

FILED

JAN 07 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

82333-2
26180-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES R. NASON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE MICHAEL P. PRICE

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Kevin M. Korsmo
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT2

 A. THE TRIAL COURT DID NOT IMPOSE A
 SUSPENDED SENTENCE3

 B. THE CHALLENGED PROVISIONS DO NOT
 VIOLATE DUE PROCESS.....5

 C. THE COURT, NOT THE CLERK, IMPOSES
 SANCTIONS FOR FAILURE TO COMPLY7

 D. COUNTIES ARE NOT REQUIRED TO ALLOW
 FELONS CONVICTED UNDER THE SRA TO
 SERVE OUT FINES IN JAIL9

CONCLUSION.....13

TABLE OF AUTHORITIES

WASHINGTON CASES

SMITH V. WHATCOM COUNTY DISTRICT COURT,
147 Wn.2d 98, 52 P.3d 485 (2002)..... 11

STATE V. BLANK, 131 Wn.2d 230,
930 P.2d 1213 (1997)..... 6, 7

STATE V. BOWER, 64 Wn. App. 227,
823 P.2d 1171, *review denied*
119 Wn.2d 1011 (1992)..... 6

STATE V. CAMPBELL, 84 Wn. App. 596,
929 P.2d 1175 (1997)..... 6

STATE V. CURRY, 118 Wn.2d 911,
829 P.2d 166 (1992)..... 6

STATE V. DeBELLO, 92 Wn. App. 723,
964 P.2d 1192 (1998)..... 3, 4

STATE V. GROPPER, 76 Wn. App. 882,
888 P.12d 1211 (1995)..... 6

STATE V. WOODWARD, 116 Wn. App. 697,
67 P.3d 530 (2003)..... 6

STATUTES

LAWS OF 1891, c. 28, §84 9

LAWS OF 1975-76, 2nd ex.s., c. 96, §3 9

RCW 7.21 11

RCW 9.94A..... 10

RCW 9.94A.130..... 3

RCW 9.94A.575..... 3

RCW 9.94A.634.....	6, 10, 13
RCW 9.94A.634(1).....	10
RCW 9.94A.634(2).....	10
RCW 9.94A.750.....	10
RCW 9.94A.760(1).....	10
RCW 9.94A.775.....	10
RCW 9.94A.905.....	10
RCW 10.01.180	9
RCW 10.01.180(1).....	11
RCW 10.01.180(3).....	11
RCW 10.82.030	9, 12

I.

APPELLANT'S ASSIGNMENTS OF ERROR

Being lengthy, respondent will not repeat the appellant's assignments of error.

II.

ISSUES PRESENTED

(1) Did the trial court impose and then suspend implementation of a sanction for violating the terms of the judgment and sentence?

(2) Where defendant was entitled to a hearing upon request, were his due process rights violated when the court indicated the sanction for future non-compliance?

(3) Are the actions of the county clerk at issue in this appeal?

(4) Does the old "pay or stay" statute apply to felons convicted under the Sentence Reform Act (SRA)?

III.

STATEMENT OF THE CASE

Respondent accepts appellant's statement of the case except for use of the term "auto-jail." While the public defender used that phrase to describe an order, the trial judge expressly rejected use of that nomenclature. 4/27 RP 7.

IV.

ARGUMENT

Defendant challenges the trial court's decision to be lenient and allow him to get on track with his payments rather than serve additional jail time for his willful failure to pay towards his legal financial obligations (LFOs). The trial court's¹ creative decision to approach this issue in the manner of a contempt proceeding – allowing the defendant to hold the keys to the jail – should be permitted rather than prohibited. There is no express limitation on its authority to support defendant's arguments. His other arguments likewise are without merit.

¹ An idea originally proposed by the Spokane County Public Defender, John Rodgers. CP 94-95.

A. THE TRIAL COURT DID NOT IMPOSE A
SUSPENDED SENTENCE.

Defendant first argues that the trial court imposed an illegal suspended sentence when it sanctioned him for his non-compliance. It did not. The court punished the defendant for his past failings and told him what he needed to do upon release from jail and what the consequences of failure to comply would be, but it did not suspend any jail time for the then-current violations. There was no suspended sentence.

While respondent believes that defendant's primary authority on this issue, State v. DeBello, 92 Wn. App. 723, 964 P.2d 1192 (1998), was wrongly decided, the sanction imposed in that case establishes that what the trial court did in this case was not a suspended sentence. In DeBello the court found that the defendant had committed two violations and imposed consecutive sixty day sanctions for each violation, but suspended execution of ninety days of the total penalty on condition that defendant make timely payments upon release. Id. at 725.

Division Two recognized that suspending a portion of the sanction for non-compliance was not a suspended "sentence" prohibited by former RCW 9.94A.130,² a portion of the Sentencing Reform Act

² Now codified at RCW 9.94A.575.

(SRA), because the post-sentencing sanction was not a sentencing. Id. at 727. The court then went on to conclude that because there was no express legislative authorization to suspend a portion of a sanction for non-compliance, the court lacked authority to impose such a sentence. Id. at 728.

While DeBello's conclusion is debatable – and something this court ought to examine closely if the issue is ever presented – it is not at issue in this case. The challenged sanction orders in this case do not involve suspended sanction terms. Each of the orders imposed an express term in jail for the proven violations. CP 51, 108. Each of the orders also contains the challenged provision that sets an amount and starting date for payment, sets a review date, and also tells the defendant to either seek a stay or report to jail if he has not complied. CP 52, 109. That is simply not a suspended sentence. It is a directive to take action along with a sanction if the defendant does not comply. There is no suspended sanction for the current violations; it is merely notice of the future sanction if defendant does not act.

The challenged provisions of these two orders simply do not amount to “suspended” jail time at all. Rather, the court was simply announcing to the world what the consequences of failure to abide by the revised payment schedule would be. Even at that, the proposed sanction

was not automatic. The defendant could request a stay and obtain another hearing.

The so-called “auto jail” provision is a paper tiger³ designed to scare a recalcitrant defendant into compliance.⁴ It most certainly is not a suspended sentence. The trial court did not err by imposing the provision.

B. THE CHALLENGED PROVISIONS DO NOT VIOLATE DUE PROCESS.

Appellant next contends that the challenged provisions require incarceration without a hearing on his ability to pay in violation of his due process rights. Defendant reads too much into the provision. Nothing in the provision precludes a hearing or waives the defendant’s due process rights. Rather, the onus is simply placed on defendant to either report to jail or demand a hearing if he has an excuse for failing to comply.

³ Since defendant has not given the provision any more respect than the judgment and sentence provisions he routinely ignores, his attack on the requirement is somewhat curious. He was only once found in violation of the provision and received concurrent sanctions in that instance. CP 108.

⁴ One wonders how the provision is harmful even if defendant’s view of it were correct since the failure to make payments by the stated time would itself authorize the trial court to issue a bench warrant for the defendant’s arrest (as had been done here on several earlier occasions). Since defendant already would be in violation of the payment requirement even before he had an obligation to report to jail, the trial court could easily order his arrest before the “auto jail” deadline. Defendant simply is not harmed by the delayed reporting date that he seeks to challenge.

The governing principles involved are well settled. RCW 9.94A.634 sets out the procedure for handling post-conviction violations such as failure to pay. It is the State's obligation to establish the non-payment. When non-payment is shown, then the defendant is given the opportunity to explain why there was no payment. Defendant bears the burden of establishing that the failure to pay was not willful. State v. Woodward, 116 Wn. App. 697, 67 P.3d 530 (2003); State v. Bower, 64 Wn. App. 227, 823 P.2d 1171, *review denied* 119 Wn.2d 1011 (1992); State v. Gropper, 76 Wn. App. 882, 887, 888 P.2d 1211 (1995); State v. Campbell, 84 Wn. App. 596, 600 n.1, 929 P.2d 1175 (1997). The determination whether or not a defendant has the ability to pay is a factual one which will be upheld unless clearly erroneous. State v. Campbell, *supra* at 601-602.

This scheme is in accord with the dictates of the United States constitution. It is not permissible to sanction offenders who lack the ability to pay. A show cause or contempt hearing must be held before sanctions for non-payment can be imposed. Sanctions can only be imposed for intentional or willful refusal to pay. State v. Curry, 118 Wn.2d 911, 915-916, 829 P.2d 166 (1992); State v. Blank, 131 Wn.2d 230, 237-238, 930 P.2d 1213 (1997). Ability to pay is

determined at the time collection is sought rather than at the time the monetary obligation is imposed. State v. Blank, supra at 242.

Here, the defendant had been found to be in willful non-compliance on his payment obligations for the fourth time. Since defendant had been employed at the time he committed the crimes, and also admitted he was looking for work, it was clear that he had the ability to make money and, hence, make payments towards his LFOs. The trial court could reasonably conclude that if he failed for a fifth time, it was because he again chose not to comply. Even at that, however, the door was left open for defendant to seek to stay his obligations by contacting the court. The provisions did not violate due process. Defendant was entitled to a hearing, if he wanted one, before he would be jailed again.

Defendant's due process rights were not violated by the challenged provisions. He is entitled to a hearing if he wants one.

**C. THE COURT, NOT THE CLERK, IMPOSES
SANCTIONS FOR FAILURE TO COMPLY.**

Defendant next complains that the Spokane County Clerk exceeds his authority by negotiating settlements and sanctions with recalcitrant defendants. Respondent does not believe that is the case, but, like the first claim of error, this case does not present that actual issue. It is

the court, not the clerk, that exercises ultimate authority in these cases – and it is two *court* rulings from which the defendant has appealed.

Whether or not the clerk is authorized to negotiate sanctions with recalcitrant defendants, the fact is that it is a trial judge who imposed sanctions by order of the court. CP 51-52, 108-109, 122-123. The notices of appeal are taken from two of those orders. CP 110-113, 134-138. The actions of the clerk simply are not at issue here. Both of the challenged orders were entered by judges and signed, *inter alia*, by counsel for the defendant. This was not the case of a clerk acting as judge or attorney.

Respondent also doubts that the deputy clerk exceeded her authority. Appellant has produced no relevant authority indicating that a clerk is limited to doing only what the Legislature has specified. Clerks deliver files to courtrooms every day even though there is not statutory authorization for the act. Here, the clerk is authorized to collect legal financial obligations. How he or she goes about that duty is not limited to express statutory directives. It also is not surprising that the statutes empowering the Department of Corrections (DOC) are not the same as those directed to the county clerk. Under the former scheme, the Department was authorized to impose sanctions for non-compliance.

County clerks do not have those same powers. Judges, not the clerk, impose sanctions for non-compliance.

Any alleged actions of the clerk do not govern the validity of the trial court's orders. Defendant's arguments are simply not relevant.

D. COUNTIES ARE NOT REQUIRED TO ALLOW FELONS CONVICTED UNDER THE SRA TO SERVE OUT FINES IN JAIL.

Defendant's last argument is a claim that he is entitled to credit at \$25 per day against his LFOs for the time spent in custody for non-payment. The SRA, not a statute enacted in the time of the Washington Territory, governs this situation. Even if the old "pay or stay" statute did apply, defendant would receive no credit as he has not served one day solely because of his failure to pay his LFOs. For both reasons, defendant's final argument also is without merit.

Neither of the statutes defendant cites applies to a SRA case. RCW 10.82.030 was first enacted in 1854 and the majority of the current language of the statute, which was updated in 1967, was enacted in 1891. *See* Laws of 1891, c. 28, §84. RCW 10.01.180 was enacted in 1976 as part of the new criminal code. *See* Laws of 1975-76, 2nd ex.s., c. 96, §3. While both would be applicable to modern misdemeanor sentences and to pre-SRA felony sentences, neither should apply to SRA proceedings

because of the extensive statutory scheme the Legislature has put in place for dealing with modern felony sentencing and sentence enforcement.

The SRA sets forth a very detailed sentencing scheme for felony offenses occurring after July 1, 1984. RCW 9.94A; RCW 9.94A.905. In particular, the Legislature has enacted an impressive number of statutes dealing with imposition and collection of LFOs. *See* RCW 9.94A.750 through RCW 9.94A.775.⁵ The sheer number and breadth of these provisions show a strong legislative interest in collecting LFOs. No provision is made anywhere in the SRA for an offender to “sit out” his payment obligations in jail at public expense to the financial detriment of his victims. There also is no cross-reference to Title 10.

A legal financial obligation is considered part of the sentence imposed by the trial court. RCW 9.94A.760(1) [first sentence]. RCW 9.94A.634 governs violations of the terms of a judgment and sentence. In particular, RCW 9.94A.634(1) states: “If any offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.” [emphasis added]. RCW 9.94A.634(2) expressly states that violations of a court order enforcing the judgment are also handled by §634. The quoted language of §634(1) indicates that

⁵ There are at least 24 different SRA subsections involved.

statute is to be the exclusive means of enforcing SRA sentences. There is no attempt made to incorporate statutes outside of the SRA, including those in Title 10.

The SRA supersedes the earlier Title 10 statutes cited by defendant. However, even if they were viewed as complementary statutes, there is simply no reason to believe that they must be used. Nothing in the language of either statute requires a judge to act under them when deciding what to do with recalcitrant non-paying offender. If there is discretionary authority to use these statutes to punish offenders, there most certainly is nothing that mandates their use. The trial court simply was not obligated to imprison the defendant to compel payment. It was entitled to consider other options.

Even if the Title 10 statutes had to be applied to this case, defendant would not qualify for any credit for time spent in custody to date. RCW 10.01.180(3) applies only to “a term of imprisonment for contempt for nonpayment of a fine or costs.” RCW 10.01.180(1) in turn expressly applies to actions for contempt under RCW 7.21. A court acts under its civil contempt authority when it invokes this statute. Smith v. Whatcom County District Court, 147 Wn.2d 98, 105-106, 52 P.3d 485 (2002). When it does, it must give the offender notice and appoint counsel. Id. at 112-113. None of the trappings of RCW 7.21 were

applied here – a clear indication that the court was not acting under its contempt authority.

Similarly, RCW 10.82.030, initially enacted in 1854, applies to “any person ordered into custody until the fine and costs adjudged against him be paid . . .” The trial court here did not act under this authority because defendant was never ordered into custody for an indefinite duration subject to payment of LFOs. Rather, in each instance the trial court imposed a definite term of confinement for the violations. CP 31, 51-52, 108-109, 122-123. By the plain language of this statute, it was not applicable to this case.

Finally, neither statute applies for the additional reason that defendant never was jailed *solely* for non-payment of LFOs. Rather, in each instance there were multiple violations such as failure to report, failure to perform community service, and failure to appear in court. In each instance, the court imposed the same sanction on each violation and ran them concurrently. CP 31, 51-52, 108-109, 122-123. Thus, defendant has *never* been jailed *only* for non-payment of financial obligations, which is the trigger mechanism for both statutes. Rather, the non-payment has only been one of the many reasons for which defendant has been incarcerated. There has been a total failure to live up to his sentence

obligations. Never having been incarcerated solely due to failure to pay, he would not receive credit for any time spent in custody.

The ancient collection statute does not apply to this SRA proceeding. The other title ten statutes also, by their plain language, do not apply to the facts of this case. For both reasons, the trial court properly rejected the claim that defendant deserved credit against his LFOs for time spent in custody.

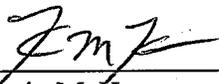
Under the SRA, the trial court could only act under RCW 9.94A.634. Even if it had discretion to go outside that statute, the other statutes cited by defendant do not apply to his case. He is not entitled to credit against his LFOs.

V.

CONCLUSION

For the reasons stated, the orders of the trial court should be affirmed.

Respectfully submitted this 7th day of January, 2008.



Kevin M. Korsmo #12934
Deputy Prosecuting Attorney

Attorney for Respondent