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66262-7

NO. 66262-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHRISTINA DRESS aka CHRISTINA LARCOM,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR3

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3

IV. STATEMENT OF THE CASE4

V. STANDARD OF REVIEW.....8

VI. ARGUMENT8

A. The Snohomish County Superior Court Had No
Jurisdiction To Issue A Writ Of Mandamus For An
Inmate In Pierce County8

B. Dress Cannot Receive A Writ Of Mandamus Because
She Already Has An Adequate Remedy: A PRP.....11

C. A Writ Of Mandamus Cannot Be Used To Compel DOC
To Perform An Act That Is Contrary To Law13

D. A Writ Of Mandamus Cannot Be Used To Compel DOC
To Perform An Act That Involves Discretion.....14

E. Dress Cannot Receive The Equitable Relief Of
Concurrent Sentences Because It Would Violate The
Statute16

F. The Trial Court Incorrectly Believed DOC Was Barred
From Correcting An Inmate’s Sentence Structure.....20

G. The Court Should Hold That Dress Cannot Receive
Credit Toward Her Prison Term For The Time That She
Spent Out Of Prison.....21

VII. CONCLUSION21

TABLE OF AUTHORITIES

Cases

<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	15
<i>Burd v. Clarke</i> , 152 Wn. App. 970, 219 P.3d 950 (2009).....	13
<i>Cedar Cnty. Comm. v. Munro</i> , 134 Wn.2d 377, 950 P.2d 446 (1998).....	15
<i>City of Olympia v. Thurston Cty. Bd. of Comm'rs.</i> , 131 Wn. App. 85, 125 P.3d 997 (2005).....	12
<i>City of Seattle v. Williams</i> , 101 Wn.2d 445, 680 P.2d 1051 (1984).....	12
<i>Council of County & City Employees v. Hahn</i> , 151 Wn.2d 163, 86 P.3d 774 (2004).....	11
<i>Gerberding v. Munro</i> , 134 Wn.2d 188, 949 P.2d 1366 (1998).....	15
<i>Heavey v. Murphy</i> , 138 Wn.2d 800, 982 P.2d 611 (1999).....	15
<i>In re Crowder</i> , 97 Wn. App. 598, 985 P.2d 944 (1999).....	20
<i>In re Lopez</i> , 126 Wn. App. 891, 110 P.3d 764, (2005).....	20
<i>In re Marriage of Buchanan</i> , 150 Wn. App. 730, 207 P.3d 478 (2009).....	17
<i>In re Mattson</i> , 166 Wn.2d 730, ¶ 17, 214 P.3d 141 (2009).....	20

<i>In re Pullman</i> , 167 Wn.2d 205 P.3d 913 (2009).....	21
<i>In re Smith</i> , 139 Wn.2d 199, 986 P.2d 131 (1999).....	9, 10
<i>In re Tran</i> , 154 Wn.2d 323, 111 P.3d 1168 (2005).....	12
<i>Longview Fibre Co. v. Cowlitz County</i> , 114 Wn.2d 691, 790 P.2d 149 (1990).....	16
<i>Malyon v. Pierce County</i> , 131 Wn.2d 779, 935 P.2d 1272 (1997).....	9
<i>State ex rel. Clark v. City of Seattle</i> , 137 Wash. 455, 242 P. 966 (1926)	15
<i>State v. Barber</i> , __ Wn.2d __, __ P.3d __, 2011 WL 172088, *10, ¶ 37 (2011).....	14
<i>State v. Bunker</i> , 169 Wn.2d 571, 238 P.3d 487 (2010).....	9
<i>State v. Codiga</i> , 162 Wn. 2d 912, ¶ 27, 175 P.3d 1082 (2008).....	18
<i>State v. Epler</i> , 93 Wn. App. 520, 969 P.2d 498 (1999).....	8, 10
<i>State v. Mollichi</i> , 132 Wn.2d 80, 936 P.2d 408 (1997).....	18
<i>State v. Wilson</i> , 102 Wn. App. 161 P.3d 637 (2000).....	17
<i>Toliver v. Olsen</i> , 109 Wn.2d 607, 746 P.2d 809 (1987).....	12
<i>Town Concrete Pipe of Washington, Inc. v. Redford</i> , 43 Wn. App. 493, 717 P.2d 1384 (1986).....	16

<i>Washington State Farm Bureau Fed'n v. Reed</i> , 154 Wn.2d 668, 115 P.3d 301 (2005).....	15
<i>Washington State Labor Council v. Reed</i> , 149 Wn.2d 48 P.3d 1203 (2003).....	15

Statutes

RCW 9.94A.441.....	17
RCW 9.94A.589.....	4
RCW 9.94A.589(2).....	4
RCW 9.94A.589(2)(a)	passim
RCW 9.94A.728(2).....	20
RCW 9.95.100.....	20

Rules

RAP 16.2(a)	13
RAP 16.3 - 16.15	12

Constitutional Provisions

Wash. Const., art. IV, § 6.....	11
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I. INTRODUCTION

The superior court acted beyond its jurisdiction when it ordered the Department of Corrections (DOC) to administer an ambiguous judgment and sentence in a manner contrary to statute. The Snohomish County Superior Court issued a writ of mandamus directing the DOC to run Christina Dress's Snohomish County sentence concurrent to her revoked King County Drug Offender Sentencing Alternative (DOSA) sentence. This order violates RCW 9.94A.589(2)(a), which requires the sentences to run consecutively.

At sentencing, Dress failed to disclose to the superior court that she committed her Snohomish County crime while serving the King County DOSA. In contrast, the DOC did not remain silent on that issue. As soon as the DOC discovered there was a problem with the concurrency statement in the judgment and sentence, it twice wrote to the court and all parties about it. But nobody took the time to respond; Dress (and her defense attorney) continued to remain silent, perhaps believing she would profit from inaction.

Four years later, in 2010, as with all inmates about to be released, the DOC performed a routine audit of Dress's sentence structure to make sure her release date was correctly calculated. At that time, the DOC discovered that the problem regarding concurrency still existed. Because

the clause in the sentence regarding concurrency was ambiguous, however, the DOC used its discretion to interpret the ambiguity in a way that is the most consistent with what the law requires, which is consecutiveness. This caused Dress's early release date to move ahead significantly.

In response, Dress filed a motion in the superior court accusing the DOC of allegedly violating the judgment and sentence. She convinced the Snohomish County Superior Court to order the DOC to release her almost ten months earlier than her actual early release date. In this way, she profited from her lack of full disclosure at sentencing and from her silence when DOC alerted the parties and the court to the problem soon after sentencing.

When the superior court ordered the DOC to run the sentences concurrently and release Dress immediately, its order was beyond its constitutional jurisdiction. The Washington Constitution, article IV, section 6, grants superior courts the authority to issue a writ of mandamus only to inmates in "actual custody" in the superior court's county. Dress was not in actual custody in Snohomish County. She was in prison in Pierce County. Thus, the Snohomish County Superior Court had no jurisdiction to issue a writ of mandamus in her case.

II. ASSIGNMENTS OF ERROR

1. The superior court erred when it issued a writ of mandamus to an inmate not in actual custody in that county, exceeding its authority under article IV, section 6 of the Washington Constitution.

2. The superior court erred when it used a writ of mandamus to order a discretionary act by the DOC, for which mandamus is unavailable.

3. The superior court erred when it used a writ of mandamus to compel DOC to administer a sentence in a way that violates RCW 9.94A.589.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Snohomish County Superior Court lack jurisdiction under article IV, section 6 of the Washington Constitution to issue a writ of mandamus to an inmate not in actual custody in Snohomish County?

2. Was the extraordinary relief of a writ of mandamus not warranted in Dress's case because she already had an adequate remedy at law in the form of an emergency personal restraint petition?

3. Where a writ of mandamus is available only to force a state officer to undertake a mandatory ministerial duty, was it inapplicable where the DOC had discretion to interpret an ambiguous clause in Dress's judgment and sentence so that it complies with statutory requirements?

4. Is the equitable relief of concurrent sentences unavailable to Dress, where such equitable relief would be contrary to statute?

IV. STATEMENT OF THE CASE

This case arises from a dispute over the DOC's interpretation of boilerplate language in Dress's Snohomish County judgment and sentence. The clause at issue states: "The sentence herein shall run . . . concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589." CP 20 (Response of DOC, at page 6 of Exhibit 1). RCW 9.94A.589(2)(a) requires Dress's Snohomish County sentence to run consecutively to a 2002 King County DOSA sentence that she was serving when she committed her Snohomish County crime.¹ See CP 53 (Response of DOC, at page 21 of Exhibit 3) (showing supervision intake date of January 14, 2004, for King County Cause No. 02-1-04273-9, and supervision termination date of February 25, 2006); CP

¹ RCW 9.94A.589(2) provides as follows:

(a) Except as provided in (b) of this subsection, 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.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

For the Court's convenience, a copy of RCW 9.94A.589 is attached in the Appendix.

15 (Response of DOC, at page 1 of Exhibit 1) (showing date of Snohomish County crime of February 12, 2006). Because the clause in the Snohomish County judgment and sentence cites RCW 9.94A.589, the DOC understands the clause to mean: “this sentence herein shall run concurrently to any other felony cause not referred to in this Judgment, *or consecutively as otherwise provided by RCW 9.94A.589.*” CP 106 (Response of DOC, at page 2 of Exhibit 9).

During sentencing in 2006 after a conviction by guilty plea, the Snohomish County Superior Court stated that it was not going to give Dress any breaks because her lengthy criminal history created an issue of public safety. CP 94 & 99 (Response of DOC, at pages 5 & 10 of Exhibit 7). Her defense attorney also conceded that her offender score was “astronomical.” CP 97 (Response of DOC, at page 8 of Exhibit 7). However, at the time of sentencing, Dress failed to inform the sentencing court that she committed her crime while serving a 2002 King County DOSA sentence. CP 93-97 (Response of DOC, at pages 4-8 of Exhibit 7). The fact that she committed her crime while serving another sentence meant that any confinement time for the two sentences had to run consecutively under RCW 9.94A.589(2)(a).

When the DOC received Dress shortly after sentencing, it noticed the clause in the judgment and sentence stating, “The sentence herein

shall run . . . concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.” Unlike Dress, the DOC did not remain silent on that issue. As soon as the DOC discovered it, the DOC wrote to the court and all parties. CP 140-141 (Petition of Dress, at Appendix B). After not hearing from anyone, three months later the DOC again wrote to the court and all parties. CP 143-144 (Petition of Dress, at Appendix C). But nobody took the time to respond; Dress (and her defense attorney) continued to remain silent, perhaps believing it was to her advantage not to draw anymore attention to the problem.

Four years later, in 2010, as with all inmates about to be released, the DOC performed a routine audit of Dress’s sentence structure to make sure her early release date was correct. At that time, the DOC discovered that the problem regarding concurrency still existed. Because the clause in the sentence regarding concurrency was ambiguous, the DOC used its discretion to interpret the ambiguity in a way that is the most consistent with what the law requires, which is consecutiveness. This caused Dress’s early release date to move out eleven months. CP 104 (Response of DOC, at Exhibit 8, upper left) (“ERD: 09/10/2011”), and in the chrono text (showing early release date of 10/21/2010 before the change). Her maximum expiration date became June 25, 2014. CP 33 (Response of

DOC, at page 1 of Exhibit 3) (“Prison Max Expiration Date”), where it previously was approximately February 4, 2013.²

In response, Dress filed a CrR 7.8 motion in the Snohomish County Superior Court under her criminal cause, asking the court to order the DOC to run her sentences concurrently. *See* CP 105 (Response of DOC, at Exhibit 9). Because the DOC is not a party to the criminal cause, it responded only by letter. *Id.* The court denied Dress’s petition for lack of jurisdiction over the DOC under the criminal cause. *See* CP 4 (Response of DOC, at 4). Dress did not file a personal restraint petition to contest the DOC’s administration of her sentence. Instead, she then filed a petition for writ of mandamus in Snohomish County Superior Court. CP 123-144 (Petition of Dress). The court granted her petition and issued the writ ordering the DOC to release her from Pierce County prison by December 23, 2010, which is almost ten months earlier than the DOC’s

² This date is arrived at by subtracting the estimated remaining DOSA time from June 25, 2014. Dress had a 36-month, 21-day DOSA community custody term and a 36-month, 21-day DOSA prison term prior to revocation. CP 29 (Response of DOC, at page 4 of Exhibit 2) (showing 36.75-month community custody term); CP 46 (Response of DOC, at page 14 of Exhibit 3) (showing confinement length for cause AM of “3Y 0M, 21D”). At the time her DOSA was revoked, based on a rough estimate, she had successfully served about 20 months of her DOSA community custody term, while about five additional months were tolled due to failure to report or to time in jail on violation sanctions. *See* CP 53 (Response of DOC, at page 21 of Exhibit 3) (showing supervision activity for the King County DOSA). Subtracting credit for 20 months from her 36 months and 21 days to serve upon revocation leaves 16 months and 21 days to serve after revocation. Subtracting that from her June 25, 2016, prison maximum expiration date results in an approximation of what the prison maximum expiration date would have been when DOC was running her DOSA revocation time concurrently with her Snohomish County time.

calculation of Dress's early release date of September 10, 2011. CP 119-120 (Order and Writ of Mandamus); CP 33 (Response of DOC, at page 1 of Exhibit 3) (showing "ERD," upper left).

The DOC complied with the writ. As a result, Dress is no longer in prison. She is not being supervised, either.

V. STANDARD OF REVIEW

The superior court's decision to issue a writ under article IV, section 6 of the Washington Constitution, including a writ of mandamus, is reviewed de novo. *See State v. Epler*, 93 Wn. App. 520, 523, 969 P.2d 498 (1999).

VI. ARGUMENT

A. **The Snohomish County Superior Court Had No Jurisdiction To Issue A Writ Of Mandamus For An Inmate In Pierce County**

Article IV, section 6 of the Washington Constitution grants superior courts the authority to issue the writ of mandamus, but they are granted jurisdiction only over petitions by inmates in "actual custody" in the court's county:

Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, *on petition by or on behalf of any person in actual custody in their respective counties.*

Id. (emphasis added).

When Dress filed her petition for a writ of mandamus, she was in custody at the Washington Corrections Center for Women in Pierce County. CP 33 (Response of DOC, at page 1 of Exhibit 3), upper right (“Location: WCCW”). She was not in “actual custody” in Snohomish County. The Snohomish County Superior Court therefore did not have jurisdiction over Dress when she was imprisoned in Pierce County, and the court’s issuance of the writ of mandamus was in error.

The superior court disregarded the rules of statutory construction, which are used in interpreting constitutional provisions. *See Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997) (appropriate constitutional analysis considers the grammatical relationship of the words used). One such grammar rule is the “last antecedent” rule of statutory construction, which states that “qualifying or modifying words and phrases refer to the last antecedent.” *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). *Accord In re Smith*, 139 Wn.2d 199, 204, 986 P.2d 131 (1999). A corollary to the rule, however, is that “the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one.” *Bunker*, 169 Wn.2d at 578; *Smith*, 139 Wn.2d at 204 (internal quotations omitted). Courts do not apply the rule or the corollary where a contrary intent appears, *Bunker*, 169 Wn.2d at 578, or where doing so would result

in an interpretation that is “forced, unlikely, or strained.” *Smith*, 139 Wn.2d at 204.

Article IV, section 6 places the qualifying phrase “on petition by or on behalf of any person in actual custody in their respective counties” after a comma. Applying the corollary rule above, that phrase therefore modifies the series of writs listed before the comma: “writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus.” There is no language in article IV, section evidencing any contrary intent. The superior court’s construction to the contrary disregarded this canon of statutory construction, resulting in a forced construction that is incorrect and also that is contrary to common sense.

The superior court’s construction also at odds with *State v. Epler*, 93 Wn. App. 520, 969 P.2d 498 (1999), which understood that the “actual custody” qualifier in the constitutional clause applies not just to habeas actions but to all antecedent actions listed in the clause—in that case, a writ of review. As the *Epler* Court explained, “[w]rits are of two varieties: the constitutional common law writ and the statutory writ.” *Epler*, 93 Wn. App. at 523. “The Washington Constitution empowers the superior court to issue a writ of review on a petition by a person in actual custody, and other appellate power as prescribed by statute.” *Id.*, citing Wash. Const.,

art. IV, § 6. If a person is not in actual custody, the writ that applies is a statutory writ. *Id.*

In Dress's case, because she was in actual custody, the writ that applied was the constitutional writ. And because she was in prison in Pierce County, only the Pierce County Superior Court had jurisdiction to issue a writ of mandamus. Snohomish County did not have such jurisdiction because she was not in prison in Snohomish County. The Snohomish County Court therefore acted outside its authority.

B. Dress Cannot Receive A Writ Of Mandamus Because She Already Has An Adequate Remedy: A PRP

Dress filed her petition for an extraordinary writ to compel the DOC to run her sentences concurrently. But extraordinary relief is not warranted in her case because she has an adequate remedy at law: a personal restraint petition.

The court "will not grant a writ of mandamus if there is a plain, speedy, and adequate remedy at law." *Council of County & City Employees v. Hahn*, 151 Wn.2d 163, 167, 86 P.3d 774 (2004). The existence of an adequate remedy merely requires that there be a process by which the plaintiff may seek redress for the allegedly unlawful action. *Id.* at 170 (union had adequate remedy under Public Employees Collective Bargaining Act); *City of Seattle v. Williams*, 101 Wn.2d 445, 455-56, 680

P.2d 1051 (1984) (existence of RALJ appeal provided adequate remedy). “A remedy may be adequate even if attended with delay, expense, annoyance, or some hardship.” *City of Olympia v. Thurston Cty. Bd. of Comm’rs.*, 131 Wn. App. 85, 96, 125 P.3d 997 (2005). For a remedy to be inadequate, “[t]here must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress afforded without issuance of the writ.” *Id.* at 96.

Dress has an adequate remedy available to her in the form of a personal restraint petition under RAP 16.3 - 16.15 which provides a defendant the right to collaterally attack the DOC’s administration of a sentence. *See* RAP 16.3 - 16.15. Post-conviction review is now a well established part of this state’s criminal process. *Toliver v. Olsen*, 109 Wn.2d 607, 610, 746 P.2d 809 (1987). The post-conviction relief rules were adopted in order to provide a “single unitary post-conviction remedy” called a personal restrain petition. *Id.*, 109 Wn.2d at 610-11 (internal quotations omitted).

Personal restraint petitions are a customary vehicle for challenging Department of Corrections’ administrations of sentences. *See, e.g., In re Tran*, 154 Wn.2d 323, 111 P.3d 1168 (2005). If Dress seeks exceptionally speedy relief, she can file a motion for accelerated review with her personal restraint petition. For this reason, she has failed to meet her

burden of showing the lack of a plain, speedy, and adequate remedy, and the extraordinary writ is not available to Dress.

C. A Writ Of Mandamus Cannot Be Used To Compel DOC To Perform An Act That Is Contrary To Law

The superior court's order on writ of mandamus required the DOC to release Dress by December 23, 2010, essentially compelling the DOC to run Dress's sentences concurrently in violation of RCW 9.94A.589(2)(a). But this is beyond the power of a writ of mandamus. Instead, mandamus can only be used to compel DOC to do something it was already required to do by statute. "The superior court or our Supreme Court may issue a writ of mandamus to compel a state official to perform an act the law clearly requires as part of the official's duties." *Burd v. Clarke*, 152 Wn. App. 970, 972, 219 P.3d 950 (2009) (citing RAP 16.2(a) (upholding dismissal of petition for writ of mandamus to compel DOC to complete inmate's dangerous mentally ill offender assessment, where inmate was no longer in DOC's custody).

The DOC was under no mandatory statutory duty to run Dress's sentences concurrently. Neither did the clause in her Snohomish County judgment and sentence impose a clear direction; that clause was ambiguous at best. Even if a clause in a judgment and sentence could have created a duty to administer a sentence illegally, which DOC strongly

disputes, the clause in Dress’s sentence did not create such a duty. *Cf. State v. Barber*, __ Wn.2d __, __ P.3d __, 2011 WL 172088, *10, ¶ 37 (2011) (“the primary purposes for enacting the SRA [Sentencing Reform Act, chapter 9.94A RCW] were ‘to . . . make sentencing more dependent upon the crime committed and criminal history of the offender,’ Requiring the courts to enforce illegal sentences seriously undermines the goal of uniformity and consistency in sentencing that gave rise to the SRA”).

The DOC used its discretion to interpret an ambiguous clause in a judgment and sentence in a manner that complies with controlling law, RCW 9.94A.589(2)(a). It was required to exercise that discretion “within the bounds of sentencing laws.” *Cf., Barber*, 2011 WL at 11, ¶ 39. It had no duty—or authority—to interpret the ambiguity illegally. Thus, the superior court was not authorized to issue a writ of mandamus to force the DOC to interpret the ambiguity in an illegal manner.

D. A Writ Of Mandamus Cannot Be Used To Compel DOC To Perform An Act That Involves Discretion

As explained above, the DOC is mandated by statute to run the sentences consecutively in this case. The DOC lacks discretion to depart from that statutory mandate. Here, the language in Dress’s judgment and sentence is ambiguous and must be interpreted. To the extent the DOC

has discretion to interpret ambiguous language, it must do so in a manner consistent with RCW 9.94A.589(2)(a). While the correctness of DOC's interpretation may be reviewed in a personal restraint petition, its exercise of discretion is not subject to mandamus.

Mandamus is available "to compel a state officer to undertake a clear duty." *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998). "The duty to act must be imposed expressly by law, and involve no discretion." *Cedar Cnty. Comm. v. Munro*, 134 Wn.2d 377, 380-81, 950 P.2d 446 (1998) (citing *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)); *Washington State Farm Bureau Fed'n v. Reed*, 154 Wn.2d 668, 672, 115 P.3d 301 (2005). "A mandatory duty exists when a constitutional provision or statute directs a state officer to take some course of action." *Brown v. Owen*, 165 Wn.2d 706, 724-25, 206 P.3d 310 (2009) (citing *Heavey v. Murphy*, 138 Wn.2d 800, 804-05, 982 P.2d 611 (1999)) (statute providing state treasurer shall deposit certain taxes created a mandatory duty); *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 55, 65 P.3d 1203 (2003) (statute providing the secretary of state shall canvass votes and certify the results to the governor created a mandatory duty). "Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance." *Walker*, 124 Wn.2d at 408.

A writ of mandamus is not available to compel an agency's exercise of discretion. The DOC exercised its discretion in construing an ambiguous sentence to comply with the controlling statute. Dress sought mandamus to compel the DOC to exercise its discretion differently. The superior court erred in issuing a writ of mandamus as a means of directing the DOC's discretionary action.

E. Dress Cannot Receive The Equitable Relief Of Concurrent Sentences Because It Would Violate The Statute

Even if Dress seeks relief in equity, she cannot receive it because the legislature foreclosed concurrent sentences in Dress's situation. The well-settled rule is that courts "will not give relief on equitable grounds in contravention of a statutory requirement." *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990). "While equity will not suffer a wrong without a remedy, equity follows law and cannot provide a remedy where legislation expressly denies it." *Town Concrete Pipe of Washington, Inc. v. Redford*, 43 Wn. App. 493, 498, 717 P.2d 1384 (1986).

Even if one could construe the superior court's authority as one arising out of equity, its order was not lawful. Its authority to grant equitable relief is limited to relief that is not contrary to statute. Here, the superior court granted relief in violation of RCW 9.94A.589(2)(a).

Furthermore, a person seeking equity must come into court with clean hands. *In re Marriage of Buchanan*, 150 Wn. App. 730, 737, 207 P.3d 478 (2009). Dress does not have clean hands because she failed to disclose a material fact at sentencing regarding concurrency and then she remained silent when the DOC immediately pointed out the concurrency problem to her and to the court soon after sentencing and again three months later. CP 93-97 (Response of DOC, at pages 4-8 of Exhibit 7).

Both parties have a duty to disclose criminal history. Under CrR 4.7(a)(1)(vi) a prosecutor has a duty to disclose known prior criminal convictions of the defendant. This was done in this case. CP 83-84 (Response of DOC, at Appendix A to Exhibit 6). Dress's criminal history was also listed in the judgment and sentence. CP 16-17 (Response of DOC, at pages 2-3 of Exhibit 1). Under RCW 9.94A.441, both parties have a duty to disclose criminal history:

The prosecuting attorney and the defendant shall each provide the court with their understanding of what the defendant's criminal history is prior to a plea of guilty pursuant to a plea agreement. All disputed issues as to criminal history shall be decided at the sentencing hearing.

RCW 9.94A.441.

In *State v. Wilson*, 102 Wn. App. 161, 6 P.3d 637 (2000), this Court found that "just as the State must fulfill its obligations under the plea agreement, so too must a defendant be held to his or her side of the

bargain. He or she must agree to the plea based on his or her actual criminal history.” *Wilson*, 102 Wn. App. at 169. In *Wilson* the defendant acknowledged a prior VUCSA possession conviction in the plea agreement when in fact the prior conviction was a VUCSA delivery. Plea agreements are contracts. *State v. Mollichi*, 132 Wn.2d 80, 90, 936 P.2d 408 (1997); *see also State v. Codiga*, 162 Wn. 2d 912, 928, ¶ 27, 175 P.3d 1082 (2008) (defendant has statutory and contractual duty to provide accurate statement of criminal history during plea proceedings). Therefore, a failure to disclose material information would warrant a fraud analysis.

Clearly Dress knew that she was still serving the DOSA sentence for the 2002 King County conviction when she committed her 2006 crime. It is doubtful the prosecutor was aware at sentencing in 2006, or would have bothered to check, whether Dress was still serving a four-year-old sentence that is listed in the prosecutor’s criminal history as having only 36.75 months of confinement. CP 83 (Response of DOC, at Appendix A to Exhibit 6).³ Dress, more than anyone, would have known about it, though, because she was the one serving the community custody. This

³ After Dress was sentenced on the Snohomish County matter, her King County DOSA was revoked. CP 58 (Response of DOC, at page 26 of Exhibit 3) (“04/27/2006 . . . DOSA Reclassified”). It is the confinement for that revocation that must run consecutively to the Snohomish County matter. That amount is approximately 16 months.

was material to her sentence because the fact that she committed her crime while serving another sentence meant that the confinement time for the two sentences had to run consecutively under RCW 9.94A.589(2)(a).

Dress may claim that it was the DOC, not Dress, who has the unclean hands here. However, this allegation is without merit. The DOC did not delay in this case. The DOC called the problem to the attention of the court and parties in 2006 twice, and nobody did anything about it. Counsel for the DOC recognizes the potential problem with that—four years ago the DOC argued that the judgment and sentence should be fixed. The DOC's understanding in 2010 and now is that the DOC has the discretion to interpret an ambiguity in a way that is consistent with the statute.

In a standard audit of Dress's sentence structure in 2010 to ensure that her release date was correctly calculated, the DOC saw that the problem was still there and decided that the language in the judgment and sentence could be interpreted in a way that was consistent with the law. The fact remains that the DOC noticed the problem right away in 2006, commented on it twice, and nobody took the time to respond. The DOC does not have unclean hands. It was Dress who failed to uphold her responsibility to the court.

F. The Trial Court Incorrectly Believed DOC Was Barred From Correcting An Inmate's Sentence Structure

The trial court reasoned that the DOC does not have the legal authority to correct a sentence structure on the eve of an inmate's release. RP at 17. This is incorrect.⁴ Nothing in statute or case law bars DOC from ensuring that prior to the inmate's release, the DOC's original calculation of the inmate's release date is in fact correct. Likewise, there is no due process liberty interest in early release. *In re Mattson*, 166 Wn.2d 730, 740, ¶ 17, 214 P.3d 141 (2009) (interpreting former RCW 9.94A.728(2)). Rather, the statute grants offenders only the right to have DOC follow its own legitimately established procedures regarding early release into community custody. *Id.*; see also *In re Crowder*, 97 Wn. App. 598, 601, 985 P.2d 944 (1999) (finding no liberty interest in parole release decisions under RCW 9.95.100 because of the discretionary nature of the decision and statute's presumption of continued incarceration).

Also, the superior court's implied belief that some sort of equitable estoppels applies once the DOC sets a release date is also not supported by the law. See *In re Lopez*, 126 Wn. App. 891, 894-95, 110 P.3d 764, (2005) (denying inmate's equitable estoppels challenge to risk level increase that changed early release date); *In re Pullman*, 167 Wn.2d 205, 216, 218 P.3d

⁴ Dress did not raise this argument in the superior court. Rather, the superior court raised this argument sua sponte.

913 (2009) (DOC's recalculation of offender's early release date on basis of risk classification that is *always subject to change* cannot create liberty interest protected by due process where legislature has made clear none exists).

G. The Court Should Hold That Dress Cannot Receive Credit Toward Her Prison Term For The Time That She Spent Out Of Prison

If this Court reverses the superior court and orders Dress to return to prison, the DOC requests that this Court direct that upon her return to prison, she is not entitled to credit toward her prison term for the time that she was released by the superior court. This Court previously denied the DOC's motion to stay the superior court's order releasing her, reasoning that Dress would not receive credit for such time toward her prison term if the DOC prevailed in this appeal. *See* Letter Ruling by Commissioner James Verellen, dated December 17, 2010 ("Dress has conceded in open court that she will not be entitled to any credit for the time she is released if DOC prevails in this appeal.")

VII. CONCLUSION

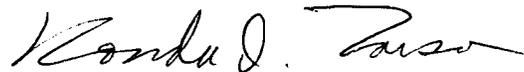
The DOC requests that the Court reverse the superior court's grant of the writ of mandamus that ordered release of Dress from prison almost ten months prior to her early release date. The DOC also requests that the

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Court direct that Dress is not entitled to credit toward her prison term for the time she spent out of prison due to the superior court's unlawful order.

RESPECTFULLY SUBMITTED this 28th day of February, 2011.

ROBERT M. MCKENNA
Attorney General



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CERTIFICATE OF SERVICE

I certify that on the date below I served a copy of the foregoing document on all parties or their counsel of record as follows:

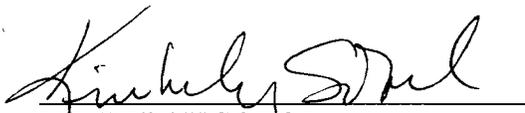
Via U.S. Mail Postage Prepaid

TO:

DAVID B. KOCH
ATTORNEY AT LAW
1908 E. MADISON ST.
SEATTLE, WA 98122

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 1st day of March, 2011 at Olympia, Washington.


KIMBERLY SOBOL
Legal Assistant

~~2011 MAR -2 AM 10:00~~