

31803-6-III

FILED
July 2, 2014
Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VERNON R. JOHNSON, JR.,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	1
V. <u>ARGUMENT</u>	3
<u>Where The Defendant Was Not Serving</u> <u>Any Other Sentence, But Only Held Pending Trial,</u> <u>He Should Receive Credit For Time Served</u>	3
VI. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

State Cases

Page No.

In re Personal Restraint of Albritton, 143 Wn. App. 584,
180 P.3d 790 (2008)3

In re Pers. Restraint of Costello, 131 Wn. App. 828,
129 P.3d 827 (2006)5

In re Personal Restraint of Phelan, 97 Wn.2d 590,
647 P.2d 1026 (1982)3

In re the Personal Restraint of Schillereff, 159 Wn.2d 649,
152 P.3d 345 (2007)3, 4, 5

State v. Cook, 37 Wn. App. 269, 679 P.2d 413 (1984)6

State v. Stewart, 136 Wn. App. 162, 149 P.3d 391 (2006)4

State v. Williams, 59 Wn. App. 379, 796 P.2d 1301 (1990)4

Statute

Page No.

RCW 9.94A.505.....3

Secondary Authority

13B WASH. PRAC. sec. 36036

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts remand is appropriate to permit the Defendant be credited with time served.

III. ISSUE

Where the Defendant is held in custody pending trial on the instant matter as well as on out of state charges, shall he receive credit for time served?

IV. STATEMENT OF THE CASE

The Defendant Vernon Johnson challenges the lower court's determination of credit for time served.

When the matter was raised below, the State prepared a Memorandum on the topic. CP 21-30. The prosecutor explained that the court could not credit the Defendant with the time he was in the hospital (February 19, 2012 – September 21, 2012) before he was ever arrested on

this case. CP 23; RP 16-17. The Defendant agreed. RP 20-21.

The prosecutor also argued that the court had discretion to give the Defendant credit for time served from the date of his Washington arrest on September 21, 2012, but the Defendant was not entitled to credit for that time, because he was also detained on out of state warrants from Missouri and Oregon. CP 24; RP 16.

The Defendant challenged this, explaining that the various offenses “appeared to be a spree that started in Washington and eventually ran back through Washington [where] they were caught.” RP 20. Until his Washington matter was resolved, he could not address the outstanding charges in other states. RP 19-21. The defense asked for 276 days credit. RP 20.

Relying on the prosecutor’s citations and over the Defendant’s protestations, the court denied the Defendant credit for time served. RP 21, 25-26. The court imposed 73.5 months. RP 24.

On appeal, the Defendant challenges the court’s discretion to deny credit for time served.

V. ARGUMENT

WHERE THE DEFENDANT WAS NOT SERVING ANY OTHER SENTENCE, BUT ONLY HELD PENDING TRIAL, HE SHOULD RECEIVE CREDIT FOR TIME SERVED.

The sentencing court relied on the prosecutor's recitation of the authorities. The prosecutor's memorandum cited the following authorities: RCW 9.94A.505(6), *In re Personal Restraint of Phelan*, 97 Wn.2d 590, 595, 647 P.2d 1026 (1982), *In re Personal Restraint of Albritton*, 143 Wn. App. 584, 180 P.3d 790 (2008), and *In re the Personal Restraint of Schillereff*, 159 Wn.2d 649, 152 P.3d 345 (2007). None of these authorities support the denial of credit for time served.

The statute only states when credit must be given, not when it may not. "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.*" RCW 9.94A.505(6) (emphasis added).

In the *Phelan* matter, the court denied the defendant credit for non-jail time served on probation and for time served in lieu of revocation of probation. Neither of these circumstances exist in the instant case.

In the *Albritton* matter, there was "no dispute that Albritton [was] not entitled to receive credit for time he spent in jail on unrelated charges."

Albritton, 143 Wn. App. at 594. Therefore, the case offers no analysis, but only refers to *State v. Stewart*, 136 Wn. App. 162, 165, 149 P.3d 391 (2006) and *State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990).

In the *Stewart* case referenced in *Albritton*, the opinion states that under RCW 9.94A.505(6), a defendant “should be given credit [] for presentence time he has actually served on the charged offense.” *Id.* The court only denied the defendant credit for time served on other *sentences* or when he was *not actually in custody* on the cases in question. *State v. Stewart*, 136 Wn. App. at 165. Again, these are not the circumstances of this case. The Defendant is asking for credit for time he was actually in custody and was not serving time on any other sentence.

And in the *Williams* case referenced in *Albritton*, the court denied the defendant credit for time he was serving on a parole violation. *State v. Williams*, 59 Wn. App. at 382. But there is no record that the Defendant was “serving” any sentence or probation violation. He was only detained pending resolution of open cases.

In *Schillereff*, the court denied the defendant credit for time that he was actually incarcerated pretrial because, but for his Texas conviction and sentence, he would have been able to bail out on the Washington

offense. *Schillereff*, 159 Wn.2d at 652. In this case, however, the Defendant Johnson was not serving an out of state sentence. He was waiting to face charges on out of state cases. There is no record to suggest that the Defendant would have posted bail and been out of custody, but for the other state charges. Therefore, the case is not applicable here.

The Defendant on appeal offers cases that are on point and support his argument. Appellant's Brief at 5, citing *State v. Speaks*, 119 Wn.2d 204, 026, 829 P.2d 1096 (1992), *In re Pers. Restraint of Costello*, 131 Wn. App. 828, 832, 129 P.3d 827 (2006) and *In re Schaupp*, 66 Wn. App. 45, 49-50, 831 P.2d 156 (1992). The strongest language appears in the *Costello* case.

The statutory requirement codified in former RCW 9.94A.120(17), that an offender receive credit for all pretrial detention time served, reflects a constitutional mandate. *State v. Speaks*, 119 Wash.2d 204, 206, 829 P.2d 1096 (1992). Failure to allow such credit violates due process, denies equal protection, and offends the prohibition against multiple punishments. *State v. Cook*, 37 Wash.App. 269, 271, 679 P.2d 413 (1984).

In re Pers. Restraint of Costello, 131 Wn. App. at 832. More than a statutory issue, the matter is constitutional. When credit is not permitted, those unable to obtain release pending trial may serve longer sentences than those who are released, thereby violating the equal protections clause.

State v. Cook, 37 Wn. App. 269, 271, 679 P.2d 413 (1984).

A review of Washington Practice also supports the Defendant's argument. A court "must give the offender credit for all confinement served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." 13B WASH. PRAC. sec. 3603 (citing RCW 9.94A.505(6) and *In re Phelan*, 97 Wn.2d 590, 594, 647 P.2d 1026 (1982)). "If [] the offender is confined on two charges simultaneously, any time not credited towards one charge must be credited towards the other." *Id.* (citing *State v. Davis*, 69 Wn. App. 634, 640-41, 849 P.2d 1283, 1286-87 (1993), *State v. Watson*, 63 Wn. App. 854, 859-60, 822 P.2d 327, 329-30 (1992); and *State v. Stewart*, 136 Wn. App. 162, 149 P.3d 391 (2006)). As the Defendant notes, the Washington trial court could not know the future outcome of cases in Oregon or Missouri, or even whether there would be a conviction and sentence on either of those cases. Appellant's Brief at 6. Therefore, the only way to credit this time is in the Washington case. Subsequent courts, however, would not need to credit the time served in Washington on a Washington sentence.

The sentencing court mistakenly believed that the Defendant's request was "contradicted by [case law] and statutory authority." RP 21. It is not. Because the court did not believe it had discretion to grant credit

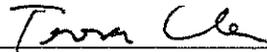
for time served, and because the constitution requires the court to have credited the requested 276 days, the sentence should be remanded.

VI. CONCLUSION

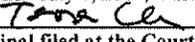
Based upon the forgoing, the State respectfully agrees to remand.

DATED: July 1, 2014.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

<p>David N. Gasch <gaschlaw@msn.com> Vernon R. Johnson, Jr. #800026 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 1, 2014, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
--	---