

FILED
Court of Appeals
Division III
State of Washington
12/10/2018 4:42 PM

35830-5-III
35831-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JON PAUL SAUNDERS, Appellant.

APPEAL FROM THE WALLA WALLA COUNTY
SUPERIOR COURT

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 4242
Pasco, Washington 99302
(509) 545-3543

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>	4
A. <u>The Court Did Not Abuse Its Discretion In Failing To Address A Matter That Was Not Raised To It; This Court Must Decline Review Where There Is An Insufficient Record Upon Which To Adjudicate The Claim</u>	4
B. <u>The DOSA Revocation Was Not A Full Resentencing So As To Trigger A New Review Of LFOs Imposed In 2014</u>	11
C. <u>The State Will Not Seek Costs</u>	12
VI. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

State Cases

Page No.

In re Flippo,
187 Wn.2d 106, 385 P.3d 128 (2016) 12

In re Pers. Restraint Petition of McKay,
127 Wn. App. 165, 110 P.3d 856 (2005) 5, 6, 8

Court Rules and Statutes

RAP 2.5 5

RAP 9.1 8

RAP 9.11 9

RCW 9.94A.171 8

RCW 9.94A.660 5, 11

RCW 9.94A.729 3

RCW 10.73.090 12

RCW 13.40.165 10

Secondary Authorities

13B Wash. Prac., Criminal Law § 3603 (2018-2019 ed.) 9

13B Wash. Prac., Criminal Law § 3604 (2018-2019 ed.) 9

I. IDENTITY OF RESPONDENT

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

II. RELIEF REQUESTED

Respondent asserts no error occurred in the DOSA revocation of the Appellant.

III. ISSUES

1. Should this Court decline review where the matter is not preserved for review and where there is an insufficient record upon which to adjudicate the claim?
2. Did the court abuse its discretion in failing to address a matter not raised to it?
3. Is the Defendant foreclosed from challenging LFOs imposed in 2014?

IV. STATEMENT OF THE CASE

On April 21, 2014, the Defendant Jon Paul Saunders passed two forged checks taken in a burglary. CP 158-60. In Walla Walla County Superior Court case 14-1-00183-2, he was charged with two

forgeries and a theft in the third degree for other items taken in the burglary. CP 161-63. This case is referred to as "AC" in the violation reports. CP 65, 218.

The next month, the Defendant entered a stranger's room at the Red Lion Inn, showered, and stole a shirt. CP 2, 10-11. Later that day, he was then observed outside the hotel, naked and playing with his genitalia. CP 2, 10. That evening, a woman found the Defendant sitting on a couch in her home and demanded that he leave. CP 11. In Walla Walla County Superior Court case no. 14-1-00168-9, he was charged with burglary in the second degree, theft in the third degree, indecent exposure, and criminal trespass. CP 12-14. This case is referred to as "AB" in the violation reports. CP 65, 218.

The charges in these two cases were amended to burglary in the second degree and disorderly conduct for change of plea. CP 23-36. On October 20, 2014, the Defendant received concurrent sentences under the DOSA statute of 19 months confinement and 19 months of community custody. CP 37, 188; 1RP¹ 26.

He was released² from custody on September 4, 2015. CP 136.

¹ 1RP refers to the transcript of hearings dated 10/20/14, 10/19/17, 10/24/17, and 10/30/17.

² The Defendant was eligible to receive a 50% reduction in his confinement with earned

In October and November 2015, he was sanctioned for consuming methamphetamine and alcohol. CP 65-66, 218. In December 2015, the Defendant's urinalysis tested positive a third time. 1RP 28, 40. He thereafter "absconded from DOC custody for two years and was in the meantime convicted of seven new crimes in Texas." 1 RP 28, 35; CP 102, 252. He was returned to Washington under a secretary's warrant. *Id.* While waiting to be transported to Walla Walla superior court, he assaulted other inmates in Olympia. 1RP 28, 36. He was briefly released pending hearing, during which time his urinalysis tested positive for methamphetamine. CP 88; 1RP 36; 2RP3 9-10.

The superior court found numerous violations and revoked the DOSA. CP 101-02, 251-52. According to the notices of appeal, this is the order from which he is appealing. CP 143-45, 149, 296, 300-02.

Following the revocation hearing, the Defendant filed a motion, asking that his community custody time in a third case (an earlier case, cause no. 14-1-00049-6) be run concurrent to that time which was revoked in his DOSA cases. CP 123-25. This case is referred to as "AA" in the violation reports. CP 65, 218. He did not provide any

early release. RCW 9.94A.729(3)(d).

³ 2RP refers to the transcript of hearings dated 9/20/17, 10/2/17, 10/16/17, and 10/18/17.

documentation related to AA.

The State's response explained that the Defendant's request could not be accommodated, because his community custody term in 49-6 had already expired or been closed out. CP 131.

He had already served his time in the first case. The crimes in the last two cases were committed after he was released from custody in the first case. There was nothing to run the second and third cases concurrent with.

CP 131. The court agreed. CP 140-41. The Defendant has not appealed from this ruling. He has, however, made a motion in these consolidated appeals to supplement the record with the judgment and sentence from this third case. The State has objected as (1) this document from AA is not part of the appellate record, (2) it was not provided to the superior court, and (3) the Defendant has not appealed from the denial of this motion to run community custody concurrent.

V. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO ADDRESS A MATTER THAT WAS NOT RAISED TO IT; THIS COURT MUST DECLINE REVIEW WHERE THERE IS AN INSUFFICIENT RECORD UPON WHICH TO ADJUDICATE THE CLAIM.

The Defendant challenges the revocation of his DOSA.

Revocation is at the superior court's discretion if violations are found by a preponderance of the evidence. RCW 9.94A.660(7)(c); *In re Pers. Restraint Petition of McKay*, 127 Wn. App. 165, 168, 110 P.3d 856, 857 (2005).

On appeal, the Defendant claims for the first time that he could not have violated conditions of his DOSA sentence in AB and AC, because he was not serving community custody on those matters at that time. Appellant's Opening Brief (AOB) at 6. He claims that at the time of his violations, he was serving community custody on a different matter, 49-6. *Id.*

The matter is not preserved for review, having not been litigated below. This claim was not raised to the superior court so as to have been litigated and preserved for review. This Court must decline review under RAP 2.5(a), because there is an insufficient record to adjudicate when the community custody period in AA concluded and the period in AB and AC began.

The record provides insufficient factual basis for the Defendant's premise. The Defendant would like this Court to consider earlier DOC Notices of Violation filed in 2015 and 2016. The caption in those notices identified three cases referred to as Causes AA, AB, and AC.

CP 62, 65, 215, 218. The caption indicated that, in Cause AA, the Defendant was sentenced on 3/24/2014, received 12 months community custody, and had a termination [of supervision] date of 6/30/2016. *Id.* It also stated that, in Cause AB and AC, the Defendant was sentenced on 10/20/2014, received 19 months community custody, and had a termination [of supervision] date of 4/4/2017. *Id.*

However, the first of these notices was not acted upon. It alleged a violation on 10/22/15. CP 62-64, 215-17. This allegation is removed in updated notices. CP 65-66, 86-95, 218, 231-40. And the second of these notices would be significantly amended prior to hearing. *Id.* The Court cannot rely on the validity of information in previous notices which the party subsequently withdrew or amended prior to hearing.

The Defendant was not seen in Washington State for two years after he failed to report to the DOC on 12/15/2015. While he was gone, the DOC Records Department made some recalculations as to the community custody periods in all three cases. 1RP 11-12. It had initially issued a non-extraditable warrant, presumably under AA. 1RP 11-12. On January 6, 2016, applications for warrants were made under AB and AC. CP 67, 219. The Department filed a new Notice of

Violation on that same date. This notice removed the 10/22/15 allegation, presumably because this fell under the supervision term of AA. And it added violations for 12/30/2015. CP 65-66, 218.

In 2017, the Department updated the Notices of Violation a final time. CP 86-95, 231-40. The final notices allege violations on 12/15/2016, 12/30/2015, 12/31/2015, 2/2/2016, 7/24/2016, and 9/22/2017. CP 87, 91, 232, 236. Again, they did not address the 10/22/15 violation. They also omitted any information in the caption regarding Cause AA. This reflects that the AA termination date in previous notices had been incorrect and that the violation during AA's supervision period was not relevant to the request for DOSA revocation. And the amended notices reflect a different termination date to 9/28/2019.

At the very beginning of the DOSA revocation hearing, the Defendant's attorney told the court that errors and language in these earlier notices had caused some initial confusion. 1RP 39-40. Ms. Carlson Straube explained her client "expressed confusion about a couple of things" which she had assuaged. 1RP 39. He had been worried that the DOC had altered his judgments so that his two DOSA cases (AB and AC) were made to run consecutive to each other,

rather than concurrent. *Id.*, ll. 19-21. She explained that the two DOSA cases ran concurrent to each other, but consecutive to a third case. *Id.*, ll. 21-25.

On this record, it is apparent that the DOC corrected its earlier miscalculation, and that the Defendant's attorney reviewed and considered the dates. The record does not demonstrate that the Defendant was under supervision of AA at the time of the offenses which resulted in the DOSA revocation.

This Court's Commissioner has allowed the Defendant to supplement the record with information that was not available to the lower court. This is improper. A direct appeal is confined to the record on review of the superior court's action. RAP 9.1. The superior court does not commit error by failing to consider what is not before it.

Nor should this Court understand that the judgment and sentence of AA alone inform when the terms begin or end. A judgment and sentence alone will not demonstrate:

- credit for time served;
- earned early release;
- tolling under RCW 9.94A.171; or

- post-conviction rulings such as early closure or satisfaction.

None of these questions are simple; all are fact intensive. 13B Wash. Prac., Criminal Law § 3603 (2018-2019 ed.) (credit for time served); 13B Wash. Prac., Criminal Law § 3604 (2018-2019 ed.) (earned early release).

The Commissioner has granted the Defendant's motion to supplement the record. This is error. In her ruling she makes exactly the error which the State cautioned against. The Commissioner believes in stroking the elephant's trunk she has comprehended the entire beast. Ruling at 3 (believing that credit for time served in AB or AC will provide information about credit for time served in AA) (failing to acknowledge that a sentence may be served before it is ordered or that community custody may be altered after it is ordered). A poor description of the facts may very well change the court's decision, but it would not be a fair or correct resolution of the case. RAP 9.11(a) (2), (3).

The Commissioner believes that because the judge wrote in credit in AB, that every judge writes the credit in every judgment. This is false. There is no requirement or expectation that a judge

determine “credit” in the judgment. *But cf.* RCW 13.40.165(9) (required in a juvenile disposition). In fact, the notation is largely superfluous, because the jail/DOC will still have to calculate and confer credit where it is due. So while the judge hand wrote this in at CP 43, he did not repeat it in the amended judgment at CP 109 (“credit for time served to be determined by Dept. of Corrections.”). The absence of a specific notation in a judgment does not mean that the defendant did not receive some credit. A greater record is needed.

Moreover, the Commissioner misapprehends the nature of this appeal. There is no claim of ineffective assistance of counsel. *But see* Ruling at 3 (finding it excusable to fail to present evidence to the trial court where the attorney performed deficiently – “that information was available to Mr. Saunders['] trial counsel, who could have raised it at trial.”). The Defendant lays blame at the feet of the judge, not his attorney. The superior court does not err by failing to observe facts which are not part of the record.

The record is not that the Defendant was under supervision in AA to the exclusion of AB and AC at the time of the violations which resulted in the revocation of the DOSA. The record is that the attorney reviewed the periods of supervision with the DOC, and then

explained them to her client. How she determined or how we may determine when one period ended and another began is not part of the record.

If the Defendant were to have made such a claim below, the State could have investigated and provided the relevant record. This would include the testimony and documentation of the DOC. The State should be allowed to provide such a record in a CrR 7.8 hearing. But this appeal is not the vehicle.

Because the Defendant's claim is without sufficient record and because it was not raised below, the Court must decline to review it.

B. THE DOSA REVOCATION WAS NOT A FULL RESENTENCING SO AS TO TRIGGER A NEW REVIEW OF LFOS IMPOSED IN 2014.

The Defendant challenges sheriff's fees and costs of extradition – LFOs imposed in 2014 and not revisited in 2017. A revocation is not a resentencing, but only the conversion of community custody to total confinement. RCW 9.94A.660(7)(c).

A comparison of the judgments in 2014 with those in 2017 shows that the court did not add any new LFOs for the costs of extraditing the Defendant from Texas or serving warrants. In fact, the LFOs are the same with one exception. The court struck attorney

fees. Because the court did not impose any additional LFOs in 2017, the question of LFOs imposed in 2014 is foreclosed. *In re Flippo*, 187 Wn.2d 106, 385 P.3d 128 (2016) (LFO challenges are final if not challenged within the time limits of RCW 10.73.090). The Defendant however may address them and any other LFOs he has with the clerk's office in a motion to remit when released and as appropriate.

C. STATE WILL NOT SEEK COSTS.

In light of the superior court's decision to strike attorney fees and considering the current total LFO's and the Defendant's debt, the State does intend to seek costs if it substantially prevails.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the court ruling revoking the DOSA.

DATED: December 10, 2018.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

<p>Laura M. Chuang laura@ewalaw.com</p> <p>Kristina M. Nichols admin@ewalaw.com</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.</p> <p>DATED December 10, 2018, Pasco, WA</p> <p></p> <p>Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
---	--

December 10, 2018 - 4:42 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35830-5
Appellate Court Case Title: State of Washington v. Jon Paul Saunders
Superior Court Case Number: 14-1-00168-9

The following documents have been uploaded:

- 358305_Briefs_20181210164231D3551624_4319.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 358305 RESPONDENTS BRIEF.pdf

A copy of the uploaded files will be sent to:

- admin@ewalaw.com
- jill@ewalaw.com
- jnagle@co.walla-walla.wa.us
- laura@ewalaw.com

Comments:

Sender Name: Teresa Chen - Email: tchen@co.franklin.wa.us
Address:
PO BOX 4242
PASCO, WA, 99302-4242
Phone: 509-545-3543

Note: The Filing Id is 20181210164231D3551624