

May 2, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

DMITRIY ANDREEVICH GERNEGA,

Appellant.

No. 48505-2-II

UNPUBLISHED OPINION

JOHANSON, P.J. — Dmitriy A. Gernega appeals his sentence for two counts of first degree robbery.<sup>1</sup> Gernega argues that the trial court erred when it did not give him credit for 27 days served between April 17, 2015, when his Washington charges were filed, and May 14, when he was sentenced on his Oregon convictions. Because Gernega fails to provide an adequate record for our review, we reject his argument. Accordingly, we affirm Gernega’s sentence.

**FACTS**

On April 17, 2015, while Gernega was in an Oregon State jail on second degree robbery charges, he was charged in Washington State with two counts of first degree robbery. On May 14, 27 days after he was charged in Washington, Gernega was sentenced for the Oregon robberies.<sup>2</sup>

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<sup>1</sup> RCW 9A.56.200.

<sup>2</sup> Gernega apparently was sentenced to 100 total months in Oregon prison. The record does not indicate whether Oregon gave Gernega credit for presentencing time served.

In December, Gernega pleaded guilty to the Washington robberies. At the plea hearing, Gernega's attorney told the sentencing court that Gernega's "Oregon attorney [told him that] he would get credit for all the time he served in Oregon, *which he did get in Oregon*, but his understanding was, he would get credit for that here, as well." Report of Proceedings (RP) (Dec. 21, 2015) at 9 (emphasis added).

In January 2016, Gernega appeared for his sentencing hearing on the Washington convictions, and he requested that the trial court credit him for 41 days of time served after Gernega's transport from Oregon State to Washington State. The trial court denied this request and sentenced Gernega to 120 total months of imprisonment with no credit for time served, to be served "concurrently [with the] Oregon case." Clerk's Papers at 35.

Later, Gernega argued that he was entitled to credit for time served for the 27 days between April 17, 2015, when Washington charges were filed, and May 14, when Gernega was sentenced for the Oregon charges. The trial court denied Gernega's request, noting that Gernega "got credit for that . . . April 17th to May 14th credit time served in Oregon based on their detainer or their charges."<sup>3</sup> RP (Jan. 27, 2016) at 44.

Gernega appeals the denial of his request for credit for the 27 days served after he was charged in Washington.

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<sup>3</sup> It is unclear why the trial court thought that Gernega had received credit toward his Oregon sentence.

ANALYSIS

Gernega argues that if he did not receive credit toward his Oregon sentence for the 27 days he was incarcerated in Oregon between the Washington charges' filing and his Oregon sentencing, then he is entitled to credit for that period toward his Washington sentence. Gernega acknowledges that it is impossible to tell from the trial record whether he did in fact receive credit for presentencing time served toward his Oregon sentences. We thus decline to consider the merits of Gernega's claim.

We do not consider matters outside the trial record when a claim is brought on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We generally presume the correctness of a trial court's decision and sustain that decision absent an affirmative showing of error. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (quoting *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999)). Where a party presents an issue for our review, the party has the burden to provide an adequate record to establish that the trial court erred. *Sisouvanh*, 175 Wn.2d at 619. When faced with a material omission in the record, we may decline to address the alleged error. *Sisouvanh*, 175 Wn.2d at 619 (quoting *Wade*, 138 Wn.2d at 465).

Here, Gernega seeks the benefit of Division Three's holding in *In re Pers. Restraint of Schaupp* that where an offender is confined simultaneously on two charges, time served not credited toward one charge must be credited toward the other. *See* 66 Wn. App. 45, 50-51, 831 P.2d 156 (1992) (ordering a defendant receive credit toward a Franklin County conviction when he had not received all the day-for-day credit to which he was entitled toward a Spokane County

conviction).<sup>4</sup> Crucial to Gernega's argument is his assertion that he did not receive credit for time served toward his Oregon sentence. *See State v. Williams*, 59 Wn. App. 379, 381, 796 P.2d 1301 (1990) (rejecting an outcome that would allow an inmate to double count time served).

After careful review of the record, we are unable to discern whether Gernega received credit in Oregon for presentencing time served toward his Oregon sentence. Gernega did not designate the Oregon judgment and sentence nor any other evidence to support his assertion that he did not receive credit in Oregon for the 27 days served. The trial court noted that Gernega had in fact received credit toward his Oregon sentence for the 27-day period at issue. And Gernega's attorney stated that his "Oregon attorney [told him that] he would get credit for all the time he served in Oregon, *which he did get in Oregon*, but his understanding was, he would get credit for that here, as well." RP (Dec. 21, 2015) at 9 (emphasis added).

Gernega fails to meet his burden to provide a record adequate for us to review the trial court's decision. *See Sisouvanh*, 175 Wn.2d at 619. Accordingly, we presume that the trial court

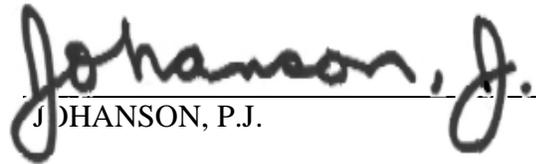
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<sup>4</sup> Due process, equal protection, and double jeopardy concerns require that an accused who cannot obtain pretrial release may not be confined for a longer period of time than a person able to obtain pretrial release. *State v. Lewis*, 184 Wn.2d 201, 205, 355 P.3d 1148 (2015); *Reanier v. Smith*, 83 Wn.2d 342, 346, 517 P.2d 949 (1974). RCW 9.94A.505(6) of the Sentencing Reform Act of 1981, ch. 9.94A RCW, codifies these principles by requiring a sentencing court to "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." *In re Pers. Restraint of Costello*, 131 Wn. App. 828, 833, 129 P.3d 827 (2006) (quoting *State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990)).

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did not err, and we consider Gernega's claim no further. *See McFarland*, 127 Wn.2d at 335; *Sisouvanh*, 175 Wn.2d at 619. We affirm Gernega's sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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JOHANSON, P.J.

We concur:

  
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MELNICK, J.

  
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SUTTON, J.