

68637-2

68637-2

NO. 68637-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BARNHILL,

Appellant.

REC'D

NOV 30 2012

King County Prosecutor
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable John Erlick, Judge
The Honorable James Cayce, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
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Seattle, WA 98122
(206) 623-2373



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A. ASSIGNMENT OF ERROR

The judgment and sentence is not sufficiently specific as to appellant's credit for time served in the Department of Corrections (DOC).

Issue Pertaining to Assignment of Error

The judgment and sentence provides that appellant is entitled to credit for time served as "determined by the King County Jail." CP 436 (condition 4.5).¹ The judgment and sentence is silent as to appellant's credit for time served in the DOC pending his first appeal and how that credit is to be determined. Where the judgment and sentence does not sufficiently specify the appellant is entitled to credit for time served in prison, is remand necessary for clarification?

B. STATEMENT OF THE CASE

In 2008 the King County prosecutor charged appellant Christopher Barnhill with two counts of communicating with a minor for immoral purposes, two counts of misdemeanor violation of a sexual assault protection order, five counts of tampering with a witness, and one count of second degree rape of a child. CP 8-12. Barnhill was found guilty as charged and imprisoned pending appeal. CP 13-26.

On appeal, several of Barnhill's convictions were dismissed and the case was remanded for a new trial on the remaining charges. CP 51-

¹ The Judgment and Sentence is attached as an appendix.

60. In 2010 the State charged Barnhill by amended information with one count each of second degree rape of a child, tampering with a witness, communicating with a minor for immoral purposes, and two counts of misdemeanor violation of a sexual assault protection order. CP 65-67. Barnhill was transferred from prison to the King County Jail to await a new trial. Supp. CP ____ (sub no. 213, Order Remanding Defendant to the Department of Adult Detention, dated 1/20/10); Supp. CP ____ (sub no. 212, Motion, Certification, and Order for Transportation of Prisoner, dated 1/7/10).

Barnhill waived his right to a jury trial. CP 195-98. The court found Barnhill guilty of second degree rape of a child. CP 432-43; 12RP ² 32. The remaining charges were dismissed. 8RP 3. The trial court imposed a standard range indeterminate sentence of 85 months to life in prison. CP 432-43; 13RP 13. The judgment and sentence provides that Barnhill is entitled to credit for time served in jail as “determined by the King County Jail.” CP 436 (condition 4.5). The judgment and sentence does not refer

² This brief refers to the verbatim report of proceedings as follows: 1RP – April 8, 20, 29, and May 4, 2012; 2RP – May 18, 19, and September 15, 2010; 3RP – October 15, 2010; 4RP – October 29, 2010; 5RP – November 8, 2010; 6RP – March 4, 2011; 7RP – April 8, 2011; 8RP – October 28, 2011; 9RP – November 17 and December 2, 2011; 10RP – January 6, 2012; 11RP – February 24, 2012; 12RP – March 2, 2012; 13RP – April 12, 2012.

to Barnhill's credit for time served in the DOC and how that credit is to be determined. Barnhill timely appeals. CP 444, 448-49.

C. ARGUMENT

THE JUDGMENT AND SENTENCE SHOULD BE REMANDED FOR CLARIFICATION OF BARNHILL'S CREDIT FOR TIME SERVED.

Pursuant to RCW 9.94A.505(6), "[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." Where a defendant has spent time in prison before winning his appeal, the State must give credit for that time against the sentence for any second conviction. State v. Phelan, 100 Wn.2d 508, 515, 671 P.2d 1212 (1983), superseded by statute on other grounds by RCW 9.94A.729. See also RCW 9.95.062(3) ("[T]he time the defendant has been imprisoned pending the appeal shall be deducted from the term for which the defendant was sentenced, if the judgment is affirmed.")

If entitled to credit for time served, "the judgment must so state on its face[.]" In re Phelan, 97 Wn.2d 590, 596, 647 P.2d 1026 (1982). Failure to allow credit violates due process, denies equal protection, and offends the prohibition against multiple punishments. State v. Cook, 37 Wn. App. 269, 271, 679 P.2d 413 (1984). Where a sentence is insufficiently specific, remand for amendment of the judgment and

sentence is the proper remedy. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997).

Section 4.5 of Barnhill's judgment and sentence provides that he is entitled to credit for time spent in jail, as "determined by the King County Jail." CP 436. The judgment and sentence does not, however, mention Barnhill's right to credit for time served in the DOC pending his first appeal, or how that credit is to be determined. While the King County Jail can determine the amount of credit earned by Barnhill while in that facility, it cannot properly calculate Barnhill's DOC earned release time. RCW 9.94A.729(1) ("The term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined."); In re Schaupp, 66 Wn. App. 45, 51, 831 P.2d 156 (1992) ("Each correctional agency having had jurisdiction of defendant must determine the amount of earned early release time in accordance with the procedures developed and promulgated by that agency.")

Barnhill's judgment and sentence does not specify he is entitled to credit for time served in the DOC. Without clarification, DOC officials may mistakenly assume that because the judgment and sentence is silent on the issue, Barnhill is not entitled to any credit for time served in prison.

The case should be remanded with an order directing the sentencing court to specify that Barnhill is entitled to credit for time served in the DOC.

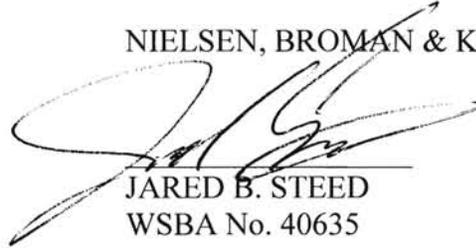
D. CONCLUSION

This Court should remand the judgment and sentence for clarification of Barnhill's credit for time served in the department of corrections.

DATED this 30th day of November, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

Appendix

(HIV)

FILED
KING COUNTY, WASHINGTON
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COPY TO COUNTY JAIL APR 12 2012

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	
)	No. 07-1-09673-2 KNT
Vs.)	
)	JUDGMENT AND SENTENCE
)	FELONY (FJS)
CHRISTOPHER D. BARNHILL,)	
)	
)	Defendant,

I. HEARING

I.1 The defendant, the defendant's lawyer, BRIAN J. TODD, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were:

Law Office of Brian J Todd
 6523 California Ave SW #179
 Seattle, WA 98136
 206-778-0750

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 **CURRENT OFFENSE(S)**: The defendant was found guilty on 03/02/2012 by jury verdict of:

Count No.: I	Crime: RAPE OF A CHILD IN THE SECOND DEGREE
RCW 9A.44.076	Crime Code: 01066
Date of Crime: 01/06/2007 THROUGH 02/25/2007	Incident No. _____
Count No.: _____	Crime: _____
RCW _____	Crime Code: _____
Date of Crime: _____	Incident No. _____
Count No.: _____	Crime: _____
RCW _____	Crime Code: _____
Date of Crime: _____	Incident No. _____
Count No.: _____	Crime: _____
RCW _____	Crime Code: _____
Date of Crime: _____	Incident No. _____

[] Additional current offenses are attached in Appendix A

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SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) _____ RCW 9.94A.533(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.533(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
- (h) Domestic violence as defined in RCW 10.99.020 was pled and proved for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).
- (j) Aggravating circumstances as to count(s) _____: _____

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

- Criminal history is attached in Appendix B.
- One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	0	XI			78 TO 102 MONTHS	LIFE AND/OR \$25,000 <i>SO, was 300 C</i>
Count						
Count						
Count						

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE

Findings of Fact and Conclusions of Law as to sentence above the standard range:
Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) _____.
Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) _____. The court would impose the same sentence on the basis of any one of the aggravating circumstances.

An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State did did not recommend a similar sentence (RCW 9.94A.480(4)).

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 - Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.
 - Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 Date to be set.
 - Defendant waives presence at future restitution hearing(s) *(waives in-person but will attend telephonic hearing)*
 - Restitution is not ordered.
- Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs (RCW 9.94A.030, RCW 10.01.160); Court costs are waived;
- (b) \$100 DNA collection fee (RCW 43.43.7541)(mandatory for crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); Recoupment is waived;
- (d) \$ N/A, Fine; \$1,000, Fine for VUCSA \$2,000, Fine for subsequent VUCSA (RCW 69.50.430); VUCSA fine waived;
- (e) \$ N/A, King County Interlocal Drug Fund (RCW 9.94A.030); Drug Fund payment is waived;
- (f) \$ N/A, \$100 State Crime Laboratory Fee (RCW 43.43.690); Laboratory fee waived;
- (g) \$ _____, Incarceration costs (RCW 9.94A.760(2)); Incarceration costs waived;
- (h) \$ 500⁰⁰, Other costs for: VPA

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 600⁰⁰. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.
 Court Clerk's trust fees are waived.
 Interest is waived except with respect to restitution.

4.4 The defendant, having been convicted of a FELONY SEX OFFENSE, is sentenced to the following:

(a) **DETERMINATE SENTENCE** : Defendant is sentenced to a term of confinement in the custody of the
 King County Jail King County Work/Education Release (subject to conditions of conduct ordered
this date) Department of Corrections, as follows, commencing: immediately;
 Date: _____ by _____ a.m. / p.m.

_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____;
_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____;

ALTERNATIVE CONVERSION - RCW 9.94A.680 (LESS THAN ONE YEAR ONLY):

_____ days of total confinement are hereby converted to:
 _____ days/ hours community restitution (for nonviolent offense) under the supervision of the
Department of Corrections to be completed: on a schedule established by the defendant's Community
Corrections Officer; or as follows: _____. If the defendant is not
supervised by the Department of Corrections, this will be monitored by the Helping Hands Program.
 Alternative conversion was not used because: Defendant's criminal history, Defendant's
failure to appear, Other: _____

COMMUNITY CUSTODY for FAILURE TO REGISTER AS A SEX OFFENDER under RCW
9A.44.130(11)(a) committed on or after 6-7-2006 as to Counts _____ is ordered
pursuant to RCW 9.94A.545(2) and RCW 9.94A.715 for the range of 36 months.

APPENDIX H, Community Custody conditions, is attached and incorporated herein.

**COMMUNITY CUSTODY (CONFINEMENT LESS THAN ONE YEAR except for Failure to
Register as a Sex Offender under RCW 9A.44.130(11)(a) committed on or after 6-7-06) as to Counts
_____**, for crimes committed on or after 7-1-2000, is ordered for a period of 12 months. The
defendant shall report to the Department of Corrections within 72 hours of this date or of his/her release if
now in custody; shall comply with all the rules, regulations and conditions of the Department for
supervision of offenders; shall comply with all affirmative acts required to monitor compliance; and shall
otherwise comply with terms set forth in this sentence. Sanctions and punishments for non-compliance will
be imposed by the Department of Corrections or the court.

APPENDIX ____: Additional Conditions are attached and incorporated herein.

COMMUNITY CUSTODY (CONFINEMENT OVER ONE YEAR) as to Counts _____;
pursuant to RCW 9.94A.700, for qualifying crimes committed before 6-6-1996, is ordered for 24 months
or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer, up to
36 months. Sanctions and punishments for non-compliance will be imposed by the Department of
Corrections or the court.

APPENDIX H, Community Custody conditions, is attached and incorporated herein.

COMMUNITY CUSTODY (CONFINEMENT OVER ONE YEAR) as to Counts _____;
pursuant to RCW 9.94A.715 for qualifying crimes (non RCW 9.94A.507 offenses) is ordered for 36
months. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections
or the court.

APPENDIX H, Community Custody conditions, is attached and incorporated herein.

The term of community custody shall be reduced by the Department of Corrections if necessary so that the total
amount of incarceration and community custody does not exceed the maximum term of sentence for any offense, as
specified in this judgment.

(b) **INDETERMINATE SENTENCE – QUALIFYING SEX OFFENSES occurring after 9-1-2001:**

The Court having found that the defendant is subject to sentencing under RCW 9.94A.507, the defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; (Date): _____ by _____ m.

Count 1: Minimum Term: 85 months/days; Maximum Term: LIFE years/life;

Count _____: Minimum Term: _____ months/days; Maximum Term: _____ years/life;

Count _____: Minimum Term: _____ months/days; Maximum Term: _____ years/life;

Count _____: Minimum Term: _____ months/days; Maximum Term: _____ years/life.

COMMUNITY CUSTODY: pursuant to RCW 9.94A.507 for qualifying **SEX OFFENSES committed on or after September 1, 2001**, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence as set forth above. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or by the court.

APPENDIX H: Community Custody conditions, is attached and incorporated herein.

4.5 ADDITIONAL CONDITIONS OF SENTENCE

The above terms for counts _____ are consecutive / concurrent.

The above terms shall run CONSECUTIVE CONCURRENT to cause No.(s) _____

The above terms shall run CONSECUTIVE CONCURRENT to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (For crimes committed after 6-10-1998.)

The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (For crimes before 6-11-1998 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is _____ months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): _____ day(s) or days determined by the King County Jail.

Jail term is satisfied and defendant shall be released under this cause.

4.6 NO CONTACT: For the maximum term of LIFE years, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: H.T.

Any minors without supervision of a responsible adult who has knowledge of this conviction.

4.7 DNA TESTING: The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

[] HIV TESTING: The defendant shall submit to HIV testing as ordered in APPENDIX G. RCW 70.24.340.

4.8 SEX OFFENDER REGISTRATION:

The defendant shall register as a sex offender as ordered in APPENDIX J.

4.9 [] ARMED CRIME COMPLIANCE, RCW 9.94A.475, .480. The State's plea/sentencing agreement is [] attached [] as follows:

The defendant shall report to an assigned Community Corrections Officer within 72 hours of release from confinement for monitoring of the remaining terms of this sentence.

Date: 4/12/13

[Signature]
JUDGE
Print Name: CAYCE

Presented by:
[Signature] 33667
Deputy Prosecuting Attorney, WSBA#
Print Name: _____

Approved as to form:
[Signature]
Attorney for Defendant, WSBA# 11050
Print Name: BARNHILL, CHRISTOPHER

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BARNHILL,

Appellant.

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COA NO. 68637-2-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF NOVEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER BARNHILL
DOC NO. 322338
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER, 2012.

x Patrick Mayovsky

NOV 30 2012
11:45 AM
CLERK OF COURT