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Court of Appeals  
Division III  
State of Washington  
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NO. 36534-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

AMEL DALLUGE,  
Appellant.

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

The Honorable John M. Antosz, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated the Fifth Amendment and Wash. Const. art. I, § 9 prohibitions against double jeopardy when it did not credit Dalluge for time spent subject to restrictive pretrial release conditions.

B. ISSUE PRESENTED ON APPEAL

Did the trial court violate the Fifth Amendment and art. I, § 9 when it failed to credit Dalluge for time spent subjected to pretrial release conditions?

C. STATEMENT OF THE CASE

1. Procedural History

Amel Dalluge was charged by information with possession of heroin. CP 1. On January 30, 2017, the trial court entered an order setting pre-trial release conditions, which required Dalluge to make contact with his assigned counsel every week, prohibited Dalluge from leaving the state of Washington or changing his address without written permission from the court, and prohibited Dalluge from possessing a firearm. Supp. CP (1/30/17 Order Setting Conditions of Release). Dalluge pled guilty to possession of heroin. Supp. CP (4/9/18 Order for Dismissal as to Count II). The

sentencing court sentenced Dalluge to 14 months of confinement and 12 months of community custody. CP 25-26. Dalluge did not receive any credit for time served. CP 26. This timely appeal follows. CP 78.

2. Substantive Facts

On the January 30, 2017 Order Setting Conditions of Release the court did not check the box for paragraph two which states as follows:

Because personal recognizance will not reasonably assure the presence of defendant/ material witness when required, or because there exists a substantial danger that the said person will commit a serious crime, jeopardize the personal safety of any person, or unlawfully interfere in the administration of justice, on the following conditions:

Supp. CP (1/30/17 Order Setting Conditions of Release).

However, the conditions of release required Dalluge to make contact with his assigned counsel every week, prohibited Dalluge from leaving the state of Washington, which would include temporarily traveling outside of Washington, or changing his address without written permission from the court. In addition, the court set bail at \$5,000 to be paid by signature bond. Supp. CP (1/30/17 Order Setting Conditions of Release).

On April 24, 2018, Dalluge's bail was increased to a \$2,500

cash bail or a \$5,000 signature bond and the court reaffirmed the conditions of pre-trial release listed in the order setting conditions of release. Supp. CP (4/24/18 Order to Increase Bail).

Dalluge continued to remain out of custody after he pled guilty to possession of heroin in the instant case on May 14, 2018. CP 10. On May 22, 2018, Dalluge made a preliminary appearance in another case with the case number 18-1-00315-9. RP 192 (5/22/18). The court entered an order setting conditions of release in that case and set bail at \$1,000. RP 197, 199-200 (5/22/18).

Dalluge's sentencing hearing in the current case did not take place until January 7, 2019, and it is unclear from the record when Dalluge was taken into custody in relation to the instant case because he had two other cases pending. RP 228 (11/13/18); RP 231 (1/7/19). At the sentencing hearing defense counsel did not request any credit for time served subject to restrictive pre-trial release conditions. RP 238-42 (1/7/19). The court sentenced Dalluge to 14 months of confinement and 12 months of community custody. CP 25-26. Dalluge did not receive any credit for time served while under restrictive court conditions. CP 25-26.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED THE FIFTH AMENDMENT AND ART. I, § 9 WHEN IT FAILED TO CREDIT DALLUGE FOR TIME HE SPENT SUBJECT TO RESTRICTIVE PRETRIAL RELEASE CONDITIONS

The trial court violated the Fifth Amendment and art. I, § 9 when it failed to credit Dalluge for time he spent subject to restrictive pretrial release conditions. Whether a defendant receives credit toward his sentence for time served subject to restrictive pretrial release conditions is a statutory question unless the statute violates a constitutional provision. *State v. Speaks*, 119 Wn.2d 204, 209, 829 P.2d 1096 (1992).

a. RCW 9.94A.505 does not prohibit credit for restrictive pre-trial release conditions other than electronic home monitoring

RCW 9.94A.505, which governs sentencing and pre-trial credit, has been amended several times. Currently, RCW 9.94A.505 authorizes credit for “all confinement time served before sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.” RCW 9.94A.505(6). Confinement includes partial confinement in work release, in a program of home detention, on a work crew, or any combination

thereof. RCW 9.94A.505(10). In 2015, the Legislature enacted RCW 9.94A.505(7) which prohibits crediting an offender for any time required to comply with an electronic monitoring program prior to sentencing if the offender was convicted of any drug offense. 2015 c 287 § 10; RCW 9.94A.505(7)(c).

Here, although Dalluge was not confined by means that mandate automatic credit such as jail time, he was also not confined by means that prohibit credit such as electronic monitoring. RCW 9.94A.505(6), (7). Thus, Dalluge is not statutorily prohibited from receiving credit for the restrictive pretrial conditions imposed.

b. The effect of the conditions of Dalluge's pretrial were restrictive and punitive

Both the Fifth Amendment to the United States Constitution and art. I, § 9 of the Washington Constitution prohibit double jeopardy, which requires that "punishment already exacted must be fully 'credited'" against a defendant's sentence. U.S. Const. Amend. V; art. I, § 9; *Harris v. Charles*, 171 Wn.2d 455, 473, 256 P.3d 328 (2011) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 718–19, 89 S.Ct. 2089, 23 L.Ed.2d 656 (1969)).

To determine whether the government action is sufficiently

punitive to trigger double jeopardy protections this court applies a two-part test. *Harris*, 171 Wn.2d at 467 (citing *State v. Catlett*, 133 Wn.2d 355, 366, 945 P.2d 700 (1997)). First, a government action is punitive if it is intended to be punitive. Second, if the intent was not punitive then the court determines whether the action's purpose or effect is so punitive it negates the government's nonpunitive intent. *Harris*, 171 Wn.2d at 467 (citing *Catlett*, 133 Wn.2d at 366).

Generally, a defendant is only constitutionally entitled to credit for time served in incarceration. *State v. Min Sik Kim*, 7 Wn. App. 2d 839, 844, 436 P.3d 425 (2019) (citing *Harris*, 171 Wn. 2d at 470-71). However, incarceration may include more than simply jail time; it may include liberty restrictions equal to time spent in jail or prison. *In re Pers. Restraint of Knapp*, 102 Wn.2d 466, 475, 687 P.2d 1145 (1984).

CrR 3.2 authorizes the court to impose bail or conditions of release if: (a) personal recognizance will not assure the defendant's appearance at future court proceedings; (b) there is a likely danger the accused will commit a violent crime; or (c) the accused will seek to intimidate witnesses or otherwise interfere with the administration of justice. *Harris*, 171 Wn.2d at 468 (citing CrR 3.2(a)(1)-(2)).

Imposing bail with a signature bond is different than release on personal recognizance. CrR 3.2. While a signature bond is secured by a promissory note, (*Regan v. State Dep't of Licensing*, 130 Wn. App. 39, 46, n.6, 121 P.3d 731 (2005) personal recognizance only requires an individual's promise to appear in court (Black's Law Dictionary 2d Ed. "Personal Recognizance" available at <https://thelawdictionary.org/personal-recognizance/> (last visited 9/7/19)). For many even a signature bond is punitive and a significant restriction because CrR 3.2 only imposes bail when the defendant is flight risk or there is a concern with re-offending.

Significant bail creates a hardship on poor defendants. *Reanier v. Smith*, 83 Wn.2d 342, 349, 517 P.2d 949 (1974). These hardships are not erased by a signature bond because the bond may further restrict an individual's movement for fear of incurring a significant debt even if done so unwillingly.

Here, the court did not find that releasing Dalluge on personal recognizance was insufficient to assure his appearance at future court proceedings: or that Dalluge was likely to commit a violent crime, or that Dalluge would intimidate any witness or

interfere with the administration of justice. Supp. CP (1/30/17 Order Setting Release Conditions).

Because the court did not find Dalluge posed any risk, Dalluge was entitled to be released on his own recognizance rather than with a significant bail and the additional restrictions on Dalluge's liberty - ordering him to meet with assigned counsel once per week. Supp. CP (1/30/17 Order Setting Conditions of Release). CrR 3.2. These conditions restricted Dalluge's most basic freedom of movement by prohibiting him from traveling outside the state of Washington without prior written permission from the court and by limiting his residence to one address. Supp. CP (1/30/17 Order Setting Conditions of Release).

Because Dalluge was under significant pre-trial release conditions, this triggered double jeopardy principles which entitle Dalluge to credit for time served for the amount of days he spent subject to those conditions. Although the record is unclear exactly when Dalluge was taken into custody in the instant case, Dalluge was subject to the restrictive pretrial release conditions from at least January 30, 2017 to May 22, 2018 when he made an appearance on another matter, for a total of 476 days. RP 192

(5/22/18); Supp. CP (1/30/17 Order Setting Conditions of Release).

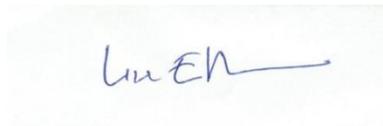
This court should remand for a new sentencing to award Mr. Dalluge credit for this time served.

E. CONCLUSION

Amel Dalluge respectfully requests this Court remand for a new sentencing hearing in which the trial court can determine how many days of credit Dalluge earned toward his sentence.

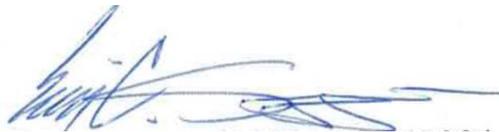
DATED this 11<sup>th</sup> day of September 2019.

Respectfully submitted,

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LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

A handwritten signature in blue ink, appearing to read "Erin C. Spenger", is written on a light-colored rectangular background.

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ERIN C. SPENGER, WSBA No. 45931  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Grant County Prosecutor's Office gdano@grantcountywa.gov and kburns@grantcountywa.gov and Amel Dalluge, DOC#779283, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326a true copy of the document to which this certificate is affixed on September 11, 2019. Service was made by electronically to the prosecutor and Amel Dalluge by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

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Signature

**LAW OFFICES OF LISE ELLNER**

**September 11, 2019 - 1:44 PM**

**Transmittal Information**

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