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NO. 36271-0-III & 36272-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN HUGHES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable M. Scott Wolfram, Judge

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BRIEF OF APPELLANT

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MARY T. SWIFT  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The sentencing court imposed illegal consecutive sentences when it ordered appellant Brian Hughes to complete his jail sentence on two current offenses before beginning his residential drug offender sentencing alternative (DOSA) on another current offense.

2. The sentencing court erred in imposing the \$200 criminal filing fee, costs of collecting unpaid legal financial obligations (LFOs), as well as interest on nonrestitution LFOs.

Issues Pertaining to Assignments of Error

1. Did the sentencing court impose illegal consecutive sentence when it ordered Hughes to complete his jail sentence on two current offenses before beginning his residential DOSA on another current offense, where a residential DOSA constitutes confinement and multiple current offenses must run concurrently to one another?

2. Is remand necessary for the sentencing court to strike the \$200 criminal filing fees, costs of collection, and nonrestitution interest from both judgments and sentences under State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018)?

B. STATEMENT OF THE CASE

On January 19, 2018, the State charged Brian Hughes under Walla Walla County Cause No. 18-1-00023-5 with one count of possession of

methamphetamine with intent to deliver, one count of drug paraphernalia use, and one count of burglary tools possession. 1CP 8-9.<sup>1</sup> All these offenses were alleged to have occurred on January 14, 2018. 1CP 8-9.

On April 4, 2018, the State charged Hughes under Walla Walla County Cause No. 18-1-00111-8 with one count of possession of methamphetamine, one count of drug paraphernalia use, and one count of first degree identity theft. 2CP 14-15. All these offenses were alleged to have occurred on April 2, 2018. 2CP 14-15.

The parties reached a global resolution on all the charges under both cause numbers. 1CP 20; 2CP 22. Hughes agreed to plead guilty to one count of possession of methamphetamine under Cause No. 18-1-00023-5 (referred to in this brief as “23-5 VUCSA,” i.e., violation of the Uniform Controlled Substances Act, chapter 69.50 RCW). 1CP 16-26. Hughes likewise agreed to plead to one count of possession of methamphetamine (“111-8 VUCSA”) and one count of first degree identity theft under Cause No. 18-1-00111-8. 2CP 18-29. In exchange, the State dropped the remaining charges and agreed to recommend a residential DOSA if Hughes qualified. 1CP 14, 20; 2CP 22.

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<sup>1</sup> This brief refers to the clerk’s papers from Cause No. 18-1-00023-5 (Appeal No. 36271-0-III) as “1CP” and the clerk’s papers from Cause No. 18-1-00111-8 (Appeal No. 36272-8-III) as “2CP.”

At a July 9, 2018 hearing, the trial court accepted Hughes's guilty pleas on the three charges.<sup>2</sup> RP 1-7.<sup>3</sup> The court ordered the Department of Corrections (DOC) to screen Hughes for a residential DOSA. 1CP 36. DOC determined Hughes was eligible for a residential DOSA on the identity theft conviction, but not the VUCSA convictions. 1CP 32-35; RP 9.

Given the global resolution, the parties proceeded to sentencing on both cause numbers on July 23, 2018. RP 8-9. The standard range sentence for both VUCSA offenses was 6+ to 12 months, with Hughes's offender score of four. 1CP 43; 2CP 36. Hughes had 123 days of credit for time served on the 23-5 VUCSA and 110 days on the 111-8 VUCSA. RP 10; 1CP 45; 2CP 39.

Defense counsel explained it was DOC's position that non-DOSA-eligible sentences must be served consecutively to a residential DOSA. RP 9-10. DOC therefore believed Hughes needed to complete his VUCSA sentences before beginning his residential DOSA on the identity theft. RP 9-10. Defense counsel opposed DOC's position, explaining sentences "are presumed to be served concurrent." RP 10. Counsel noted he researched the issue, but found "no case law specifically addressing this." RP 10.

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<sup>2</sup> Hughes ultimately entered an Alford plea on the identity theft. RP 3-4; North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

<sup>3</sup> The report of proceedings is identical for both appeals.

As a solution, defense counsel proposed the trial court exercise its discretion and impose an exceptional sentence downward of credit for time served on the VUCSA convictions. RP 10-11. That way, counsel explained, Hughes could begin his residential DOSA immediately. RP 10-11.

The State opposed defense counsel's proposal. RP 13-14. The State argued Hughes should complete his VUCSA jail sentences because "there needs to be some sting in the tail of these particular charges . . . I'm hoping that some further incarceration will get his attention." RP 14. The State accordingly recommended six months of incarceration on both VUCSA offenses. RP 15-16.

The State believed its recommendation did not constitute consecutive sentences, arguing the residential DOSA is a suspended sentence so "there is no sentence to run consecutive at this time." RP 14. The State claimed an inpatient treatment program like the residential DOSA "isn't something that is punishment. This isn't something that's incarceration . . . It's not considered a restriction on his liberties since it is a suspended prison sentence." RP 13. The State asserted, "in fact, the way Washington state law defines a treatment program is it cannot be considered to be incarceration or credit for time served." RP 13. "So," the State believed, "Mr. Hughes does have some time to finish up." RP 15.

The sentencing court initially ordered, “So we are going to impose 180 days on the 23-5 cause number. He’s given credit for 123. It will be consecutive with the other cause number.” RP 16. Both attorneys interrupted, “That should be concurrent, your Honor.” RP 17. The State again claimed, “if the Court is inclined to do Residential DOSA, that term will be suspended so there’s nothing to run consecutive to.” RP 17.

The sentencing court accordingly imposed a residential DOSA on the identity theft, while ordering “on the 23-5, it will be 180 days, credit for 123, concurrent with the 111-8 cause number.” RP 17. With regard to Hughes’s remaining jail sentence, the State explained:

So it looks like there’s a combination, your Honor, of between on 23-5, there is 57 days left to serve, with 110 days credit against the 180 days. On the first count on 111-8 that looks like there’s 70 days left to serve. So that would be the amount of time he has left in total in the county jail.

RP 19.

The 23-5 VUCSA judgment and sentence reflected a 180-day jail sentence, with 123 days credit for time served, plus 12 months of community custody, and specified it “shall be concurrent” to the 111-8 sentence. 1CP 45. The 111-8 judgment and sentence reflected a six-month sentence on the VUCSA conviction, with 110 days credit for time served, plus 12 months of community custody, and likewise specified it “shall be concurrent” to the 23-5 sentence. 2CP 39. On the identity theft, the court imposed three to six

months of residential treatment, plus 24 months of community custody, “to run concurrent” with the 23-5 VUCSA. 2CP 43.

Hughes filed timely notices of appeal in both cases. 1CP 56; 2CP 56. Subsequent treatment records show Hughes began his residential DOSA on August 24, 2018 at American Behavioral Health Systems in Chehalis, Washington. 2CP 60. This Court consolidated Hughes’s two appeals on January 9, 2019.

C. ARGUMENT

1. THE SENTENCING COURT EXCEEDED ITS STATUTORY AUTHORITY IN ORDERING HUGHES TO SERVE JAIL SENTENCES CONSECUTIVELY TO A RESIDENTIAL DOSA.

The trial court effectively imposed consecutive sentences by ordering Hughes to complete his VUCSA jail sentences before beginning his residential DOSA on the identity theft. The court lacked statutory authority to do so, where a residential DOSA constitutes confinement and multiple current offenses must be served concurrently. This Court should therefore remand for correction of Hughes’s sentence.

- a. A residential DOSA is an alternative form of standard range sentence that constitutes confinement.

A sentencing court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). “[T]he court has no inherent power to develop a procedure for

imposing a sentence unauthorized by the legislature.” State v. Bergen, 186 Wn. App. 21, 28, 344 P.3d 1251 (2015). The scope of a sentencing court’s authority under the Sentencing Reform Act (SRA) of 1981, chapter 9.94A RCW, is a question of law reviewed de novo. Bergen, 186 Wn. App. at 27-28. Statutory interpretation is also a question of law reviewed de novo. Id. at 28.

When interpreting a statute, this Court’s fundamental objective is to ascertain and carry out the legislature’s intent. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). Statutory interpretation begins with the statute’s plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related provisions, and the statutory scheme as a whole. Id. at 926-27. If the statute is unambiguous, the court’s inquiry ends. Id. at 927. A statute is ambiguous when it is susceptible to two or more reasonable interpretations, but is not ambiguous merely because different interpretations are conceivable. Id.

RCW 9.94A.660 authorizes sentencing courts to impose a prison-based or residential DOSA, if the defendant meets certain eligibility requirements. RCW 9.94A.660(3) provides:

If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based

alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

One eligibility requirement for a DOSA is “[t]he end of the standard sentence range for the current offense is greater than one year.” RCW 9.94A.660(1)(f). The end of the standard range for both of Hughes’s current VUCSA offenses was 12 months. 1CP 43; 2CP 36. DOC was therefore correct that Hughes was not eligible for a residential DOSA on the VUCSAs. RP 9. He was, however, eligible for a residential DOSA on the identity theft offense, which carried a standard range of 15 to 20 months. 2CP 36.

A residential DOSA sentence requires the defendant to “enter[] and remain[] in residential chemical dependency treatment certified under \*chapter 70.96A RCW<sup>[4]</sup> for a period set by the court between three and six months.” RCW 9.94A.664(1). In addition, the sentencing court must impose a community custody term “equal to one-half the midpoint of the standard sentence range or two years, whichever is greater.” Id.

The purpose of a DOSA is to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from addictions. State v. Grayson, 154 Wn.2d 333, 337,

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<sup>4</sup> Chapter 70.96A RCW was repealed in 2016. Laws of 2016, Spec. Sess., ch. 29, §§ 301, 601. Much of chapter 70.96A RCW was recodified in chapter 71.24 RCW. Laws of 2016, Spec. Sess., ch. 29, § 701.

111 P.3d 1183 (2005). A DOSA is an alternative form of standard range sentence.<sup>5</sup> State v. Murray, 128 Wn. App. 718, 726, 116 P.3d 1072 (2005); State v. Smith, 118 Wn. App. 288, 292, 75 P.3d 986 (2003).

Individuals have significant incentive to comply with the conditions of a DOSA, because failure may result in serving the remainder of the sentence in prison. RCW 9.94A.660(7)(c); Grayson, 154 Wn.2d at 338. However, when the sentencing court revokes a DOSA and imposes a prison sentence, the individual “shall receive credit for any time previously served under this section.” RCW 9.94A.660(7)(d). This provision has been interpreted broadly to provide “credit for community custody served in the form of a residential treatment-based DOSA sentence.” In re Postsentence Review of Bercier, 178 Wn. App. 148, 151, 313 P.3d 491 (2013).

The guarantee of credit for “any time” served on a DOSA suggests that a DOSA constitutes confinement. RCW 9.94A.660(7)(d). It also directly contradicts the State’s claim that “the way Washington law defines a treatment program is it cannot be considered incarceration or credit for time served.” RP 13; see also RP 13 (“Therefore, if they are in a treatment program, they don’t get credit for that.”).

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<sup>5</sup> As a standard range sentence, a DOSA generally may not be appealed. Smith, 118 Wn. App. at 292. “However, an offender may always challenge the procedure by which a sentence was imposed.” Grayson, 154 Wn.2d at 338.

Other statutory provisions also belie the State's assertion that a residential DOSA is not incarceration. For instance, the SRA defines "confinement" as "total or partial confinement." RCW 9.94A.030(8). "Partial confinement" means "confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government." RCW 9.94A.030(36). Partial confinement includes work release, home detention, work crew, and electronic home monitoring. Id. "Total confinement" means "confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day . . . ." RCW 9.94A.030(52). Notably, courts must give defendants "credit for all confinement time served before the sentencing."<sup>6</sup> RCW 9.94A.505(6); State v. Speaks, 119 Wn.2d 204, 209, 829 P.2d 1096 (1992) (holding "all confinement" includes partial confinement).

As discussed, a residential DOSA requires the defendant to "enter[] and remain[]" in residential chemical dependency treatment for at least three months. RCW 9.94A.664(1). The SRA does not define "residential." See RCW 9.94A.030. The dictionary defines "residential" as "used, serving, or designed as a residence or for occupation by residents." WEBSTER'S THIRD

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<sup>6</sup> The Washington Supreme Court has held defendants are entitled to credit from time served on both pretrial *and* posttrial home detention. State v. Swiger, 159 Wn.2d 224, 228-30, 149 P.3d 372 (2006); Speaks, 119 Wn.2d at 213.

NEW INT’L DICTIONARY 1931 (1993); State v. Cooper, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006) (“[W]e may discern the plain meaning of nontechnical statutory terms from their dictionary definitions.”). “Residence” is defined as “the act or fact of abiding or dwelling in a place for some time” and, similarly, “the act or fact of living or regularly staying at or in some place either in or as a qualification for the discharge of a duty or the enjoyment of a benefit.” WEBSTER’S, supra, 1931. These statutory provisions and dictionary definition demonstrate the residential treatment portion of a DOSA constitutes total confinement.

In Bercier, this Court indicated a residential DOSA likely constitutes total confinement. At issue there was the meaning of RCW 9.94A.660(7)(d), which provides credit for “any time previously served” on a DOSA. Bercier, 178 Wn. App. at 150. The trial court prohibited Bercier from receiving credit for community custody time served on a residential DOSA. Id. The State agreed with the trial court, construing subsection (7)(d) as providing credit solely for jail or prison time served. Id. DOC and Bercier disagreed, contending the subsection included Bercier’s residential DOSA community custody time served. Id.

This Court sided with DOC and Bercier, given the plain language of subsection (7)(d). Id. at 151. However, the court noted, “[i]n hindsight, the department might have avoided this dispute by construing Mr. Bercier’s

residential treatment-based DOSA sentence as total confinement.” Id. at 150 n.2. To support this statement, the court cited to the SRA’s definition of total confinement. Id. Though dicta, Bercier offers persuasive authority that a residential DOSA falls within the statutory definition of total confinement.

Another provision of the SRA supports this conclusion. RCW 9.94A.525(2) provides that prior class B or C felonies are not counted towards an individual’s offender score—or “wash out”—if the individual spends a specified amount of time in the community crime free. The washout period begins on the individual’s “last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction.” RCW 9.94A.525(2)(b)-(d). This likewise demonstrates the legislature considers residential treatment to be confinement.

The relevant DOSA statutes, other SRA provisions, and applicable case law establish the State was incorrect below that a residential DOSA is a suspended sentence that does not constitute incarceration. RP 13. On the contrary, Hughes’s residential DOSA is confinement and he is entitled to credit for all time served in treatment and on community custody. See Bercier, 178 Wn. App. at 150.

The same authority establishes the sentencing court effectively imposed consecutive sentences when it ordered Hughes to complete his VUCSA jail sentences before beginning his residential DOSA on the identity

theft. Put another way, the court required Hughes to complete his confinement on the VUCSA convictions before beginning his confinement on the identity theft conviction. This is a consecutive sentence, despite the sentencing court calling it a concurrent sentence. 1CP 35; 2CP 39, 43. The only question that remains is whether the sentencing court had authority to impose consecutive rather than concurrent sentences.

- b. The sentencing court exceeded its statutory authority in running Hughes's residential DOSA consecutively to his other current offenses.

With few exceptions, “whenever a person is to be sentenced for two or more current offenses,” those sentences “shall be served concurrently.” RCW 9.94A.589(1)(a) (emphasis added). RCW 9.94A.589(1)(a) authorizes the imposition of consecutive sentences only under the exceptional sentence provisions of RCW 9.94A.535.<sup>7</sup> “RCW 9.94A.535 requires a jury to find certain facts before a sentencing court may depart from the sentencing guidelines and increase a defendant’s sentence beyond the standard range.” State v. Jones, 137 Wn. App. 119, 123, 151 P.3d 1056 (2007).

While the SRA does not formally define “current offenses,” it has been “defined functionally as convictions entered or sentenced on the same day.” In re Pers. Restraint of Finstad, 177 Wn.2d 501, 507-08, 301 P.3d 450

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<sup>7</sup> Other exceptions relate to serious violent offenses, unlawful firearm possession, and driving under the influence, none of which are applicable here. RCW 9.94A.589(1)(b)-(d).

(2013) (citing RCW 9.94A.525(1) (“Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed “other current offenses” within the meaning of RCW 9.94A.589.”)).

Hughes’s 23-5 VUCSA conviction and 111-8 VUCSA and identity theft convictions were entered and sentenced on the same day, July 23, 2018. RP 16-17; 1CP 42; 2CP 35. All three are therefore “current offenses” within the meaning of RCW 9.94A.589(1)(a). No aggravating circumstances were found by a trier of fact under RCW 9.94A.535. The sentencing court was therefore required by law to impose concurrent rather than consecutive sentences. RCW 9.94A.589(1)(a). The court exceeded its statutory authority by running Hughes’s VUCSA convictions consecutively to his residential DOSA.

Any argument from the State that RCW 9.94A.589(3) authorized the court to impose consecutive sentences should be rejected. RCW 9.94A.589(3) provides that consecutive sentences may be imposed, at the trial court’s discretion, in certain limited circumstances:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the

court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3). This provision creates a presumption that “sentences imposed will run concurrently unless the court expressly orders they be served consecutively.” In re Pers. Restraint of Long, 117 Wn.2d 292, 303, 815 P.2d 257 (1991).

RCW 9.94A.589(3) has been interpreted to apply when “(1) a person who is not under sentence of a felony (2) commits a felony and (3) before sentencing (4) is sentenced for a different felony.” Jones, 137 Wn. App. at 124 (internal quotation marks omitted) (quoting State v. Shilling, 77 Wn. App. 166, 175, 889 P.2d 948 (1995)). Under these circumstances, “a sentencing court has total discretion in deciding whether a current sentence will run concurrently with, or consecutively to, a felony sentence previously imposed.” Jones, 137 Wn. App. at 125 (emphasis added) (quoting State v. Klump, 80 Wn. App. 391, 396, 909 P.2d 317 (1996)).

For example, in Jones, Jones committed two crimes on September 20, 2004, was convicted of those crimes, and was sentenced on December 9, 2004. 137 Wn. App. at 125. Jones subsequently committed three crimes on October 17, 2004, was convicted of those crimes, and was sentenced on January 5, 2005. Id. Thus, Jones was not under sentence of a felony when he committed the October 17 crimes. Id. Before he was sentenced for the

October 17 crimes, he was sentenced for the September 20 crimes. Id. As such, under RCW 9.94A.589(3), the sentencing court had discretion to run Jones's sentence for his October 17 crimes consecutively to his sentences for his September 20 crimes. Id.

The statutory language and facts of Jones demonstrate RCW 9.94A.589(1)(a), not RCW 9.94A.589(3), is applicable here. First and foremost, the trial court did not expressly order consecutive sentences, as required under subsection (3). On the contrary, it expressly ordered concurrent sentences, under the mistaken impression that a residential DOSA does not constitute confinement. RP 17; 1CP 35; 2RP 39, 43.

Second, as discussed, the three convictions were entered and sentenced on the same day. 1CP 42; 2CP 35. Hughes committed the 23-5 and 111-8 offenses on different dates. 1CP 16; 2CP 18. But Hughes was not sentenced for the 23-5 VUCSA first and then later sentenced for the 111-8 offenses. RCW 9.94A.589(3) therefore did not give the sentencing court discretion to run the offenses consecutively.<sup>8</sup>

In summary, the sentencing court exceeded its statutory authority by ordering Hughes to complete his VUCSA jail sentences before beginning his residential DOSA. These amounted to unlawful consecutive sentences. The

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<sup>8</sup> Moreover, Hughes was ordered to complete his jail sentence on the 111-8 VUCSA before beginning his residential DOSA on 111-8 identity theft. There can be no dispute the 111-8 convictions are current offenses.

court should have ordered Hughes to complete his VUCSA sentences while undergoing residential treatment.<sup>9</sup> The court had authority to do so because a residential DOSA constitutes confinement. The court also had authority, as suggested by defense counsel, to impose an exceptional sentence downward on the VUCSA convictions. RP 10-11; RCW 9.94A.535(1) (“The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.”).

- c. This Court should reach the merits of Hughes’s challenge, even if technically moot.

The State may argue the issue is moot because Hughes has already completed his jail sentence on the VUCSA convictions. An appeal is moot if a court can no longer provide effective relief. In re Det. of Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983).

Hughes’s appeal may not be moot. Both the State and defense counsel below believed Hughes was not entitled to credit for time served during his residential DOSA. RP 11, 13. This is contrary to the plain language of RCW 9.94A.660(7)(d), which mandates credit for “any time

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<sup>9</sup> With credit for time served on his VUCSA convictions, Hughes would finish those sentences within the minimum three months of residential treatment. 1CP 45 (only 57 days left to serve on 23-5 VUCSA); 2CP 39 (only 70 days left to serve on 111-8 VUCSA), 43 (imposing three to six months of residential treatment). As such, concurrent sentences would not implicate an unlawful hybrid sentence.

previously served” on a DOSA. See Bercier, 178 Wn. App. at 151. Hughes completed his residential treatment in November 2018, but now must serve 24 months of community custody. 2CP 43, 68. Given the parties’ erroneous positions below, Hughes is at risk of not receiving credit for time served if his DOSA is revoked and he is ordered to serve a standard range prison sentence. RCW 9.94A.660(7)(c).

Moreover, courts may decide an otherwise moot appeal when it involves matters of continuing and substantial public interest. In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141 (2009). The criteria in making this determination are: “(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.” Cross, 99 Wn.2d at 377.

First, the issue here is public in nature, because it involves interpretation of the SRA and the sentencing court’s statutory authority. “[M]ost cases in which appellate courts utilized the exception to the mootness doctrine involved issues of constitutional or statutory interpretation.” Mattson, 166 Wn.2d at 736 (quoting In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002)). Such cases “tend[] to be more public in nature, more likely to arise again, and the decisions help[] to guide public officials.” Mines, 146 Wn.2d at 285.

Second, an authoritative decision from this Court would provide guidance to public officials. DOC believed non-DOSA eligible sentences must be served consecutively to a residential DOSA. RP 9-10. The State believed a residential DOSA is a suspended sentence and does not constitute incarceration, so no consecutive sentence resulted from Hughes completing his jail sentence before starting his residential DOSA. RP 13. The sentencing court followed the State's direction and imposed consecutive sentences that it mistakenly believed were concurrent sentences. RP 16-17. Whatever the correct answer, this Court's guidance is clearly necessary.

Third, it is likely this issue will recur. The issue arose here because Hughes's VUCSA sentences were too short to qualify for a DOSA. 1CP 43; 2CP 36; RCW 9.94A.660(1)(f). Not surprisingly, less serious drug possession charges often accompany more serious theft-related charges like burglary or identity theft. The issue could very well arise in similar circumstances where individuals must complete a short jail sentence before beginning a residential DOSA program. Just like here, the individuals would almost certainly be finished with their short jail sentences and subsequent treatment by the time their appeal is decided. Thus, the issue would effectively evade this Court's review while such individuals spend unwarranted time in jail.

At sentencing, defense counsel noted he researched the issue, but found “no case law specifically addressing this.” RP 10. There is very little case law, in general, addressing the residential DOSA statute. No court has definitively decided whether a residential DOSA constitutes confinement. In Bergen, this Court reached a moot issue in order to interpret the residential DOSA statute, given “the need for an authoritative determination to provide future guidance and the certitude that this question will recur.” 186 Wn. App. at 27. The same is true here.

This Court should accordingly reach the merits of Hughes’s challenge, provide definitive direction to the sentencing court, and remand for correction of Hughes’s sentence.

2. THE \$200 CRIMINAL FILING FEES, COSTS OF COLLECTION, AND INTEREST MUST BE STRICKEN FROM BOTH JUDGMENTS AND SENTENCES BASED ON HUGHES’S INDIGENCY.

In Ramirez, 191 Wn.2d at 738, 747, the Washington Supreme Court discussed and applied House Bill (HB) 1783, which took effect on June 7, 2018 and applies prospectively to cases on direct appeal. HB 1783 amended RCW 10.01.160(3) to mandate: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Laws of 2018, ch. 269, § 6. The bill also amended RCW 36.18.020(2)(h) to prohibit imposing the \$200 criminal filing

fee on indigent defendants. Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(c), a person is “indigent” if he or she receives an annual income after taxes of 125 percent or less of the current federal poverty level.

This amendment “conclusively establishes that courts do not have discretion to impose such LFOs” on individuals “who are indigent at the time of sentencing.” Ramirez, 191 Wn.2d at 749. In Ramirez, the court struck discretionary LFOs and the \$200 criminal filing fee because Ramirez was indigent at the time of sentencing, i.e., his income fell below 125 percent of the federal poverty guideline. Id. at 749-50.

At sentencing, the trial court ordered Hughes to pay the previously mandatory \$200 criminal filing fee in both causes. 1CP 44; 2CP 37. However, Hughes was represented by appointed counsel at the time of sentencing and was subsequently found indigent for purposes of the appeal. 1CP 57-58; 2CP 57-58. DOC’s DOSA report likewise stated Hughes was unemployed and homeless at times. 1CP 32. The record therefore demonstrates Hughes was indigent at the time of sentencing. HB 1783 applies prospectively to Hughes because his direct appeal is still pending. As such, the sentencing court improperly imposed the \$200 criminal filing fee in both causes, which may not be imposed on indigent defendants.

The court also ordered that Hughes “shall pay the costs of services to collected unpaid legal financial obligations. RCW 36.18.190.” 1CP 44; 2CP

37. RCW 36.18.190 provides only discretionary authority for the court to impose collection costs: “The superior court may, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services.” RCW 36.18.190 (emphasis added); Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000) (“[T]he word ‘may’ has a permissive or discretionary meaning.”). Such discretionary fees may not be imposed on indigent defendants like Hughes.

Finally, the sentencing court ordered that Hughes’s LFOs “shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.” 1CP 44; 2CP 37. However, HB 1783 amended RCW 10.82.090(1) to specify, “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” Laws of 2018, ch. 269, § 1.

Pursuant to Ramirez, this Court should remand for the sentencing court to strike the \$200 criminal filing fees, costs of collection, and nonrestitution LFO interest from both judgments and sentences.

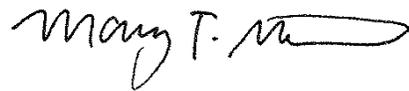
D. CONCLUSION

For the reasons discussed above, this Court should consider the merits of Hughes’s appeal and remand for correction of the erroneous consecutive sentences. This Court should also remand for the \$200 filing fees, costs of collection, and interest to be stricken.

DATED this 30th day of January, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift". The signature is written in a cursive style with a large, sweeping flourish at the end.

---

MARY T. SWIFT  
WSBA No. 45668  
Office ID No. 91051

Attorneys for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

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