his initial period of incarceration. *Olson*, 148 Wn. App at 245; *Spires*, 151 Wn. App. at 244-245. Accordingly, Spires' original 10-year jurisdiction began to run on December 13, 1992, not in February of 1992 when he was sentenced. *Spires*, 151 Wn. App. at 244-245.<sup>10</sup> Similarly, the defendant in *Olson* was released from total confinement for his underlying crime on November 19, 1986. Hence the original 10-year jurisdiction in the *Olson* case began to run on November 19, 1986 when he was released, not on July 18, 1986 when he was sentenced. *Olson*, supra at 148 Wn. App. 245.

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<sup>10</sup> See also, *Personal Restraint of Sappenfield*, 138 Wn. 2d 588, 980 P.2d 1271 (1999) ("release from total confinement" means only release from confinement for the crime for which restitution was ordered) and *State v. Gossage*, 165 Wn. 2d 1; 195 P.3d 525 (2008) (LFOs imposed for offenses committed before July 1, 2000, expire and become void after 10 years unless the trial court extends them for another 10 years prior to expiration of the first 10-year period. Gossage's LFOs "expired 10 years after he was released from confinement"), *Id.* 165 Wn. 2d at 3-4.

In this case, the trial court committed no error when entering Havens' extension order for Cause No. 94-5 on December 31, 2002. The State respectfully asks this Court to so rule.

2. **Due process was sufficient in Havens' absence when the trial court entered its LFO extension order on December 31, 2002, because no changes were made to the original terms of payment for restitution and other LFOs owed by the defendant.**

Havens appears to claim insufficient due process at the time the extension order was entered on December 31, 2002, because he was in prison at the time and did not appear in court. This argument has no merit.

No violation of due process occurred when the trial court entered its order on December 31, 2002 extending jurisdiction another 10 years. This precise issue was addressed in *State v. Hotrum*, 120 Wn. App. 681, 87 P.3d 766 (2004). *Hotrum* held that ex parte orders extending authorization to the State to collect restitution for an additional 10 years did not violate due process. No violation occurs even though the defendant did not have notice and opportunity to be heard at such a hearing. *Hotrum*, 120 Wn. App. at 684. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*, quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Ex parte orders which extend jurisdiction over LFOs and do not modify the terms of the original judgment and sentence, do not violate due process because they do not

increase the quantum of punishment imposed. *Hotrum*, 120 Wn. App. at 684.

Havens was represented by counsel at the original restitution hearing on October 26, 1992, and the Restitution Order was signed by his counsel. The Restitution Order was filed with the court on November 5, 1992. CP 90-92. The court's original jurisdiction, which was still in progress, was merely extended on December 31, 2002, with no additional punishment imposed. Therefore there was no due process violation when Havens was not present at the hearing on December 31, 2002 to extend LFO jurisdiction another 10 years.

The State respectfully asks this Court to so rule.

3. **The trial court was empowered to correct a nonsubstantive error *nunc pro tunc* back to December 31, 2002.**

Havens further appears to claim that the error incorrectly referencing his court appearance on December 31, 2002, together with the running of the 10-year jurisdictional statute, prevented the trial court from later entering an order *nunc pro tunc* correcting the record. This argument has no merit.

Retroactive entry of orders, to correct the record as to acts which actually occurred, are properly entered as orders *nunc pro tunc*. The inherent power of state courts to enter judgments *nunc pro tunc* to correct

errors in the record is discretionary and should be consistent with justice of the particular case. *State v. Smissaert*, 103 Wn. 2d 636, 640, 694 P.2d 654 (1985). In determining whether a correctable clerical error exists under the criminal rules, the reviewing court uses the same test used to determine clerical error under the civil rules governing amendment of judgments. The court looks at whether the judgment, as amended, embodies the trial court's intention, and if it does, the amended judgment merely corrects language to truthfully reflect the court's intention or adds language the court inadvertently omitted. CrR 7.8(a);<sup>11</sup> See, e.g., *State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755 (2005); *State v. Snapp*, 119 Wn. App. 614, 82 P.3d 252 (2004), *review denied*, 152 Wn. 2d 1028, 101 P.3d 110 (2004).

Here, it was apparent that Havens was not present in court on December 31, 2002 when the trial court extended its restitution and LFO jurisdiction another 10 years, because the defendant was on warrant status at least beginning October 6, 1999. VRP 2-4. Accordingly, the trial court's *nun pro tunc* order of April 4, 2011, to reflect that the defendant was not in court on October 31, 2002, was properly entered.

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<sup>11</sup> CrR 7.8(a) provides:

"Clerical Mistakes. 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. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(c)."

The respondent State of Washington respectfully asks this Court to so rule.

## **VI. CONCLUSION**

Havens' appeal has no merit. First, the trial court's original 10-year jurisdiction was still in progress and had not expired on December 31, 2002 when the court's order extending jurisdiction for the second 10 years was entered. The original 10-year jurisdictional time limit did not begin to run until on or about October 5, **1993**, a year after Havens was sentenced on Cause No. 94-5. Hence the time could not have lapsed until on or about October 5, **2003**. Where the trial court entered its LFO extension order on December 31, 2002, the order was timely and in fact well in advance of any time limit which would expire within 10 years.

Second, Sufficient due process was given when the trial court entered its LFO extension order on December 31, 2002, because the extension order did not increase the original quantum of punishment imposed.

Third, it was within the power of the trial court to correct the administrative error which had mistakenly stated Havens was in court on December 31, 2002, when in fact Havens was in warrant status and outside the jurisdiction. The court's order *nunc pro tunc*, entered April 4, 2011 after the court's hearing on Havens' motion to dismiss, merely

corrected the record to truthfully reflect that the defendant was not in court on December 31, 2002.

If anything, Havens has reaped a benefit of the State's and the trial court's mistaken assumption at the January 11, 2011 hearing, because the trial court never needed to dismiss any of the LFO extension orders at all. Due to the mistaken assumption that the time began to run on October 5, 1992 instead of October 5, **1993**, and the State's and the court's misapprehension that the time needed to be tolled due to Havens' warrant status, Havens reaped a windfall when the court dismissed Havens' LFO order for Cause No. 119-4, when the court was not obliged to do so.

Accordingly, the trial court's LFO extension orders of December 31, 2002 and April 4, 2011 should be upheld, and Havens' appeal should be dismissed. The State respectfully asks this Court to so rule.

RESPECTFULLY SUBMITTED THIS 9<sup>th</sup> day of April, 2012.

  
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