

FILED

FEB 23 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No.355101

WASHINGTON STATE COURT OF APPEALS

DIVISION III

JAMES E. ELLIS, Appellant

v.

STATE OF WASHINGTON, Respondent

APPELLANT'S REPLY BRIEF

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I. **STATEMENT OF ADDITIONAL FACTS**

Appellant concedes that the court granted the State's Motion for Summary Judgment on February 21, 2017, **CP 161-64**, and Ellis's Motion for Reconsideration was filed on March 6, 2017, even though the ten days deadline to file would have been *March 3, 2017*. **CP 165-166**.

The Motion for Reconsideration was noted pursuant to Judge Nakata's assistant to be heard without oral argument on March 22, 2017. **CP 209-210**. Although the court took the case under consideration on March 22, 2017, pursuant to the Note for Motion Docket, the court did not issue a memorandum opinion until April 4, 2017, which was *after* the 30 days would have expired to file a notice of appeal from the Order (of Dismissal with Prejudice). **CP 161-162**. The court directed the State to prepare the order. **CP 161-162**. The State prepared an Order Denying Reconsideration, which was filed on **7/11/2017**. **CP 236-244**. The Appellant Ellis filed a Notice of Appeal within 30 days of *that order on 8/10/2017*. **CP 246-256**.

The 30 days to appeal from the *February 21, 2017* order would have been March 23, 2017. Had the court issued the Memorandum decision on March 22, 2017, as was scheduled by the Note for Motion, Ellis would have still had one more day to file the appeal.

II. ARGUMENT

A. The Court Should Find That The Appellant Timely Appealed From The Order Denying Reconsideration Filed On July 11, 2017.

“The appellate court, in aid of its appellate jurisdiction...possesses all inherent power of courts of equity, and when it is made to appear that a party being denied relief to which in equity and good conscience he is entitled, it is the duty of the appellate court to find some method within its jurisdiction by which such relief may be granted.” State ex rel Davis & Co. v. Superior Ct. for King Cy, 95 Wn. 258, 261, 163 P. 765 (1917).

“While a failure to meet jurisdictional requirements has generally mandated dismissal of the appeal, this court has always retained, and occasionally exercised in unusual cases, its authority to nevertheless hear the case on the merits.” State v. Ashbaugh, 90 Wn. 2d 152, 155, 509 P. 2d 1206 (1978). See also State v. Sorenson, 2 Wn. App. 97, 101, 466 P. 2d

532 (1970), in which the Court of Appeals found substantial, but not literal compliance with the jurisdictional requirements sufficient.

Rap 18.8(b) provides that “the appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs a privilege of a litigant to obtain an extension of time and this section....”

In this case, Ellis’s counsel filed the appeal within 30 days of the court’s final order denying Ellis’s Motion for Reconsideration issued on July 11, 2017, by filing the Notice of Appeal on August 10, 2017. Jurisdiction should be granted, where Ellis attorney timely filed a Notice of Appeal within 30 days from the court’s entry of the **Order Denying Reconsideration**, especially where Ellis’s attorney scheduled that Motion for Reconsideration to be heard on March 22, 2017, which would have given Ellis’s attorney until the following day to file the appeal had she been notified of the court’s denial of the merits of the case. Instead the Judge delayed her decision until April 4, 2017, which was *after* the 30 days to appeal from the *underlying* Order (dismissing the case with

prejudice), filed on February 21, 2017, had expired. Further the State did not draft the order as directed and have it entered until *July 11, 2017*, from which order Ellis appealed within 30 days.

Under these circumstances, the Court of Appeals should consider the timely Notice of Appeal within 30 days from the Order entered on July 11, 2017, where the Notice of Appeal was filed on August 10, 2017.

B. The “Earned Early Release Credits” Apply, Even When An Offender Is Subject To ISRB Parole Hearings.

The State cites In re Personal Restraint of Addleman, 151 Wn. 2d 769, 92 P. 3d 221 (2004) for the proposition that Ellis should not be entitled to earned early release credits because of the ISRB decision denying parole. The fact that earned early release credits applies even to sex offenders was discussed at length in the Appellant’s Brief.

The Addleman case does not stand for the proposition that the ISRB can take away earned release credits. In fact, just the opposite is true. On page 773 of the Addleman decision the court states:

At the conclusion of this 2001 hearing, the ISRB extended Addleman’s minimum sentence by 175 months,

more than 14 years. Because of the arithmetic of earned early release time the ISRB's vacation of its 2000 decision, and our vacation of the 1997 order, Addleman is presumptively eligible for a parolability hearing in September of 2005....We agreed to review the 2002 extension of Addleman's minimum sentence...."

Thus, the Addleman court expressly mentioned the *granting* of early release credits, and the case did not make a decision on that issue.

As explained on p. 7 of the opening brief, Mr. Ellis fell in the category of earning earned release time at one-third of the total sentence. A sex offender who is eligible for early release credit "shall be transferred to community custody in lieu of earned release time." See p. 8 of opening brief, second paragraph.

The ISRB had the authority to extend Ellis's term to the maximum of 10 years. However, his earned release should have applied to the 120 months maximum sentence such that he should have been given credit for 33.33% off of the 120 months. By denying Ellis his earned release credits, the Department failed to follow the terms of RCW

9.94A.729 in effect in 2009. (Even violent sex offenders get 15% for earned early release credits; other sex offenders get 33.33% off. State v. Winkle made it clear that a convicted sex offender “shall be transferred to community custody in lieu of earned release time. “ RCW 9.94A.729(5)(a) (Emphasis added) ; State v. Winkle, 159 Wn. App. 323, 329, 245 P. 3d 249 (Div. 1 2011).

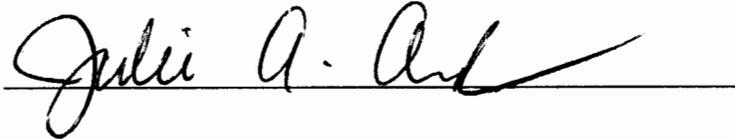
Similarly the State cited to In re Personal Restraint of Dyer, 175 Wn. 2d 186 (2012) in support of its position that the ISRB has authority to take away earned early release credits. Again, the court in Dyer only reviewed the ISRB’s decision to extend his minimum term by 60 months. The court in Dyer did not address whether he would receive earned early release credits. The defendant in Dyer received a maximum life sentence on three convictions for violent sex offenses.

By contrast, Ellis’s maximum was extended to 10 years. Ellis did not allege that the ISRB did not have the authority to make that decision in this action against the State, but rather alleged that the Department erred in refusing to give him earned early release credit off of his maximum 10 year sentence.

III. CONCLUSION

The court should consider this appeal, where Ellis appealed within 30 days of the Order Denying Reconsideration. The court should reverse the trial court's decision which granted summary judgment to the State and denied Mr. Ellis one-third off of his maximum sentence of ten years, and remand to the trial court for further proceedings.

Respectfully submitted this 21st day of February, 2018

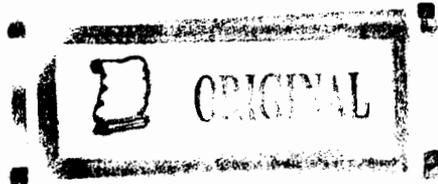
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Julie A. Anderson, WSBA#15214
Attorney for James Ellis

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

**JAMES E. ELLIS,
Plaintiff,**

vs.

**STATE OF WASHINGTON,
Defendant**

NO: 355101

Affidavit of Mailing

9 **TO: CLERK OF THE ABOVE-NAMED COURT**
10 **AND TO: HEIDI S. HOLLAND, ASSISTANT ATTORNEY GENERAL**

11

12 The undersigned declares: I am a resident of the State of Washington, over the
13 age of eighteen years and not a party interested in the above-entitled action. On the 21st
14 day of February, 2018, I mailed by mail copies of:

15

- 16 • APPELLANT'S REPLY BRIEF

17

18 The nature of which was/were set forth therein, in the above-entitled action to the
19 following:

20

21 **Washington State Office of the Attorney General**
22 **Att: Heidi S. Holland**
23 **1116 W Riverside Ave. Ste 100**
24 **Spokane, WA 99201-1113**

25

26 **I declare under penalty of perjury under the laws of the state of Washington that**
27 **the foregoing is true and correct.**

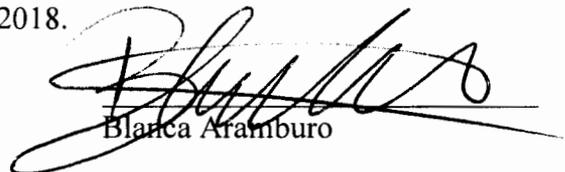
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29 Signed at Wenatchee, WA, on February 21, 2018.

30

31

32



Blanca Aramburo

Declaration of mailing