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NO. 69462-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ELIJA DOSS,

Appellant.

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DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY P. CANOVA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. On remand, it is discretionary for the trial court to decide whether to revisit an issue that was not the subject of appeal. Here, upon remand for the trial court to strike the term of community custody, Doss asked the court to recalculate his credit for time served. Did the trial court properly exercise its discretion in refusing to consider this new issue?

2. The sentencing court shall give an offender credit for time served *in confinement*. Doss was not credited for his out-of-custody participation in CCAP, an *alternative to confinement* program. Did the trial court properly refuse to credit Doss for time spent in CCAP?

3. If a defendant wishes to raise an issue on appeal that requires facts not in the existing record, the appropriate means of doing so is through a personal restraint petition. Doss asks this Court to make a determination that his credit for time served was calculated incorrectly where the record does not show how his credit for time served was calculated. Given the insufficient factual record, must this issue be brought, if at all, in a personal restraint petition?

B. STATEMENT OF THE CASE

Defendant Elija Doss was charged with assault in the second degree- domestic violence for assaulting his wife, Kimberly Doss, and thereby inflicting substantial bodily harm. CP 1. While trial was pending on the assault charge, Doss was charged with three counts of domestic violence felony violation of a court order; all of these crimes were alleged to have occurred between August 10, 2009 and August 14, 2010. CP 1-5, 13-14. Pursuant to a plea agreement, Doss pleaded guilty to three counts of domestic violence felony violation of a court order. CP 56-66, 72.

The trial court sentenced Doss, based on his offender score of 10, to the standard range sentence of 60 months of confinement on each count, to be served concurrently. CP 16, 18, 76-78. In addition, the court ordered 12 months of community custody. CP 19. The court also ordered that Doss “receive full credit for time you’ve served in the King County Jail,” and credited him with 166 days. 1RP¹ 36; CP 18.

Doss’ three crimes of conviction are Class C felonies with a statutory maximum of 60 months. RCW 26.50.110(5); RCW 9A.20.021(1)(c); CP 16. Thus, the combined terms of incarceration

¹ There are 2 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (April 23, 2010) and 2RP (September 19, 2012).

and community custody exceeded the statutory maximum for a Class C felony.

On direct appeal, Doss claimed that he was sentenced in excess of the statutory maximum. CP 27. The State conceded, and this Court remanded to permit the trial court to correct Doss' sentence by either amending the community custody term or resentencing Doss consistent with RCW 9.94A.701(9). CP 27-28.

At the hearing on remand, the trial court struck Doss' term of community custody and ordered that all other sentence conditions remain in full effect. 2RP 11. At that hearing and for the first time, Doss claimed that his credit for time served was incorrectly calculated in the Judgment and Sentence and asked the court to give him additional credit. 2RP 6. Aside from his own assertions, Doss presented no evidence of how the credit days were miscalculated.² The court declined to revisit the issue, stating, "[t]he issue of credit for time served is not properly before this court" ... "I'm not willing to make any changes at this point."

² Doss incorrectly claims that the "State informed the court" how the credit for time served was originally calculated. Brief of Appellant at 4, 6. That is wrong. The statements Doss attributed to the State in his brief are actually the arguments made by Ms. Brandes, Doss' defense counsel. 2RP 2, 12.

2RP 10, 13. The court explained that “[t]here is no basis for this court to enter any rulings changing the credit for time served.”

2RP 12. Additionally, the court indicated that Doss previously had opportunities to raise the issue: after the Judgment and Sentence was entered and on appeal. 2RP 12-13.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION ON REMAND WHERE IT REFUSED TO REVISIT AN ISSUE THAT WAS NOT THE SUBJECT OF APPEAL.

Doss claims that, at a remand hearing to strike community custody, the trial court had a duty to address the issue of credit for time served, even though that issue was not the subject of the remand. This argument should be rejected. The court properly exercised its discretion by refusing to revisit the issue. Because the trial court did not exercise its independent judgment to review and reconsider its earlier sentence, this Court should decline to review the issue, first raised at this late stage.

The trial court has discretion to decide whether to revisit an issue that was not the subject of appeal. State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993). If the trial court does so,

RAP 2.5(c)(1) states that the appellate court *may* review such an issue:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5 does not automatically revive every issue or decision that was raised in an earlier appeal. Barberio, 121 Wn.2d at 50.

An issue becomes appealable only if, on remand, the trial court exercises independent judgment to review and rule again on the issue. Id. at 50-51. In Barberio, the defendant was convicted of one count of rape in the second degree and one count of rape in the third degree. Id. at 49. The trial court imposed an exceptional sentence for each count. Id. On appeal, Barberio challenged his convictions but did not challenge the exceptional sentences. Id. This Court reversed his conviction for rape in the third degree, and the State decided not to retry Barberio on that charge. Id.

At resentencing on remand, Barberio challenged his exceptional sentence. Id. The trial court refused to consider anew its prior exceptional sentence for the affirmed count and made corrective changes to the judgment and sentence solely to reflect

the appellate court's ruling on the reversed count. Id. at 51. In refusing to revisit the issue, the trial court noted:

It seems to me that if there was an appeal with regard to the court's exceptional sentence in Count I, that the appeal should have been made at the time of the original appeal, not today because there hasn't been anything changed between then and now. ... I'm not sure that you even are properly before the court for a resentencing on Count I since nothing has changed with regard to Count I since the matter was sentenced before.

Id. at 51-52.

Similarly, in this case, the trial court decided not to revisit an issue that was not the subject of appeal, and made corrective changes to the judgment and sentence solely to reflect the Court of Appeals' prior ruling. 2RP 10-11. In exercising its discretion to not review the newly-raised issue, the court explained:

There is no basis for this court to enter any rulings changing the credit for time served. That was part of the judgment and sentence. There was an opportunity after the judgment and sentence was entered to raise the issue. It wasn't raised. The case went up on appeal, that was the time... any other issues... should have been raised. That's why I'm not willing to make any changes at this point.

2RP 12-13.³ Because the trial court here properly exercised its discretion by refusing to rule again on the issue of credit for time served, this issue is not appealable and this Court should decline to review Doss' claim pursuant to RAP 2.5(c)(3).

Nonetheless, Doss claims that the trial court had a duty to correct an erroneous sentence upon its discovery. Here, that claim is without merit where it was not clear to the trial court that there was any error with the sentence. Having no evidence before it beyond Doss' own assertions, the trial court was unable to determine whether Doss' claim had merit. After Doss argued his position, the court noted that, without evidence, there was no basis for the court to change the amount of credit for time served ordered in the original judgment and sentence. 2RP 12-13. Contrary to Doss' assertions, the trial court did not ignore its duty to correct a clear error; rather, the trial court could not determine whether there was an error at all and exercised its discretion to not revisit an issue that should have been raised in earlier proceedings.

³ After Doss continued to argue to the trial court that he was entitled to more days of credit for time served, the trial court told Doss, "I can only do what I'm legally allowed to do, and I'm not at this point legally allowed to change those conditions of the judgment and sentence... so I'm stuck." 2RP 15-16. By the time the court made that statement, it had already informed Doss that it was not willing to make any changes "at this point" and that the issue "should have been raised" earlier. 2RP 12-13.

Doss is also incorrect in his claim that the amount of credit entered on the judgment and sentence was a clerical error. A clerical error is one that incorrectly conveys the intention of the court. State v. Rooth, 129 Wn. App. 761, 770, 121 P.3d 755 (2005). Here, however, the judgment and sentence correctly reflects the amount of credit calculated at the time of sentencing. 1RP 33. This amount was offered by the State, without objection by Doss, and subsequently adopted by the court. 1RP 33; CP 18. Because the amount entered on the judgment and sentence was not entered in error, but rather, correctly reflects the court's intentions, it is not a clerical mistake.

2. DOSS IS NOT ENTITLED TO CREDIT FOR TIME SERVED ON CCAP PRIOR TO SENTENCING.

Doss argues that he is entitled to credit against his prison sentence for the time he spent participating in the King County Community Alternative Programs (CCAP) prior to sentencing. Because neither the record nor the governing statutes support this claim, it should be rejected.

An offender sentenced to a term of confinement has both a constitutional and a statutory right to receive credit for time served before sentencing in confinement. RCW 9.94A.505; State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992). The failure to provide credit for time served in confinement violates due process, equal protection, and the double jeopardy prohibition against multiple punishments. In re Costello, 131 Wn. App. 828, 832, 129 P.3d 827 (2006).

Under the SRA, the sentencing court “shall give the offender credit for all *confinement* time served before the sentencing if that *confinement* was solely in regard to the offense for which the offender is being sentenced.” RCW 9.94A.505(6) (emphasis added). Confinement is defined in the SRA as “total or partial confinement.” RCW 9.94A.030(8). “Partial confinement” is defined as follows:

“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, or, if home detention or work crew has been ordered by the court or home detention has been ordered by the department as part of the parenting program, in an approved residence, for a substantial portion of each day with the balance of the

day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

RCW 9.94A.030(35) (emphasis added).

In the statute defining a “term of partial confinement” when imposed as part of an offender’s sentence, the legislature specified that “[a]n offender sentenced to a term of partial confinement shall be *confined* in the facility for *at least eight hours per day*].”

RCW 9.94A.731 (emphasis added). Given that statutory schemes are to be construed as a whole, this statute indicates a legislative intent that “partial confinement” should confine the offender in a facility or institution for a minimum of eight hours.

The King County Code provision defining CCAP states that CCAP is “an *alternative to confinement* program in which an offender must *participate* for a *minimum of six hours per day*].” KCC 5.12.101 (emphasis added). As a result, CCAP does not qualify as “partial confinement” under the SRA because: 1) CCAP is specifically designated as an “alternative to confinement” rather than “confinement;” and 2) it requires the offender to “participate” in the program for a minimum of six hours per day rather than to be

“confined” in a “facility or institution” for a minimum of eight hours per day. Thus, Doss is not entitled to credit for time spent participating in CCAP prior to sentencing because CCAP does not meet the definition of “partial confinement.”

Doss claims that he is entitled to credit for time spent participating in CCAP pursuant to RCW 9.94A.680(3). However, a plain language reading of this statute buttresses the position that Doss is not entitled to such credit for two reasons. First, RCW 9.94A.680 specifically states that the alternatives enumerated in the statute are available only for “offenders with sentences of one year or less.” Doss’ concurrent sentences of 60 months far exceed the one-year maximum for this statute to apply to him. Second, RCW 9.94A.680(3) gives a court discretion to credit time served in an available county program: “the court *may* credit time served by the offender before the sentencing in an available county supervised community option[.]” (emphasis added). Here, the trial court specifically credited Doss with time served in the King County Jail: “You’ll obviously receive full credit for time you’ve served in the

King County Jail.” 1RP 36. Although Doss informed the court of his CCAP participation, the court did not specifically award Doss credit for his time in CCAP. 1RP 20. In sum, RCW 9.94A.680 does not entitle Doss to credit for his time in CCAP.

Doss also claims that his participation in CCAP is sufficiently similar to the programs specified in RCW 9.94A.030(35) to qualify as “partial confinement” for purposes of credit for time served. This argument is without merit. RCW 9.94A.030(57) defines “work release” as “a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school.” “Home detention” is defined as “a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.” RCW 9.94A.030(28). RCW 9.94A.030(55) defines “work crew” as “a program of partial confinement consisting of civic improvement tasks for the benefit of the community that complies with RCW 9.94A.725.”

Critically, Doss has failed to establish in the record how his participation in CCAP was sufficiently similar to the programs enumerated in RCW 9.94A.030(35) to qualify for confinement credit. The only information in the record regarding Doss' participation in CCAP are his own assertions that he completed an anger management class and was enrolled in chemical dependency counseling, and the general conditions outlined in the Conditions of Conduct for CCAP. 1RP 20; CP 37-39; Supp. CP__ (Sub # 13, Conditions of Conduct- CCAP Basic dated Sept. 15, 2009). Importantly, beyond Doss' claims, there is nothing in the record showing what Doss did or for how long while he was in CCAP. Without such information, there is no way to show that this CCAP program was sufficiently similar to the statutory definition of partial confinement.

Furthermore, the record shows that at times Doss was enrolled in an even less demanding version of CCAP- "CCAP Basic." Supp. CP__ (Sub # 13, Conditions of Conduct- CCAP Basic dated Sept. 15, 2009). According to the Conditions of

Conduct, CCAP Basic requires only that the participant call the facility once a day. Id. No credible argument can be made that Doss is entitled to credit against his prison sentence for making a daily telephone call.

Nonetheless, Doss argues that the rule of lenity, equal protection, and double jeopardy require that he be given credit for CCAP. These arguments are also without merit.

The rule of lenity applies only when statutes are ambiguous, meaning that they are susceptible to more than one reasonable interpretation and there is no discernible evidence of legislative intent. In re Personal Restraint Petition of Bowman, 109 Wn. App. 869, 875-76, 38 P.3d 1017 (2001), rev. denied, 146 Wn.2d 1001 (2002). Here, the statutes do not support Doss' argument that CCAP constitutes partial confinement, and they are not ambiguous. As such, the rule of lenity does not apply.

Doss' equal protection argument depends on his *entitlement* to credit for time served under CCAP. In State v. Anderson, the case cited by Doss, the court held that a condition that would

qualify as confinement pre-conviction must also qualify as confinement post-conviction. 132 Wn.2d 203, 207-08, 937 P.2d 571 (1997). However, because Doss is not entitled to time served pre-conviction in CCAP, this case is inapposite.

Finally, Doss' claim that the court's failure to credit his time in CCAP violates double jeopardy does not apply. Doss cites State v. Gocken and State v. Womac in support of his argument that the failure to give credit for CCAP violates double jeopardy. 127 Wn.2d 95, 896 P.2d 1267 (1995); 160 Wn.2d 643, 160 P.3d 40 (2007). However, these cases analyze double jeopardy for time spent in jail or prison. Because CCAP is not analogous to jail or prison and Doss' argument depends on his entitlement to credit for time served in CCAP, these cases do not apply.

3. THE RECORD IS INSUFFICIENT.

Doss claims that he is entitled to credit for time served in jail following his second arrest. However, the record is insufficient to make this determination.

Pursuant to RCW 9.94A.505(6):

The sentencing court shall give the offender credit for all confinement served before the sentencing if the confinement was solely in regard to the offense for which the offender is being sentenced.

However, in this case the record is insufficient to resolve the amount of credit for time served that Doss is entitled to. The record does not establish how credit for time served was originally calculated in the Judgment and Sentence. Nor does the record resolve whether Doss has already received credit for the time he complains of or even if he is entitled to be credited for this time period at all under RCW 9.94A.505.⁴

⁴ Although it is not clear from the record, it appears that Doss was actually credited with *more* days than he is entitled to under RCW 9.94A.505. Here, Doss was sentenced for three counts of domestic violence felony violation of a court order; however, he was not charged with any of these offenses until November 5, 2009. Supp. CP__ (Sub # 1, Information for 09-1-07138-8 SEA dated Nov. 5, 2009). Although an arrest warrant was issued on November 5, 2009, Doss was first arrested for these charges, for which he was later sentenced, on November 19, 2009. Supp. CP__ (Sub # 2, Order for Warrant dated Nov. 5, 2009), Supp. CP__ (Sub # 11, Sheriff's Return on Warrant dated Dec. 3, 2009). Thus, Doss did not serve *any* days confined on the offense for which he was ultimately sentenced until November 19, 2009. Doss was not sentenced on the original assault charge and, thus, he is not entitled to credit for any time served solely on that offense (it appears that all of Doss' participation in CCAP was exclusively during the period when he was charged only with the assault). Awarding him credit for any time before November 19, 2009, would result in an absurd outcome where Doss would receive credit for an offense *before* he was charged with and arrested for the offense. Accordingly, because there were only 155 days between Doss' date of arrest and his date of sentence on these offenses (November 19, 2009 to April 23, 2010), when Doss was credited with 166 days, he was likely credited with 11 more days than he is entitled to.

"If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition[.]" State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Here, because the record is insufficient, this issue would be appropriately raised through a personal restraint petition -- not through this direct appeal.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Doss' Judgment and Sentence.

DATED this 21 day of May, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ELIJAH DOSS, Cause No. 69462-6 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of May, 2013

A handwritten signature in black ink, appearing to be "Eric J. Nielsen", written over a horizontal line.

Name

Done in Seattle, Washington