

NO. 36182-5-II

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

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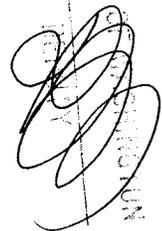
STATE OF WASHINGTON,

Respondent,

v.

ANTONIO RICARDO CROSS,

Appellant.

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Lisa Worswick, Judge

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BRIEF OF APPELLANT

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CASEY GRANNIS  
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to credit appellant for time served on his assault conviction.
2. The trial court erred in failing to set a definite probationary term for appellant's assault conviction.

Issues Pertaining to Assignment of Error

1. Constitutional due process, the right to equal protection, and the prohibition against double jeopardy require the trial court to credit presentence detention time against the sentence. Must the case be remanded for resentencing because the court failed to give appellant credit for presentence detention time served in connection with his assault conviction?
2. Terms of a sentence must be definite. Must the case be remanded for resentencing because the trial court did not specify the length of appellant's probationary term on his assault conviction?

B. STATEMENT OF THE CASE

On September 22, 2006, Vcete Lemus, Felipe Zuniga, and a friend were parked in a car at a convenience store. CP 12; 1RP<sup>1</sup> 157-59.

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<sup>1</sup> "Vcete Lemus" is the correct spelling. 1RP 154. The findings of fact misspell his name as "Vicente Lumus." CP 11-16.

The verbatim report of proceedings is contained in seven volumes referenced as follows: 1RP (seven consecutively paginated volumes from 3/6/07; 3/7/07; 3/8/07; 3/12/07; 3/13/07 (morning); 3/13/07 (afternoon); 3/14/07 and 4/13/07.

Lemus, the owner of the vehicle, spoke with a prostitute but did not reach an agreement for sexual services. CP 12-13. The prostitute left and telephoned Tiki Taru McCollum. CP 13.

Shortly afterwards, appellant Antonio Ricardo Cross and McCollum entered Lemus's car without permission and sat in the back seat. CP 13; 1RP 159. Lemus and his friends did not know McCollum and Cross. CP 13. McCollum showed what appeared to be a weapon to Zuniga, who was in the backseat. CP 13. In actuality, neither McCollum nor Cross possessed a gun or knife during the incident. CP 13. Cross was acting agitated. CP 13. McCollum told Lemus to drive, which caused Lemus to fear harm may come to him or his passengers. CP 13. Lemus and his friends left the car. CP 13. McCollum and Cross drove the car away. CP 13. Police arrested McCollum and Cross outside a nearby restaurant. CP 14.

On September 25, 2006, the state charged Cross with first degree robbery and second degree assault in connection with this incident.<sup>2</sup> CP 1-2. The court ordered Cross detained unless he executed a surety bond or posted cash in the amount of \$500,000. Supp CP \_\_ (Order Establishing Conditions Of Release, 9/25/06).

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<sup>2</sup> The "corrected" information filed March 7, 2007 and the amended information filed March 12, 2007 contain the same charges. CP 6-7, 8-9.

At trial, the state asked the court to consider a lesser charge of second degree robbery in place of first degree robbery and fourth degree assault in place of third degree assault. CP 12; 1RP 452, 477-78. The Honorable Lisa Worswick found Cross guilty of second degree robbery and fourth degree assault. CP 11-16.

On April 13, 2007, the court sentenced Cross to a standard range sentence of 75 months confinement for robbery and a one year suspended sentence for the misdemeanor assault. CP 20-32, 33-37. The court credited Cross with 202 days served on the robbery conviction, but did not give credit for any days served on the assault conviction. CP 24, 33-37. This appeal timely follows. CP 10.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO GIVE CROSS CREDIT FOR TIME SERVED ON HIS ASSAULT CONVICTION.

The trial court is constitutionally required to credit presentence detention time against the sentence. Reversal and remand is required because the trial court failed to credit Cross for the days he served while awaiting trial and sentencing for assault.

For purposes of time served, there is no distinction between presentence and postsentence incarceration. In re Pers. Restraint of Knapp,

102 Wn.2d 466, 474, 687 P.2d 1145 (1984) (citing In re Pers. Restraint of Phelan, 97 Wn.2d 590, 595, 647 P.2d 1026 (1982)). Presentence detention time must therefore be credited against the sentence ultimately imposed. State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992).

Cross was detained for the same period on both the robbery and assault counts, which arose out of the same incident. The trial court credited Cross with 202 days served on the robbery count, but did not give credit for time served on the assault count. Constitutional due process, the right to equal protection, and the prohibition against multiple punishments under the double jeopardy clause require the court to give Cross credit for time served during pre-sentence detention. Reanier v. Smith, 83 Wn.2d 342, 346-47, 352, 517 P.2d 949 (1974).

The prohibition against double jeopardy is violated where, as here, punishment already endured is not fully subtracted from any new sentence imposed. State v. Phelan, 100 Wn.2d 508, 515-16, 671 P.2d 1212 (1983). A failure to credit for time served also violates conceptions of fundamental fairness inherent in the due process clause of the Fifth and Fourteenth Amendments. Reanier, 83 Wn.2d at 346. In addition, the failure to credit for pre-trial detention is an unconstitutional discrimination on the basis of wealth prohibited by the equal protection clause of the Fourteenth

Amendment. Wealthy defendants, because of their ability to post bond or bail, are generally able to remain out of prison until conviction and sentencing while the poor stay behind bars. In the absence of credit for time served, this differing treatment on the basis of wealth is unconstitutional. Id. at 346-47, 349-50; Phelan, 100 Wn.2d at 512-15.

For all these reasons, this Court should remand the case to the trial court for calculation of credit for time served on the assault conviction.

2. THE TRIAL COURT ERRED IN FAILING TO SET A DEFINITE PROBATIONARY TERM.

The court placed Cross on probation in connection with the assault count but did not specify when his probationary term would end. CP 33-37. Reversal and remand is required to enable the trial court to set a lawful probationary term.

The court suspended Cross's one-year term of confinement for fourth degree assault and imposed probation. CP 33, 35. The "conditions on suspended sentence" states:

[H]aving sentenced the defendant ANTONIO RICARDO CROSS to the term of ONE YEAR for the crime(s) of ASSAULT IN THE FOURTH DEGREE and the Court having suspended that term, the Court herewith orders the following conditions and provisions:

1. (X) Termination date is to be \_\_\_ year(s) after date of sentence.
2. (X) The Defendant shall be under the charge of a probation officer employed by the Department of Corrections

and follow implicitly the instructions of said Department, and the rules and regulations promulgated by the Department of Corrections for the conduct of the Defendant during the time of his/her probation herein.

CP 35.

The trial court neglected to fill in the blank space regarding the length of probation. A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998). The judgment and sentence in Cross's case is insufficiently specific about the period of probation.

In Broadaway, the boilerplate language in the judgment and sentence contained a similar deficiency. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). The Court held when "a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for the correct period of community placement is the proper course." Id.

The same result is mandated here. Probation and community placement are similar insofar as non-compliance with conditions under either scenario may result in incarceration or the imposition of more onerous conditions. RCW 9.95.230;<sup>3</sup> RCW 9.94A.634 (setting forth authority to

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<sup>3</sup> RCW 9.95.230 provides "[t]he court shall have authority at any time prior to the entry of an order terminating probation to (1) revoke, modify, or change its order of suspension of imposition or execution of sentence."

impose further punishment for violation of sentence conditions); RCW 9.94A.737(1) (penalties for non-compliance with community custody conditions). Cross should not be subject to an indefinite term of probation and its attendant consequences of failing to comply with imposed conditions.

The need for a definite term is especially compelling in dealing with probation because there is no automatic end to the court's jurisdiction over a probationer. Rather, the court may modify or revoke the defendant's probation for misconduct occurring after the expiration of the probationary term but before the entry of an order terminating probation, so long as the modification or revocation of probation is based on proscribed conduct that occurs during the probationary period. State v. Holmberg, 53 Wn. App. 609, 610, 768 P.2d 1025 (1989). Cross's probationary period is currently endless, which means he is potentially subject to sanction for any conduct that occurs into the indefinite future.

A court has the authority to correct an erroneous sentence. Broadaway, 133 Wn.2d at 136. This Court should therefore remand the case to allow entry of a definite and lawful term of probation.

D. CONCLUSION

For the reasons stated, this Court should remand for resentencing on the fourth degree assault conviction.

DATED this 6<sup>th</sup> day of September, 2007.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 36182-5-II
	)	
ANTONIO RICARDO CROSS,	)	
	)	
Appellant.	)	

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**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 6<sup>TH</sup> DAY OF SEPTEMBER 2007, 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] KATHLEEN PROCTOR  
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BY  STATE OF WASHINGTON  
07 SEP -7 PM 1:16  
COURT OF APPEALS  
DIVISION II

**SIGNED** IN SEATTLE WASHINGTON, THIS 6<sup>TH</sup> DAY OF SEPTEMBER 2007.

x Patrick Mayovsky