

64062-3

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NO. 64062-3

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARK D. PETERSON,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita Farris

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

The period of probation permitted on a gross misdemeanor sentenced in superior court is limited to two years and the court's inherent power to toll this period is limited to circumstances where the probationer is not subject to the jurisdiction of the court. The court here, however, merely sentenced two offenses simultaneously and nothing on Mr. Peterson's part constituted a "default," permitting tolling of the probationary period. As a result, the superior court was without authority to impose the balance of the suspended sentence four years after it was imposed.

B. ASSIGNMENTS OF ERROR.

The superior court exceeded its inherent and statutory authority by revoking a previously suspended misdemeanor sentence more than two years after the sentence was imposed.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

The authority of the superior court in imposing a suspended sentence and probation on a misdemeanor is proscribed by RCW 9.95.210, which provides in part that

(1) In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it

shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

(Emphasis added.) Where Mr. Peterson was sentenced in 2005, and 180 days of that sentence was suspended pursuant to RCW 9.92.060, did the sentencing court retain the authority to impose the remainder of the suspended sentence in 2009?

D. STATEMENT OF THE CASE.

Mark Peterson was sentenced in May 2005. 5/17/05RP. On Count One, the felony offense of indecent liberties (RCW 9A.44.100), the court imposed 77 months in prison, to be served concurrently with the sentence in Count Two, the gross misdemeanor of attempted third degree child molestation in the third degree (RCW 9A.28.020). CP 23-41. The sentence for the gross misdemeanor called for 365 days in jail with credit for 185 days already served and 180 days suspended, along with a 24 month term of probation.¹ CP 23-24.

After having served the confinement portion of his sentence, Mr. Peterson was alleged to have violated the conditions of his sentence on April 22, 2009. CP 21. For the violation of the

¹ Although not discussed at the sentencing hearing, the judgment and sentence form included the following language, "Probation is tolled during any time the defendant is in custody." CP 24; 5/17/05 RP 7-17.

conditions of his community custody on the felony Mr. Peterson was administratively sentenced to 360 days confinement. 7/31/09 RP 8.

Thereafter, on July 31, 2009, a hearing was held at which the prosecutor separately sought the revocation of the 180 day suspended sentence on the gross misdemeanor sentenced in 2005. 7/31/09RP 3. Mr. Peterson objected to the inequity of imposing further confinement in light of the DOC sanction. 7/31/09RP 4-5. Unmoved, Judge Farris imposed the remainder of the sentence she had suspended in 2005. 7/31/09RP 8.

Mr. Peterson timely appealed the court's ruling. CP 4-9; 7/31/09RP 9.

E. ARGUMENT.

THE SENTENCING COURT DID NOT RETAIN THE
AUTHORITY TO REVOKE ITS 2005 SENTENCE
MORE THAN TWO YEARS AFTER IMPOSING THE
SENTENCE

1. The sentencing authority of the superior court is defined by the legislature and limited to two years. The superior court does not have inherent authority to suspend or defer a sentence. State v. Bird, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (juvenile court had statutory power to suspend juvenile commitments). As a result, the

power to suspend or defer a sentence may only be granted by the Legislature. State ex rel Woodhouse, v. Dore, 69 Wn.2d 64, 69, 416 P.2d 670 (1966) (power to defer imposition of sentence in criminal cases was not conferred upon justice of the peace courts by statute that granted to municipal courts the power to defer sentencing.).

The probation power of superior courts is found in RCW 9.95.210 and RCW 9.95.230. These statutes give the superior court the power to defer or suspend certain sentences and grant probation for the longer of two years or the statutory maximum sentence, as well as the power to modify or revoke probation. City of Spokane v. Marquette, 146 Wn.2d 124, 129-30, 43 P.3d 502 (2002).² The superior court's revocation of Mr. Peterson's suspended sentence four years after it was imposed fell far beyond the authority granted it by the Legislature.

2. The sentencing court did not have the power to toll the probationary period. Even where statutes limit a court's probation power, judicial construction may permit tolling where the probationer is not subject to the jurisdiction of the court. City of

² Jurisdiction is a question of law reviewed de novo. Id.

Spokane v. Marquette, 146 Wn.2d at 130. Courts have concluded that to give full effect to the legislative intent underlying these probation statutes, it should not count time during which the probationer is not subject to supervision. Id.

This rule has traditionally been applied to circumstances where the probationer has fled the jurisdiction. See e.g. State v. Haugen, 22 Wn.App. 785, 591 P.2d 1218 (1979) (defendant's probation tolled when he fled to California). Similarly, when the defendant is on warrant status and not subject to the court's supervision, and its rehabilitative effects, the probation period is tolled. Gillespie v. State, 17 Wn.App. 363, 366-67, 563 P.2d 1272 (1977).

The rule our Supreme Court has distilled from these cases is that "[t]olling is only triggered by the defendant's default." City of Spokane v. Marquette, 146 Wn.2d at 132. The Court found support for this rule in the federal tolling rule which holds, "a probationer can not obtain credit against the [probationary] period for any period of time during which he was not, in fact, under probationary supervision by virtue of his own wrongful act." Id. at

132-33, quoting United States v. Workman, 617 F.2d 48, 51 (4th Cir. 1980).³

Although the Court describes the federal rule as tolling a probationer's time "while in jail on another charge or outside the court's jurisdiction" this presupposes the defendant's default after the sentence was imposed. City of Spokane v. Marquette, 146 Wn.2d at 133 ("It would be absurd to allow a probationer unilaterally to undermine the courts statutory authority.") It does not contemplate a circumstance such as this one where the two offenses were sentenced at the same time, by the same judge, and ordered to be served concurrently. Instead, tolling is limited to circumstances in which the probationer affirmatively seeks "to avoid the terms of probation by ignoring the court's authority." Id. at 134.

3. A broader rule tolling whenever the probationer is in custody is inconsistent with Washington law. While the logic of developing exceptions to the jurisdiction limits based on tolling may be apparent, efforts to expand the exceptions to cover any period of confinement are contrary to the principles underlying the statute and the rule. Division Three of the Court of Appeals has noted that

³ See also United States v. Martin, 786 F.2d 974 (10th Cir. 1986); Nichols v. United States, 527 F.2d 1160, 1162 (9th Cir. 1976) (issuance of a bench warrant

a “defendant’s suspended sentence probationary period is tolled where the defendant, voluntarily or because of wrongdoing, is not subject to the court’s control and probation supervision.” State v. Robinson, 142 Wn.App. 649, 653, 175 P.3d 1136 (2008). The court went on to assert in dicta, however, that “[t]his includes the time a defendant is on appeal, on warrant status, in prison, or outside the jurisdiction in violation of probation terms.” Id., (emphasis added) citing Marquette, supra, State v. Mahoney, 36 Wn.App. 499, 675 P.2d 628 (1984), and State v. Campbell, 95 Wn.2d 954, 957, 632 P.2d 517 (1981). The cases cited, however, do not support such a broad expansion of the tolling power.

As noted already, Marquette carved out a narrow exception for circumstances where the probationer affirmatively sought to ignore or avoid the court’s authority. In State v. Mahoney, the court held the probationary period was tolled while the case was on appeal because under former RCW 9.95.062 and RAP 7.2(f), once appeal was taken from a conviction execution of the judgment was stayed and the defendant was subject to release. 36 Wn.App. at

tolled the probationary period).

501. Certainly no such provision was in place here because Mr. Peterson was ordered to serve his sentence immediately. CP 23.

In Campbell, probation was also tolled while the defendant was committed to a mental institution. 95 Wn.2d at 957. This decision was based upon the premise that the defendant was not amenable to process while his competency was being established. On the other hand, nothing precluded enforcement of the probation conditions Judge Farris imposed upon Mr. Peterson including the direction that he commit no law violations, have no contact with the victim, and submit to HIV/AIDS testing. CP 24.

Campbell in turn relied on United States v. Gerson, 192 F.Supp. 864 (E.D.Tenn.1961) (where defendant was sentenced to federal probation term, but then removed to serve a state prison sentence, federal probation was tolled), *affirmed*, 302 F.2d 430 (6th Cir. 1962) and People v. Davidson, 25 Cal.App.3d 79, 101 Cal.Rptr. 494 (1972) (at appellant's request sentencing court adjourned all criminal proceedings and initiated a narcotic commitment procedure pursuant to section 3051, tolling probation). Neither of these cases provide support for expanding the common law tolling rules to circumstances where the unavailability of the

result of the same judge's ordering Mr. Peterson to serve two sentences concurrently.

Washington cases that previously addressed circumstances where the probationer was out of the jurisdiction contrary to the terms of probation, State v. Frazier, 20 Wn.App. 332, 334, 579 P.2d 1357 (1978); Gillespie v. State, 17 Wn.App. 363, 563 P.2d 1272 (1977), illustrate the harm the rule was intended to address. The public policy underlying these decisions is essentially that once the probationer is committed to another facility beyond the sentencing court's authority or otherwise out of the jurisdiction, he or she is not subject to the probationary supervision of the court. These decisions cannot be read to grant the superior court plenary authority to extend its jurisdiction by stacking a probationary period on top of a concurrently imposed sentence.

4. Imposition of the remainder of the sentence was without authority of law. The statutory limits placed on the superior court's probationary jurisdiction by RCW 9.92.060(1) and RCW 9.95.210(1) are clear and specific. They expressly limit the authority of the superior court to a period "not exceeding the maximum term of sentence or two years...." RCW 9.95.210(1). Where courts act beyond the authority granted by statute, their

actions are void. State ex re. Schock v. Barnett, 42 Wn.2d 929, 931, 259 P.2d 404 (1953); State v. Hall, 35 Wn.App. 302, 305, 666 P.2d 930 (1983).

As the Court has explained, in judicial interpretation of statutes, “the first rule is the court should assume that the legislature means exactly what it says.” State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995). In light of the plain language, this Court should find the jurisdiction of the superior court expired in 2007 pursuant to the two year limit explicitly provide in the statute.

In the absence of authority to extend the probationary period, the superior court’s revocation of the remainder of the suspended sentence was invalid and void.

5. Waiver does not limit Mr. Peterson’s right to relief.

Neither the courts, nor the parties, can provide the sentencing court with authority to act where it is contrary to the specific direction of the Legislature. State v. Hughes, 154 Wn.2d 118, 151-21, 11 P.3d 192 (2005); State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980). A defendant “cannot empower a sentencing court to exceed its statutory authorizations.” In re Matter of PRP of West, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005). As the West court reiterated,

“waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence.” 154 Wn.2d at 213.

Neither the failure to object to the tolling provision written into the judgment and sentence in 2005, nor the lack of a specific objection to the sentencing court’s lack of jurisdiction in 2009, can serve to give that court authority which has not been provided by the Legislature.

F. CONCLUSION.

The specific legislative directives limiting the probationary power of the superior court to two years from the date of sentence served to deprive the court of the authority to revoke the remainder of the suspended sentence four years after sentencing and common law tolling rules do not apply.

DATED this 29th day of January 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)
)
 Respondent,)
)
)
 MARK PETERSON,)
)
)
 Appellant.)

NO. 64062-3-I

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 29 PM 4:53

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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