

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint
of SEAN LAMONT DELL,

Petitioner.

No. 80458-8-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Sean Lamont Dell filed a personal restraint petition (PRP) contending that the Department of Corrections (DOC) has failed to accurately calculate sentencing credits to which he is legally entitled. We agree, grant the petition in part, and remand to DOC for recalculation.

FACTS

In 2009, Sean Dell pleaded guilty to two offenses including (1) a 2008 domestic violence felony violation of a no-contact order, and (2) a 2009 violation of the Uniform Controlled Substances Act; chapter 69.50 RCW. For the 2008 offense, the trial court imposed a prison-based special drug offender sentencing alternative (DOSA) of 27.75 months confinement and 27.75 months community custody.¹ For the 2009 offense, the trial court sentenced Dell to 12 months plus one day confinement and 12 months community custody. The trial court ordered the 2008 and 2009 sentences to run concurrently.

¹ A DOSA sentence is split evenly between confinement and community custody based upon the midpoint of the total standard range. RCW 9.94A.662(1).

In 2010, after serving the confinement portion of his sentence, Dell was released from prison to serve community custody. In January 2012, while still on community custody, Dell committed a new offense. Following a DOC violation hearing in February 2012, DOC revoked Dell's 2008 DOSA and returned him to prison.

In June 2012, Dell pleaded guilty to domestic violence assault in the second degree. The trial court sentenced him to 70 months confinement, 18 months community custody, and ordered that the confinement term run concurrently to the revoked DOSA imposed in the 2008 sentence. The 2012 judgment and sentence did not reference the 2009 sentence or whether the community custody imposed in 2012 ran concurrently or consecutively to Dell's prior sentences.

In July 2012, the King County Jail certified to DOC that based on 132 days that Dell served in jail, he was eligible for 66 days of earned early release time.² See RCW 9.94A.728(1)(a); RCW 9.94A.729(1)(a).

In 2016, DOC calculated his release date from confinement to be February 26, 2016, but Dell did not get released until March 31, 2016 because DOC needed to approve his release plan. The delay equated to 34 days.

In March 2016, DOC released Dell from confinement and he began serving the 12 month community custody term imposed under the 2008 and 2009 sentences. Dell did not, however, begin supervision on the community custody

² We refer to earned release time under RCW 9.94A.729(1)(a) as "earned early release time" or "good time."

portion of the 2012 sentence at this time. DOC took the position that the 2012 community custody sentence ran consecutively to the prior sentences for two reasons. First, Dell committed the 2012 offense while on supervision for the 2009 controlled substance case, and per RCW 9.94A.589(2)(a) the community custody terms shall run consecutively.³ Second, because the trial court that imposed the 2012 community custody did not indicate whether it would run consecutive or concurrent to prior sentences, DOC lacked authority to add terms to the judgment and sentence. Based on this belief, DOC ordered the remaining community custody terms under Dell's 2008 and 2009 sentences to run concurrent to each other but ordered that his 2012 community custody term run consecutive to the 2008 and 2009 terms.

On February 13, 2017, Dell completed the community custody imposed in his 2008 and 2009 sentences. That same day, Dell began serving the community custody portion of his 2012 sentence.

On September 15, 2017, while on community custody, Dell was convicted of domestic violence felony harassment. The trial court sentenced him to 60 months confinement to run consecutive to his prior convictions.

On September 19, 2017, Dell was transferred to DOC custody. Roughly 36 days later, on October 25, 2017, DOC held a hearing on Dell's violation of community custody conditions. DOC revoked Dell's earned early release time

³ In pertinent part, former RCW 9.94A.589(2)(a)(2016) states, "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."

that he received for the 2012 conviction, which it calculated as 631 days. Additionally, DOC determined that Dell had 30 days of successful community custody time on the 2012 sentence resulting in 601 days of confinement left to serve with a start date of September 19, 2017. DOC refused to credit Dell's 2012 sentence with any of the time he spent in the community because it was deemed at the time that the community custody Dell served in 2016 was solely related to the 2008 and 2009 sentences.

On May 13, 2019, Dell completed the remainder of his confinement on the 2012 sentence and began serving the consecutive term of confinement imposed in his 2017 sentence. DOC calculated Dell's earned release date for the 2017 conviction to be March 9, 2022.

Dell then filed this PRP challenging the DOC's administration of the community custody terms of his 2012, 2009, and 2008 sentences.⁴ He claimed that running the confinement portions of the sentences concurrently, but running the community custody terms consecutively, is an illegal hybrid sentence.

[5/6/20 Order Referring to Panel] "Washington law requires that sentences be either fully consecutive to or fully concurrent with one another." In re Pers. Restraint of Costello, 131 Wn. App. 828, 834, 129 P.3d 827 (2006). DOC conceded that remand for correction or clarification of the sentences was appropriate and Dell's personal restrain petition (PRP) was referred to a panel of this court.

⁴ Dell initially filed a "Motion to Modify or Correct Sentence and Judgment" in the King County Superior Court. The trial court transferred the motion to this court for consideration as a PRP pursuant to CrR 7.8(c)(2).

On June 11, 2020, Substitute House Bill (SHB) 2394 became effective and directs DOC to:

recalculate the scheduled end date for terms of community custody, community supervision, and community placement so that they run concurrently to previously imposed sentences of community custody, community supervision, community placement, probation, and parole, unless the court pronouncing the current sentence has expressly required such terms to run consecutively. This section applies to each offender currently in confinement or under active supervision, regardless of whether the offender is sentenced after the effective date of this section and regardless of whether the offender's date of offense occurred prior to the effective date of this section or after.

LAWS OF 2020, ch. 276, § 3; see also LAWS OF 2020, ch. 276, § 5 (DOC “has the authority to begin implementing this act upon the effective date of this section.”); and LAWS OF 2020, ch. 276, § 6 (“This act applies retroactively and prospectively, regardless of the date of an offender's underlying offense.”).

On July 28, 2020, DOC applied SHB 2394 to Dell's sentence, corrected its calculation of Dell's various community custody terms, and adjusted his overall earned release date from March 9, 2022 to June 23, 2021. This adjustment resolves the primary claim in Dell's PRP but not his four other claims of sentencing calculation errors, which we now turn to address.

ANALYSIS

Dell contends that DOC has improperly calculated various credits he should receive for time he has served and thus his earned released date. Specifically, Dell argues that DOC (1) did not include the 66 days of good time he earned while held in King County Jail to arrive at the “maximum expiration” of his 2012 sentence, (2) has not given him good time credit for the 34 days DOC held

him past his scheduled release date of February 26, 2016 while awaiting a release plan, (3) exceeded its authority in adding 83 days of community custody supervision, and (4) had not credited him for 36 days while awaiting his October 25, 2017 disposition hearing.

A. Standard of Review

Dell has not had a prior opportunity to obtain judicial review of the issues in his PRP, “so he need not make any threshold showing of prejudice; he must show only that he is under an unlawful restraint as defined by RAP 16.4.” In re Pers. Restraint of Stuhr, 186 Wn.2d 49, 52, 375 P.3d 1031 (2016) (citing In re Pers. Restraint of Grantham, 168 Wn.2d 204, 214, 227 P.3d 285 (2010)). A DOC decision that wrongfully calculates an offender’s sentencing credits results in an unlawful restraint of the offender. In re Pers. Restraint of Reifschneider, 130 Wn. App. 498, 501, 123 P.3d 496 (2005). Thus, we look to see whether DOC’s calculation of Dell’s time served and earned release date was “unlawful” under RAP 16.4(c). This is a question of law that we review de novo. In re Pers. Restraint of Erickson, 146 Wn. App. 576, 585, 191 P.3d 917 (2008).

B. Credit for 66 Days Jail Earned Release Time in 2012

First, Dell challenges DOC’s calculation of his release date arguing that DOC failed to subtract the 66 days (of early release time he earned while confined in King County Jail) from the total sentence to arrive at the “maximum

expiration” date for his sentence. Dell used WAC 137-30-060(1)⁵ and DOC’s Statewide Inmate Orientation Handbook (Handbook) to calculate his maximum expiration date as October 17, 2017. DOC’s Handbook provides the following rubric for calculating release dates:

1	Start with total sentence length (converted to days)	36 months = 1095 days	Total Sentence Length
2	Subtract the number of days of jail credits (Jail time and jail good time combined)	1095 – 90 days = 1005 days	Days to be served in DOC prior to earned release credits being applied (Maximum Expiration Date)
3	Multiply by one third for DOC earned release credits. NOTE: If your sentence is any other earned time percentage, use this same process but use the correct earned time percentage	1005 x 0.333 = 335 days DOC earned release credits	DOC earned release credits.
4	Subtract the DOC earned release credits from the Days to be served in DOC	1005 – 335 = 670 days to serve in DOC	Total days to be served in DOC
5	Add the total days to be served in DOC to your time start date	1-01-2009 plus 670 days = 11-02-2010	This becomes your Earned Release Date (ERD)

DOC “concededly” agrees that the Handbook “does support the calculation [Dell] put forth.” DOC further acknowledges that “October 17, 2017, would result as the maximum expiration date because the handbook subtracts both jail time and jail earned time from the total sentence to arrive at the maximum expiration date.” Despite this, DOC claims “the calculation example

⁵ WAC 137-30-060(1) provides, “[t]o calculate an offender’s release date on a determinate sentence, the jail time and jail earned release time are deducted from the total sentence. The earned release time applicable per statute is applied to the adjusted sentence.”

provided in the handbook was superseded by Department policy” and therefore, Dell “may not rely on the handbook in this petition.” DOC has failed to provide Dell or this court with a copy of the “superseded” policy upon which it now attempts to rely.

Dell is entitled to receive credits for all time certified by the jail including the earned early release time while Dell was held in the King County Jail. In re Pers. Restraint of Taylor, 122 Wn. App. 880, 884-85, 95 P.3d 790 (2004) (holding that DOC’s compliance with statutory requirements affecting release from confinement is a protected liberty interest). So, we remand to DOC for computation of Dell’s release date giving credit for all his jail earned early release time.

C. Credit for 34 Days Additional Confinement in March 2016

Next, Dell also contends DOC did not credit him with “earned release time” for the 34 days he was held in total confinement beyond his February 26, 2016 release date due to waiting for DOC to approve his release plan.⁶ DOC admits that it “did not award any extra credit based on those days.”

Our decision in Reifschneider is instructive. There, the offender received a DOSA sentence following a residential burglary conviction. Reifschneider, 130 Wn. App. at 500. And, similar to Dell’s situation here, “[a]t the end of [the offender’s] period of incarceration, he was held for an additional 252 days

⁶ “Earned Release Time (ERT)” means “the combined earned time and good conduct time credit an offender is eligible to earn off the minimum term established by the indeterminate sentence review board or the sentencing court.” WAC 137-30-020.

because he was unable to provide the DOC with a satisfactory address in his release plan.” Reifschneider, 130 Wn. App. at 500. After the offender was released into community custody and returned upon a violation of those conditions, DOC did not apply any good time credit earned during the offender’s 252 days of additional prior incarceration. Reifschneider, 130 Wn. App. at 500. The offender filed a PRP with this court arguing that he was entitled to good time credits for the additional incarceration. Reifschneider, 130 Wn. App. at 500-01. We agreed, granted the PRP, and held that,

[A]n inmate must be allowed to accrue good-time credits when he or she is held beyond the earned early release date for failure to submit an approved release plan. The DOC must consider any good-time credits earned during the confinement portion of a DOSA sentence if the community custody portion is subsequently revoked and the inmate is reincarcerated.

Reifschneider, 130 Wn. App. at 504. Reifschneider clearly applies to Dell’s situation. Dell was entitled to receive good time credits for the days he was “held beyond the earned early release date for failure to submit an approved release plan.”

DOC counters that Reifschneider’s holding does not extend “to non-DOSA sentences so as to require the Department to award extra credit.” But DOC asks this court to read into Reifschneider language that does not exist. Nothing in Reifschneider limits its holding to DOSA sentences. We reject DOC’s request to do so.

DOC’s failure to award Dell any good time credit for 34 days was unlawful. Accordingly, we grant the PRP and remand to DOC to recalculate Dell’s applicable good time credits for this period.

D. Credit for 83 Days Community Custody Time

Dell also argues that at the time of his March 2016 release, DOC exceeded its authority by adding 83 days to his 18 month community custody term imposed under the 2012 sentence. The DOC concedes that “[t]his appears to have been incorrect under the law in effect at the time.”

In July 2016, DOC corrected its error and removed “83 additional community custody days” from the 2012 sentence. The 18 month term was the lawfully available term of community custody at the time. RCW 9.94A.501(8) (“The period of time the department is authorized to supervise an offender under this section may not exceed the duration of community custody specified under . . . RCW 9.94A.701(1) through (8).”). DOC’s correction resulted in changing Dell’s scheduled release date from December 26, 2017 to October 4, 2017.

Thus, we deny Dell’s claim regarding 83 days additional credit.


E. Credit for 36 Days Detention in September and October 2017

Finally, Dell argues the DOC failed to credit him with 36 days while he was detained awaiting his community custody violation hearing under the 2012 conviction.

Pursuant to RCW 9.94A.633, an offender returned to total confinement is entitled to credit “for any period actually spent . . . in detention awaiting disposition of an alleged violation.” RCW 9.94A.633(2)(a). Here, the record shows that Dell returned to prison on September 19, 2017 and DOC began to run his “return time” on the same day. On October 25, 2017, DOC held Dell’s disposition hearing. DOC represents that it gave Dell credit for time spent in

detention while awaiting this hearing. Dell has not produced evidence in the contrary. In re Pers. Restraint of Gronquist, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999) (to support a PRP, offenders must present facts or evidence beyond conclusory allegations, speculation, conjecture, or inadmissible hearsay). Thus, we deny Dell's claim that he was not credited 36 days.

We grant the PRP in part and deny it in part. Accordingly, we remand to DOC for recalculation of Dell's release date giving him credit for all earned good time in accordance with this opinion.



WE CONCUR:

