

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUN 29 10:45

NO. 68502-3 I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

THOMAS EUGENE HALL, JR.,

Appellant,

v.

KING COUNTY

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

This case arises out of Thomas Hall's suspended sentence for three counts of domestic violence. The sentence placed Hall on probation for two years. Hall's theory is that the probation automatically ended at the end of two *calendar* years, and that he was therefore falsely held in jail from December 31, 2008 until January 12, 2009, when probation was terminated and he was ordered released from jail.

Hall's theory ignores the fact that he spent 74 days in jail prior to his probation being terminated. By case law and the explicit terms of Judge Heavey's sentencing order, those days do not count towards the two-year probation term. Instead, probation is tolled during those 74 days. With the tolled days accounted for, Hall's two years of probation ran on January 16, 2009 – four days *after* probation was terminated and he was released from jail.

The district court properly dismissed Hall's two claims -- for false imprisonment and a "policy and custom" under 42 U.S.C. sec. 1983. This court should affirm.

II. ISSUE PRESENTED

A defendant's probationary period is tolled during any period that of incarceration; thus a term of probation does not run when a defendant is in jail. On November 3, 2006, Hall was sentenced to two years of

probation for domestic violence; thereafter, Hall was incarcerated on other matters for a total of 74 days before completing his two-year probation term. Was Hall's probationary period on the domestic violence conviction tolled for 74 days, thereby making the disputed 12 days of incarceration lawful?

III. STATEMENT OF THE CASE

Hall's claim is that he was unlawfully held in the King County Jail between December 31, 2008 and January 12, 2009, awaiting a hearing on charges that he violated the terms of his probation. Hall contends that King County wrongfully imprisoned him for these 12 days because the two-year probation on his three domestic violence convictions had supposedly expired two calendar years after his sentence, November 2, 2008.

Hall is incorrect. Due to a series of incarcerations in 2007 and 2008, Hall's two-year probationary period on the domestic violence conviction did not end in November 2008. Because of tolling, Hall gets no credit towards his probation for the 74 days that he was incarcerated. Therefore, Hall was still within his two-year probationary period when he appeared before Judge Heavey on January 12, 2009, thus making Hall's detention during the disputed 12 days lawful.

The details of Hall's relevant legal troubles are as follows. On November 3, 2006, Hall was found guilty on three counts of domestic violence. CP 97 -- 99. Judge Michael Heavey sentenced him to 24 months of probation. CP 98. The probation was to commence immediately. *Id.* The judgment and sentence explicitly provided that probation would be "tolled during any period of confinement." *Id.*

Between November 3, 2006 through December 31, 2008, Hall was jailed for 74 days. CP 105-106. These periods of confinement were as follows:

1. August 8 – 24, 2007 (16 days)
2. March 10 – April 8, 2008 (29 days)
3. June 26 – July 10, 2008 (14 days)
4. December 16 – 31, 2008 (15 days)

Hall does not dispute that he was lawfully incarcerated during the above time frames.

The details of Hall's incarceration in December 2008 are important in understanding the bases for his detention from December 31, 2008 through January 12, 2009.

Hall was jailed on December 15, 2008 on a \$10,000 arrest warrant for Malicious Mischief 3 and Domestic Violence. CP 10; 21-22. This charge was cleared on December 16, 2008. However, by that time there

were two “arrest and detain” orders from the DOC requiring the jail to continue to hold Hall. CP 24-28.

The first “arrest and detain” order (on felony cause number 07-1-04376-1) alleged that Hall violated the terms of his probation in that case by “committing assault on or about 12/1/08.” CP 25. This order provided that the DOC had jurisdiction and that it would schedule a hearing. CP 24.

The second “arrest and detain” order (on felony cause number 06-1-05423-3) alleged that Hall had violated the terms of his probation on his 2006 domestic violence convictions by (1) committing DV malicious mischief on or about 12/15/08; (2) failing to take a GED exam on 12/10/08; and (3) ingesting THC on or about 12/2/08. CP 28. This order provided that King County had jurisdiction and that county staff would schedule a hearing. CP 27.

King County received both orders from DOC on December 16, 2008. CP 24, 27. Both orders directed that Hall be detained in jail and not released until a hearing. *Id.*

Hall’s Community Corrections Officer submitted a “Court Notice of Violation” on December 23, 2008. CP 81. This notice contained additional evidence supporting Hall’s alleged probation violations on the 2006 domestic violence conviction. CP 83. It listed the three misdemeanor counts on which Hall had been convicted, the sentence on

each count (2 years), the date of sentence (11/3/2006), and the “termination date” for each count (11/2/2008). CP 81. Under “status,” the order states “Field (Tolling).” *Id.*

On December 31, 2008, a DOC hearings officer held a hearing on the 2007 “arrest and detain” order. CP 32. The officer addressed the three alleged probation violations and found Hall guilty of ingesting THC but not guilty of the other charges. CP 32. That arrest and detain order was therefore cleared that day, leaving only the 2006 “arrest and detain” order.

A hearing on Hall’s second “arrest and detain” order was originally scheduled on the SRA calendar that same day. CP 93. Because the sentenced charges were misdemeanors (any felony charges had been dismissed), the violation could not be heard by the DOC. CP 92. Instead, Hall had to appear before a superior court judge. *Id.* Additionally, the King County Superior Court and the King County Prosecutor’s Office had an agreed upon practice that domestic violence offenders alleged to have violated their probation would appear before their sentencing judge, not on the SRA calendar. CP 93. The sentencing judge for this charge was Judge Heavey. CP 99.

DPA Laura Petragal, the deputy prosecuting attorney responsible for post-sentencing matters, therefore complied with the agreed practice of the superior court and the Prosecuting Attorney’s Office and took the

prosecutorial act of having Hall's December 31, 2008 hearing on the SRA calendar stricken so that Judge Heavey could hear the matter. CP 93. It was then up to the court to place him on Judge Heavey's calendar. *Id.*

The court set a hearing before Judge Heavey for January 12, 2009. CP 37, 93. Three alleged probation violations were before the court: (1) ingesting THC on or about 12/1/08; (2) assaulting Sienna Essex on or about 12/1/08; and (3) failing to attend a GED test date on or about 12/15/08. CP 37. The state struck the assault allegation and Judge Heavey found that the THC allegation had been previously addressed by the DOC. CP 37-38.

Hall then argued that the court lacked jurisdiction to hear the violations. CP 38. For some reason, the DPA that handled the hearing did not argue that Hall's two-year period was still active because it had been tolled. CP 93. Having not been provided with this critical information, Judge Heavey erroneously ruled that he did not have jurisdiction any longer and therefore signed an order terminating probation on the 2006 cause number and ordered Hall released from jail. CP 40 – 43. Yet because Hall's probation term had been tolled during his 74 days in jail, his two-year term actually ran on January 16, 2009, four days after he was released.

Hall later sued King County in March of 2011, alleging false imprisonment and a “policy and custom” claim under 42 U.S.C. sec. 1983. CP 1. King County moved for summary judgment in October 2011. CP 9. The briefing ultimately focused on whether tolling had extended Hall’s two-year probation term through the date of his January 12, 2009 hearing before Judge Heavey. King County claimed that it had. CP 85. Hall claimed that under RCW 9.95.210, his probation term had automatically expired at the end of two *calendar* years, on November 2, 2008. CP 108.

At the end of the summary judgment hearing, Judge Carey requested briefing on whether tolling applied or not. CP 118.

King County then filed a supplemental brief with additional authority showing that tolling is lawful, that it was explicitly ordered by Judge Heavey, and that Hall’s two-year probation term had been lawfully tolled for 74 days. CP 119 – 122. King County also showed that Hall’s probation lawfully continued to the date that Judge Heavey entered the order terminating it, regardless of tolling. *Id.*

Hall did not bother to file a supplemental brief. The trial court then granted King County’s summary judgment motion. CP 144 -- 147.

Hall then filed motions for reconsideration, summary judgment, and for sanctions. CP 151. He renewed his argument that, under RCW 9.95.210, his probation automatically expired two *calendar* years after his

November 3, 2006 conviction. CP 152. Hall claimed that Judge Carey's rejection of his theory was the result of sanctionable misconduct by King County's attorney, Senior DPA Kristofer Bundy. CP 151-153. According to Hall, DPA Bundy committed misconduct by failing to adequately address RCW 9.95.210. The claim being that DPA Bundy deliberately and dishonestly tricked Judge Carey into granting summary judgment. Judge Carey denied all of Hall's motions. CP 162 – 163. This appeal followed.

IV. ARGUMENT

Appellate courts review decisions on motions for summary judgment de novo. *Zervas Group Architects, P.S. v. Bay View Tower LLC*, 161 Wn. App. 322, 325 note 1, 254 P.3d 895 (2011). A summary judgment should be affirmed when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). Interpretation of a statute and its application to a particular state of facts are questions of law reviewed de novo. *Zervas*, 161 Wn. App. at 325.

- A. Hall's two-year probation period had not run due to tolling and he was therefore lawfully detained during the disputed 12 days.

A defendant's suspended sentence probationary period does not run where the defendant, voluntarily or because of wrongdoing, is not subject to the

court's control and probation jurisdiction. *State v. Robinson*, 142 Wn. App. 649, 653, 175 P.3d 1136 (2008). This includes the time a defendant is on appeal, on warrant status, in prison, or outside the jurisdiction in violation of probation terms. *Id.*; see also *State v. Campbell*, 95 Wn.2d 954, 957, 632 P.2d 517 (1981) (“probation period does not run when the probationer is in prison ...”). This is because a defendant cannot be supervised by his probation officer when he is incarcerated or otherwise unavailable to be supervised. Hall's brief ignores this well established rule of law.

Hall was convicted of three counts of domestic violence on November 3, 2006, and sentenced to 24 months of probation. CP 97. The Judgment and Sentence expressly stated that “[p]robation shall commence immediately but is tolled during any period of confinement....” CP 98. Hall's brief ignores this dispositive provision of Judge Heavey's order. During these two years, Hall continued to commit crimes and therefore spent 74 days imprisoned on other offenses. CP 105 -- 106. Hall's probation was therefore tolled for 74 days, thereby moving the end date of the two-year term from November 2, 2008 to January 16, 2009. Hall was released from the jail on January 12, 2009 – four days before his probation expired. Hall's detention for the disputed 12 days was therefore lawful and his claims fail.

B. Hall's probation did not automatically expire after 24 calendar months.

In addition to tolling, probation does not end automatically. Until the entry of an order terminating probation, a sentencing court retains the authority to hear alleged probation violations:

The court shall have authority at any time prior to the entry of an order terminating probation to (1) revoke, modify, or change its order of suspension of imposition or execution of sentence ... [RCW 9.95.230].

In *State v. Alberts*, 51 Wn. App. 450, 754 P.2d 128 (1988), this court addressed whether RCW 9.95.230 gave a trial court authority to hear probation violations after the initial probation period had expired. During his one year probation period, Alberts had failed to pay restitution. *Alberts*, 51 Wn. App. at 451. A probation violation report was issued on October 16, 1986 – one week before Alberts' probation expired on October 22, 1986. The state filed a notice of probation revocation on November 5, 1986, and the trial court heard the matter on November 20, 1986. *Id.*

Alberts claimed the trial court had no jurisdiction to modify probation because his probation had expired. The court disagreed, ruling that “under present RCW 9.95.230 the trial court’s jurisdiction to modify probation continues until the entry of an order terminating it.” *Alberts*, 51 Wn. App. at 454.

Hall contends that neither RCW 9.95.230 nor *Alberts* applies in this case, and that the trial court automatically lost jurisdiction to address his alleged probation violations after two calendar years, on November 2, 2008. App. Brief at 9. He relies on RCW 9.95.210(1), which states:

In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

Hall's argument is that this statute trumps RCW 9.95.230 because it is more specific. App. Br. at 9. He also argues, without citing any authority, that RCW 9.95.230 only applies to cases with probationary periods shorter than two years, and that RCW 9.95.210 applies to all cases where two years have passed since sentencing. App. Br. at 10.

Hall is incorrect for three reasons. First, RCW 9.95.210 does not trump RCW 9.95.230. In *State v. Holmberg*, 53 Wn. App. 609, 768 P.2d 1025 (1989), the Court of Appeals reconciled the two statutes, meaning that .210 does not trump .230:

Construing RCW 9.95.230 together with RCW 9.95.210, in order to reach a harmonious result we are satisfied that the purpose of the later enactment is to extend the jurisdiction of the court to modify or revoke probation for violations occurring during the probationary period until an order terminating probation is entered. [*Holmberg*, 53 Wn. App. at 613].

Second, Hall's unsupported contention that RCW 9.95.230 applies only to probationary periods shorter than two years also fails -- *Holmberg* applied .230 in the context of a three-year probation period.

But most importantly, Hall's probation was still four days less than two years. That is because under the case law and Judge Heavey's Judgment and Sentence, Hall gets no credit for any time that he was in jail during his probationary period. *See e.g. Campbell*, 95 Wn.2d at 957 ("probation period does not run when the probationer is in prison ..."); CP 98 ("[p]robation ... is tolled during any period of confinement.")

Hall therefore got no credit towards completing his two-year probationary term while he spent 74 days in jail. And when his probation was terminated on January 12, 2009, it was actually terminated four days short of two years, well within the two years provided for in .210.

Hall's detention from December 31 2008 until January 12, 2009 was therefore lawful and plaintiff's complaints to the contrary fail.

C. Hall's claim for false imprisonment and his "policy and custom" claim were properly dismissed.

Hall's state law claim, the intentional tort of false imprisonment, fails for three reasons. First, as set forth above, the 12 days of confinement was lawful.

Second, the claim fails because the decision by Deputy Prosecuting Attorney Laura Petragal to strike the December 31, 2008 hearing so that the matter could be heard before Judge Heavey is a prosecutorial act that is afforded absolute immunity. *See e.g. Scott v. Hern*, 216 F.3d 897, 908 (10th Cir. 2000) (ruling that while absolute immunity does not extend to actions “that are primarily investigative or administrative in nature,” it “may attach even to such administrative or investigative activities ‘when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court.’”). DPA Petragal’s absolute immunity for her prosecutorial act of striking the hearing to get the matter before Judge Heavey extends to her employer, defendant King County. *See Creelman v. Svenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966).

Third, Judge Heavey’s order explicitly states that there would be tolling: “[p]robation . . . is tolled during any period of confinement.” CP 98. DPA Petragal had no duty or right to violate the express terms of Judge Heavey’s order.

Hall’s only response to this argument in the trial court was implicit: DPA Petragal had a duty to violate Judge Heavey’s order because any fool should have concluded that “it is unenforceable and void.” CP 152. Hall’s brief to this court inexplicably ignores this dispositive provision of Judge Heavey’s judgment and sentence.

Hall's federal policy and custom claim fails for two reasons. First, Hall cannot show that a policy or custom caused DPA Petragal to violate his constitutional rights because his confinement for the 12 days was lawful. *See Waggy v. Spokane Cty.*, 594 F.3d 707, 713 (9th Cir. 2010) (“[on a policy and custom claim] a plaintiff must show ... that a county employee violated the plaintiff’s constitutional rights. ...”).

Second, the claim fails because there is nothing wrong or unlawful about the joint practice developed by the Prosecutor’s Office and the Superior Court: probation review hearings for DV offenders were to be heard by the sentencing judge. CP 93 (“our office and the Superior Court wanted domestic violence offenders who appear for sentence and probation violations to appear before their sentencing judge.”) No authority supports Hall’s meritless argument that this lawful and wise practice somehow violates the United States Constitution.

Finally, Hall devotes a significant part of his brief to a request for sanctions. App. Br. at 11-15. His argument is that he should win under RCW 9.95.210, and that the county’s attorney, Mr. Bundy, deliberately and dishonestly hoodwinked Judge Carey into ruling against him. App. Br. at 13. The trial court considered these bizarre arguments and properly exercised her considerable discretion and rejected them. Hall’s venomous arguments for sanctions in this court are similarly meritless.

V. CONCLUSION

Under his sentence, Hall owed the court two years of probation. Because he continued to commit crimes, he ended up going to jail for 74 days during his probationary period. Due to tolling, Hall gets no credit towards his two-year probation sentence for these 74 days. Therefore, while it took Hall longer than two *calendar years* to complete his probation, he never did serve the two-year term of probation that he owed the court. Hall's detention for the disputed 12 days was therefore lawful and his claims fail.

Hall's claims also fail because King County is entitled to DPA Petragal's absolute immunity. And there is nothing wrong with the sensible and lawful joint practice of the Prosecuting Attorney's Office and the King County Superior Court of having domestic violence offenders appear before their sentencing judge for probation violations. Judge Carey's orders should be affirmed.

DATED this 29th day of June, 2012 at Seattle, Washington.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, I served by ABC Messenger Service, with instructions to be delivered no later than 4:30 p.m. on the afternoon of June 29, 2012, a copy of **BRIEF OF RESPONDENT** to the following:

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