

63498-4

63498-4 NK

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2009 DEC -3 PM 2:58

NO. 63498-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

FREDDIE LEVI HARRIS,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL J. FOX

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DENNIS J. McCURDY  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
C. <u>ARGUMENT</u> .....	5
1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST TO RECEIVE CREDIT FOR THE TIME HE SPENT IN CUSTODY IN CANADA ON AN IMMIGRATION MATTER.....	5
D. <u>CONCLUSION</u> .....	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122,  
372 P.2d 193 (1962)..... 10

State v. Brune, 45 Wn. App. 354,  
725 P.2d 454 (1986)..... 10

State v. Davis, 69 Wn. App. 634,  
849 P.2d 1283 (1993)..... 6

State v. Dennison, 115 Wn.2d 609,  
801 P.2d 193 (1990)..... 9

State v. Gaut, 111 Wn. App. 875,  
46 P.3d 832 (2002)..... 7

State v. Guloy, 104 Wn.2d 412,  
705 P.2d 1185 (1985), cert. denied,  
475 U.S. 1020 (1986)..... 7

State v. Rienks, 46 Wn. App. 537,  
731 P.2d 1116 (1987)..... 11

State v. Robtoy, 98 Wn.2d 30,  
653 P.2d 284 (1982)..... 13

State v. Stewart, 136 Wn. App. 162,  
149 P.3d 391 (2006)..... 6

State v. Williams, 59 Wn. App. 379,  
796 P.2d 1301 (1990)..... 6

State v. Young, 89 Wn.2d 613,  
574 P.2d 1171 (1978)..... 10

Statutes

Washington State:

Laws 2001, ch. 10, § 6 ..... 7  
RCW 9.94A.120 ..... 7  
RCW 9.94A.505 ..... 2, 5, 7

Rules and Regulations

Washington State:

RAP 10.3 ..... 9

Other Authorities

Immigration and Refugee Protection Act,  
S.C., ch. 27, § 47-49..... 11

**A. ISSUES PRESENTED**

Is a defendant entitled to credit for time served on his Washington criminal conviction for pre-sentence time spent in custody in another country on an immigration matter, while he has an outstanding warrant for his arrest in the United States on the criminal matter?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

On February 6, 1997, the defendant was charged with robbery in the second degree and kidnapping in the second degree. CP 1-4. At the time of filing, the court signed an order directing the issuance of an arrest warrant--extraditable from all 50 states, with a bond amount of \$10,000. CP 104-07; CP 108-09.

The defendant was subsequently arrested and released but failed to appear in court for a case setting hearing on April 25, 2003; and another warrant was issued for his arrest. CP 110. A month later, on May 19, 2003, the defendant failed to appear for another case setting hearing, and a warrant was issued for his arrest. CP 111; CP 113-14.

On June 3, 2004, the defendant's case setting hearing was continued because he was in custody in Whatcom County where he was pending trial for violation of the uniform controlled substances act, possession with intent to distribute. CP 112. The defendant was convicted as charged. CP 58.

Finally, after multiple delays, including time the defendant spent as a fugitive, his case went to trial in March of 2005. CP 8-15. The defendant proceeded to trial on a charge of first-degree robbery with a deadly weapon enhancement, unlawful imprisonment, bail jumping, and first-degree kidnapping with a deadly weapon enhancement. CP 16-18. As the jury was deliberating, the defendant absconded yet again and a warrant was issued for his arrest. CP 15, 25. The warrant was extraditable from all 50 states. CP 26-28. The defendant was booked back in the King County Jail on the warrant on August 23, 2006. CP 26-28.

The defendant was sentenced on November 3, 2006. CP 52-59. He received a total sentence of 96 months. CP 55. The Judgment and Sentence ordered that the defendant receive credit for time served, as determined by the King County Jail, and DOC, "solely for confinement under this cause number pursuant to RCW 9.94A.505(6)." CP 55. The defendant filed an appeal, with the

court denying the defendant's request to set an appeal bond because "[t]he court finds that the defendant is likely to flee if the judgment is stayed." CP 116. A mandate was issued on September 19, 2008, rejecting the defendant's claims on appeal and terminating review. CP 71-82.

On April 17, 2009, almost two and a half years after he was sentenced, and well after a mandate terminating review had been issued, the trial court, the Honorable Michael J. Fox presiding, heard the defendant's motion to give him credit against his sentence for time he served in custody in Canada on an immigration matter.<sup>1</sup> The time period in question concerns a portion of the time the defendant was on the lam, post-trial, before his ultimate return to King County.

At the hearing, the defendant admitted that he was held by Canadian authorities on matters other than his King County criminal case. Defense counsel informed the court that:

He [the defendant] was apprehended in Canada. Because he is not a citizen of Canada, he was apprehended on an immigration hold. He was held in immigration custody from June of 2005 until August of 2006.

---

<sup>1</sup> The court's order described the defendant's motion as a request "to award him credit for time he served in Canadian custody from 6/28/05 to 8/21/06 on unrelated matters." CP 97.

The reason he was held is because there was a pending asylum application and that application took that period of time to work through the process.

RP 3<sup>2</sup>. "It's not disputed," counsel added, "that the only reason he was held in Canadian custody was because of the immigration hold." RP 4.

Counsel conceded that he was not arguing that the court was *required* to give the defendant credit for time served, but that "the Court has the authority to exercise some discretion," in deciding whether to allow the defendant to receive credit for his time in custody in Canada.<sup>3</sup> RP 4.

The court asked counsel, "[w]hat has he done in terms of his attendance and responsibility in this matter to merit discretion in his favor?" RP 5. Counsel suggested that the defendant had not really been trying to flee when he was on the lam, and that he pled guilty to a charge of bail jumping, in which he received a concurrent sentence. RP 5. The court denied the defendant's request, stating

---

<sup>2</sup> The one volume verbatim report of proceedings is cited as RP--4/17/09.

<sup>3</sup> Counsel's recitation to the court was consistent with a declaration he submitted to the court. See CP 84-87. Counsel wrote in his declaration that the defendant was held in custody "while he awaited resolution of his immigration matters." CP 84. The warrant, counsel declared, remained "outstanding for this entire period," and extradition to the United States was not pursued. CP 84.

that the defendant made his own choices, including seeking asylum in Canada. RP 8. The court signed a written order denying the defendant's motion. CP 97.

**C. ARGUMENT**

**1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST TO RECEIVE CREDIT FOR THE TIME HE SPENT IN CUSTODY IN CANADA ON AN IMMIGRATION MATTER.**

For the first time, the defendant contends that the trial court was required to give him credit for the time he spent in custody in Canada on an immigration matter. He claims this result is dictated by RCW 9.94A.505(6). This issue has been waived. In any event, his claim is not supported by the record.

RCW 9.94A.505(6) provides that "[t]he 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."

Certain requirements exist under the statute before the court is required to give credit for time served. First, in order to receive credit for presentence confinement, the time in custody must be

"actually served on a charged offense." State v. Stewart, 136 Wn. App. 162, 165, 149 P.3d 391 (2006); State v. Davis, 69 Wn. App. 634, 641, 849 P.2d 1283 (1993) ("Washington does not allow credit for time served on other sentences"). In other words, if a defendant is in custody on another matter, he is not entitled to credit for time served because he is not serving time on the matter to be sentenced.

Second, in order to receive credit for presentence confinement, the time in custody must be solely on the offense being sentenced. Davis, 69 Wn. App. at 641 (a defendant being held prior to trial, but also being held on a sentence from another matter is not entitled to credit for time served); State v. Williams, 59 Wn. App. 379, 796 P.2d 1301 (1990) (a defendant does not get credit for time served pending trial when he is also being held for a parole violation).

For the first time on appeal, the defendant now contends that he was held in custody in Canada solely in regards to his convictions in Washington and thus the court was required to give him credit for time served. However, before the trial court, the defendant conceded this was not true. In no uncertain terms,

defendant counsel told the court that because the defendant was "not a citizen of Canada, he was apprehended on an immigration hold. He was held in immigration custody from June of 2005 until August of 2006...because there was a pending asylum application."

RP 3.

This issue is waived because the defendant never raised a claim that RCW 9.94A.505(6) applied to his case.<sup>4</sup> A party may only assign error in the appellate court on the specific ground made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985), cert. denied, 475 U.S. 1020 (1986). The scope of review is limited to the trial court's exercise of its discretion in deciding the issues that were raised by the motion. State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002).

However, even if this Court were to consider the argument that RCW 9.94A.505(6) applies to his case, his argument fails.

First, the defendant calls this a case of first impression. It is not. The law is quite clear; a defendant must be in custody on the

---

<sup>4</sup> On appeal, the defendant cites to RCW 9.94A.505. The provision in place at the time of the commission of his crime was RCW 9.94A.120, recodified as RCW 9.94A.505 by Laws 2001, ch. 10, § 6. The substance of the provisions are the same.

matter being sentenced and he must be in custody solely on that matter. The interpretation of the statute is not in dispute.

Second, the defendant's issue statement in which he claims this case is a case of first impression presents a scenario that is not before this Court. In claiming this is a case of first impression, the defendant claims the issue is "whether a defendant should be granted credit for time served in detention while challenging deportation from Canada to face criminal charges in Washington State." Def. br. at 6. Both legally and factually, this is not a correct statement.

The warrant issued in Washington for the defendant's arrest was not executed in Canada, nor could it be. The defendant admitted, and the documents show, there were no requests by Washington authorities to extradite the defendant. CP 91 ("the Minister is not aware of any requests for an Order for Extradition from the United States of America or other authority"); CP 84 ("the State...did not seek his extradition from Canada"). In fact, the defendant cites to no authority that shows the warrant issued by a King County Superior Court was enforceable in Canada. The

defendant was not fighting any Washington State attempt to have him removed from Canada; he was fighting Canadian authorities attempt to deport him for violations of Canada's immigration laws.

Third, the defendant seems to argue--without citation to any legal authority--that although there was no legal authority emanating from Washington allowing for the holding of the defendant in custody in Canada--and thus he could not be serving time on his Washington conviction, there was some sort of *de facto* Washington authority by which Canadian authorities were holding the defendant in custody. But this legal proposition is in contrast to the plain language of statute and the defendant provides no legal support for his claim. This court need not consider arguments that are not developed in the briefs and for which a party has not cited authority. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(5). Where no authority is cited in support of a proposition, the court is not required to search out authority, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error

presented are well taken. State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978), (citing DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986) (bare allegations unsupported by citation to authority, or persuasive reasoning cannot sustain the defendant's burden).

Finally, the defendant's factual claim that he was held by Canadian authorities solely on his Washington State criminal matter is not supported by the record he has provided--and is contrary to the position he took before the trial court.

The defendant's trial counsel told the court he obtained several hundred pages of documents regarding the defendant's detention in Canada. CP 85. Of the hundreds of pages of documents he received, counsel provided the court with but eight redacted pages; none of which included a single order from Canadian authorities indicating the defendant's immigration status or reason he was being held.

Now on appeal, instead of relying upon actual evidence, the defendant wants this Court to assume that but for the warrant for his arrest issued by a King County Superior Court judge, the

defendant would not have been held in custody in Canada. It is the defendant's burden to perfect the record so that the court has before it all of the evidence relevant to the issue. State v. Rienks, 46 Wn. App. 537, 544, 731 P.2d 1116 (1987). Matters not in the record will not be considered by the court on appeal. State v. Rienks, 46 Wn. App. 537, 544, 731 P.2d 1116 (1987).

The defendant is not a citizen of Canada and he does not assert that he had any legal right to be in Canada. In fact, prior to the time period in question, according to the defendant's own evidence, he had been arrested for being in Canada illegally, he was released pending a hearing, he failed to abide by the conditions of his release, and he fled the country. CP 93-94.

The defendant wants this Court to assume--without supporting documentation--that his subsequent detention by Canadian authorities was based solely on a question of whether he would be deported to face criminal charges in Washington. However, he ignores the fact that he had applied for asylum, and that he may already have been subject to an order for removal for his prior illegal entry into Canada. See Immigration and Refugee Protection Act, S.C., ch. 27, § 47-49.

The defendant also wants this Court to assume that Canadian authorities did not hold the defendant in custody based on a belief that he was dangerous or that he would not appear for any future immigration hearing. Again, because the defendant has failed to provide documents showing the reasons for his detention, he must rely on pure speculation. Further, considering the documents he has provided show he previously was released from Canadian authorities on conditions that he failed to follow, and that on another occasion he escaped from the Canadian immigration authorities, the speculative conclusion the defendant wants this Court to draw is not supported by the evidence. In addition, the defendant's criminal history would have shown Canadian authorities that the defendant is a drug dealer who had committed armed violent offenses, certainly valid reasons for Canadian authorities to find the defendant was potentially dangerous.

In short, the defendant cannot provide concrete answers to two questions he must prove to support his theory. First, he cannot prove that but for the Washington State warrant for his arrest, he would not have been held in custody in Canada. Second, he

cannot show Canadian authorities held him solely on the Washington warrant. Absent proof of these two questions, the defendant's argument fails.

The defendant has failed to prove that the trial court was *required* to award him credit against his sentence for time held in custody on an immigration matter in Canada. The trial court exercised its discretion and refused to award credit for time the defendant spent in custody in Canada, as the court stated, "on unrelated matters." CP 97. Besides arguing the court applied the wrong legal standard, the defendant does not otherwise argue the court abused its discretion.

If the defendant were to challenge the court's exercise of discretion, to prevail on appeal, he would have to prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Considering the defendant's history of fleeing and blatant attempt to avoid justice after being convicted, he cannot show the trial court abused its discretion. As the trial court asked defense counsel, "What has he done in terms of his attendance and responsibility in this matter to merit discretion in his favor?"

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the trial court's decision to deny the defendant's request that he receive credit for time he spent in custody in Canada on an immigration hold.

DATED this 3 day of <sup>December</sup>~~November~~, 2009.

Respectfully submitted,

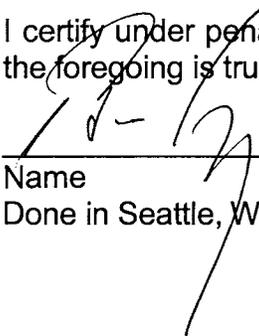
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

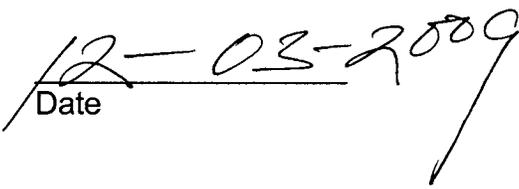
By: DJ McCurdy  
DENNIS J. McCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 Harlan Dorfman, 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. HARRIS, Cause No. 63498-4-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.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

  
\_\_\_\_\_  
Date