NOTICE: SLIP OPINION
(not the court's final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

For more information about precedential (published) opinions, nonprecedential (unpublished) opinions, slip opinions, and the official reports, see https://www.courts.wa.gov/opinions and the information that is linked there.

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FILED
DECEMBER 4, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Post-Sentence Review of:	))	No. 35284-6-III
	)	
KYE CALEB ALLERY.	)))	ORDER GRANTING MOTION TO PUBLISH

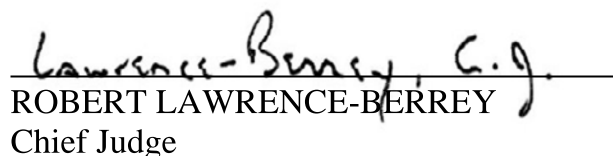
THE COURT has considered the motion filed by the Department of Corrections to publish our October 16, 2018, opinion, and the record and file herein;

IT IS ORDERED that the motion to publish is granted. The opinion filed by the court on October 16, 2018, shall be modified on page one to designate it as a published opinion and on page six by deletion of the following language:

> A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

PANEL: Judges Pennell, Siddoway and Fearing

FOR THE COURT:



ROBERT LAWRENCE-BERREY
Chief Judge

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FILED
OCTOBER 16, 2018
In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Post-Sentence Review of:	)	No. 35284-6-III
	)	
	)	
KYE CALEB ALLERY.	)	UNPUBLISHED OPINION
	)	
	)	

Pennell, A.C.J. — The Department of Corrections (DOC) petitions under RCW 9.94A.585(7) to review Kye Caleb Allery's sentence imposed for his 2017 Whitman County conviction of third degree assault. The DOC contends the trial court erred in crediting Allery's sentence with 30 days of county jail sanction time he served for a community custody violation in a prior unrelated felony case. We grant the DOC's petition and remand to the superior court to remove those credits.

FACTS AND PROCEDURE

Mr. Allery was arrested for assault and booked into the Whitman County Jail on December 20, 2016. The next day, December 21, the State charged him with third degree

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assault under superior court cause number 16-1-00224-38, and the court entered a pretrial release order setting bail at $25,000. Mr. Allery remained in jail pending trial. A jury found him guilty as charged. On February 15, 2017, the court imposed a 22-month standard range sentence. Boilerplate paragraph 4.1(c) of the judgment and sentence states:

> The defendant shall receive credit for eligible time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

Post-Sentence Pet., Ex. 1 at 4. The county jail certification shows credit for 56 days served on cause number 16-1-00224-38—from December 21, 2016 to February 15, 2017. The warrant of commitment accompanying the judgment and sentence credits Mr. Allery with 57 days of county jail credit as of February 15, 2017.

Apparently unbeknownst to counsel and the court at the time of sentencing, Mr. Allery served 30 days of his county jail time (December 20, 2016 to January 19, 2017) as a DOC-imposed sanction for violating community custody conditions of a 2010 felony judgment and sentence for communication with a minor for immoral purposes.[1] Upon Mr. Allery's transfer to prison, DOC personnel reviewed the current judgment and sentence documents and determined Mr. Allery was credited with the sanction days in error. After unsuccessfully attempting to resolve the issue in the trial court, the DOC

[1] Whitman County Superior Court Cause No. 10-1-00080-6.

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timely filed this petition in accordance with RCW 9.94A.585(7) and RAP 16.18. Since Mr. Allery is indigent, we appointed counsel for him as required under RAP 16.18(c).

ANALYSIS

The sole issue is whether Mr. Allery's third degree assault sentence was improperly credited with the 30-day jail sanction he served for a community custody violation in the prior unrelated felony case.

Our scope of review in a post-sentence review petition "shall be limited to errors of law." RCW 9.94A.585(7). Whether a sentencing court exceeded its statutory authority under the Sentencing Reform Act of 1981, chapter 9.94A RCW, is an issue of law we review de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). To the extent the issue implicates questions of statutory interpretation, review is also de novo. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). "The primary goal of statutory construction is to carry out legislative intent. If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001) (citation omitted).

The DOC contends the crediting of Mr. Allery's assault sentence with the 30-day jail sanction served in the 2010 case violates two statutes: First, the consecutive sentence requirement in RCW 9.94.589(2)(a) that "whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms." And

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second, RCW 9.94A.505(6), which requires the trial court to give offenders credit for all presentence jail time served, but only "if that confinement was solely in regard to the offense for which the offender is being sentenced." Credit is not allowed for time served on other charges. *In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 597, 647 P.2d 1026 (1982).

The State (Whitman County Prosecutor) initially argues that the trial court was entitled to rely solely on the December 21 pretrial release order to calculate the jail credits, and the DOC should now be precluded from submitting sanction information that it did not present to the court at the time of sentencing. We reject the State's argument.

The DOC was not a party at the time of sentencing and played no role in the trial court's award of presentence jail credits. The DOC notified the parties and court when it became aware after Mr. Allery's transfer to DOC jurisdiction that the jail certification was incomplete or inaccurate. Thereafter, the DOC followed proper procedures under RCW 9.94A.585(7) and RAP 16.18 in bringing this petition supported by evidence showing the sanction time served on the prior 2010 case. The court's December 21 pretrial release order says nothing of time served on other matters and is not dispositive of what credit is proper. The DOC's arguments are properly before us.

On the merits, the State contends RCW 9.94A.589(2)(a) does not clearly apply to this situation, so Mr. Allery is entitled to the 30 days credit under the rule of lenity. The State does not address RCW 9.94A.505(6).

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We agree with the DOC and find RCW 9.94A.505(6) dispositive. The statute plainly allows presentence credit for time served solely for the offense being sentenced—not for confinement time served on other matters such as Mr. Allery's DOC-imposed sanction for violating community custody terms of a prior sentence. He is thus not entitled to credit on his assault sentence for the 30-day sanction served from December 20, 2016 to January 19, 2017.

Moreover, Mr. Allery was in community custody and thus still under sentence for the 2010 felony conviction when he committed the current assault. *See State v. Roberts*, 76 Wn. App. 290, 884 P.2d 628 (1994) (persons under community supervision were "under sentence of felony" for purposes of former RCW 9.94A.400(2), *recodified as* RCW 9.94A.589(2)(a) (LAWS OF 2001 ch. 10 § 6)). Crediting Mr. Allery with the sanction time served on the 2010 matter starts his new assault sentence 30 days before expiration of the prior term and makes the sentences partially concurrent. This violates the plain language of RCW 9.94A.589(2)(a) that "the latter term shall not begin until expiration of all prior terms." The rule of lenity does not avail Mr. Allery in this situation. His third degree assault sentence cannot begin until the 30-day sanction in the prior case was fully served.

We grant the DOC's petition and remand Mr. Allery's judgment and sentence to the trial court for it to give credit for presentencing jail time for only those days he served in confinement solely in regard to the third degree assault offense for which he was being

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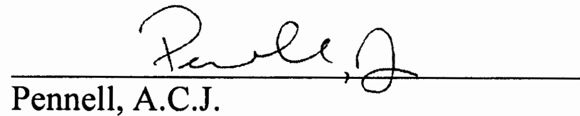
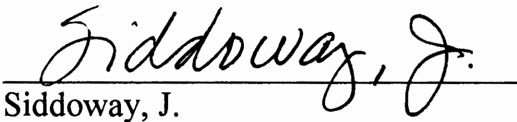
sentenced and to remove any credit for presentencing jail time given for days he served on DOC sanctions.[2]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

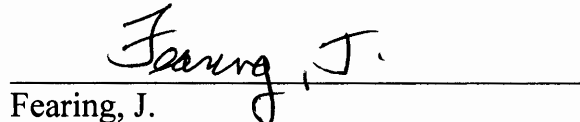


Pennell, A.C.J.

WE CONCUR:



Siddoway, J.



Fearing, J.

[2] Appointed counsel for Mr. Allery has filed a brief and motion to withdraw in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); RAP 18.3(a)(2). Counsel acknowledges the issue raised by the DOC and states he finds nothing in the record that would support Mr. Allery receiving credit on his assault sentence for jail time spent on the unrelated matter. Counsel otherwise presents no argument. This court finds no arguable issues of merit that favor Mr. Allery in this petition. Counsel's motion to withdraw is therefore granted, conditioned upon his compliance with RAP 18.3(a)(4).