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STATE OF WASHINGTON

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STATE OF WASHINGTON

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No. 40240-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Davis,

Appellant.

Lewis County Superior Court Cause No. 03-1-00881-2

The Honorable Judge Richard L. Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by modifying the Amended Judgment and Sentence.
2. The trial court erred by changing Mr. Davis's sentence from a DOSA to a non-DOSA sentence.
3. The trial court erred by denying Mr. Davis credit for time served on community custody pursuant to his DOSA sentence.
4. If the error was invited by defense counsel, Mr. Davis was denied the effective assistance of counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court may not modify a sentence unless modification is authorized by statute. In this case, the trial judge modified Mr. Davis's sentence in the absence of statutory authority, changing it from a DOSA sentence to a non-DOSA sentence after four years. Did the trial court exceed its authority by modifying Mr. Davis's sentence?
2. A DOSA sentence consists of a prison term followed by an equal period of community custody. Here, the trial court modified Mr. Davis's DOSA sentence to include an 84-month prison term instead of 42 months in prison and 42 months on community custody. Did the trial judge impose a sentence that was not authorized by law?
3. An offender whose DOSA is revoked must be reclassified to serve the remaining balance of his original sentence. Because the trial judge modified Mr. Davis's sentence, he was erroneously deprived of credit for time served in DOSA. Did the trial court err by denying Mr. Davis credit for time served in DOSA?

4. An accused person has a constitutional right to the effective assistance of counsel. Here, defense counsel may have been responsible for the unlawful modification of Mr. Davis's sentence. Was Mr. Davis denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In December of 2003, James Davis pled guilty to one count of Manufacture of Methamphetamine. CP 2. Pursuant to an agreement with the prosecutor, he was given a DOSA sentence.¹ CP 14. In the spring of 2009, he was administratively terminated from DOSA. Letter from Defendant (filed 11/09/09), Supp. CP; Letter from Defendant (filed 12/22/09), Supp. CP.

Following the administrative termination, the parties discovered an error in the Judgment and Sentence. Mr. Davis's standard sentence range should have been 68+-100 months, rather than 100+-120 months. *See* Order Modifying Judgment and Sentence, Supp. CP. The court issued an order modifying the Judgment and Sentence to reflect the correct standard range.² Order Modifying Judgment and Sentence, Supp. CP. In addition, the court modified the DOSA sentence, which had erroneously been calculated to include 55 months total confinement followed by 55 months community custody. CP 14.

¹ The agreement for a DOSA sentence stemmed from Mr. Davis's promise to testify in another case. RP (11/21/05) 3. He was originally sentenced to 100 months and one day of confinement, followed by 9-12 months of community custody. CP 6.

² This correction was apparently made without a hearing on the record.

The correction to the Judgment and Sentence included the following language: "Paragraph 4.5 is amended to reflect a total sentence of '84 months' with no Drug Offender Sentencing Alternative sentence. This reflects the original intent of the parties and the court and recognizes the fact that the prior DOSA sentence was revoked." Order Modifying Judgment and Sentence, Supp. CP. Because the court did not hold a hearing, it is not clear how this language was determined; however, the order was on defense counsel's pleading paper. Order Modifying Judgment and Sentence, Supp. CP.

One consequence of the modification from a DOSA sentence to a non-DOSA sentence was that the Department of Corrections refused to credit Mr. Davis with the time he'd spent on DOSA community custody following the completion of his prison term. RP (12/10/09) 3; Letter from Defendant (filed 11/09/09), Supp. CP; Letter from Defendant (filed 12/22/09), Supp. CP. Mr. Davis asked the court to credit him with the time spent on community custody, or, in the alternative, to reinstate his DOSA with the correct standard range. Letter from Defendant (filed 12/22/09), Supp. CP. The court refused, and entered an "Order Modifying Sentence" denying credit for time served. CP 20; RP (12/24/09) 7-8. This timely appeal followed. CP 18.

ARGUMENT

I. THE TRIAL COURT LACKED AUTHORITY TO MODIFY MR. DAVIS'S SENTENCE.

A. Standard of Review

Issues of statutory construction are reviewed *de novo*. *In re Detention of Strand*, 167 Wn.2d 180, 186, 217 P.3d 1159, 1162 (2009).

B. Former RCW 9.94A.660 (2003) authorizes imposition of a prison term followed by an equal period of community custody.

When interpreting a statute, the court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789, (2004). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *State Owned Forests v. Sutherland*, 124 Wn.App. 400, 409, 101 P.3d 880 (2004); *see also State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006) ("Plain language does not require construction;" *Id.*, at 879, *citations omitted*). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

At the time of Mr. Davis's offense, the Drug Offender Sentencing Alternative was governed by former RCW 9.94A.660 (2003). Under the statute, eligible offenders were sentenced to "a period of total confinement

in a state facility for one-half of the midpoint of the standard sentence range...” Former RCW 9.94A.660(2) (2003). The sentencing court was also required to impose the “remainder of the midpoint of the standard range as a term of community custody.” Former RCW 9.94A.660(2)(a) (2003). Thus a DOSA sentence consisted of a prison term followed by an equal period of community custody.³ Former RCW 9.94A.660(2)(a) (2003). “Community custody” was defined to mean “that portion of an offender’s sentence of confinement in lieu of earned release time or imposed pursuant to RCW [9.94A.660], served in the community subject to controls placed on the offender’s movement and activities by the department.” Former RCW 9.94A.030 (2003).

Termination from the DOSA program was governed by former RCW 9.94A.660(3) and (5) (2003). Upon an administrative finding of willful violation, DOC was permitted to reclassify the offender “to serve the remaining balance of the original sentence.” Former RCW 9.94A.660(3) (2003). An offender who failed to complete the program or who was administratively terminated would be “reclassified to serve the

³ In addition, DOSA sentences included an additional term of community custody, to be imposed only upon failure to complete or administrative termination from DOSA. Former RCW 9.94A.660(2)(d) (2003).

unexpired term of his or her sentence as ordered by the sentencing court.”
Former RCW 9.94A.660(5) (2003).

Under the plain language of the statute, an offender whose DOSA is revoked must serve what remains of the sentence at the time of the revocation. Assuming the offender has completed the initial prison term, the “remaining balance of the original sentence” will consist of that portion of the community custody term that has not yet been served.

In this case, the trial court determined that Mr. Davis had an offender score of five. CP 11. His standard range was therefore 68+-100 months, and his original DOSA sentence should have consisted of 42 months of total confinement, followed by 42 months community custody.⁴ *See* former RCW 9.94A.517 (2003), former RCW 9.94A.518 (2003), former RCW 9.94A.660 (2003). The trial court recognized its error, but instead of correcting the DOSA sentence to reflect these figures, it modified the sentence to impose 84 months confinement “with no DOSA.” Order Modifying Judgment and Sentence, Supp. CP.

⁴ The Amended Judgment and Sentence, entered on November 21, 2005, reflected an incorrect standard range of 100-120 months. CP 11. Accordingly, the DOSA term was incorrectly calculated to be 55 months in prison, followed by 55 months of community custody. CP 14. The standard range was corrected by the trial court’s Order Modifying Judgment and Sentence, Supp. CP.

Mr. Davis had already served a substantial portion of his DOSA when the court modified the sentence. He had completed the (erroneously imposed) 55-month prison term, and part of the (erroneously imposed) 55-months of community custody. Upon revocation, the Department should have simply reclassified him “to serve the remaining balance of the original sentence.” Former RCW 9.94A.660(3) (2003). In other words, he should have only been returned to prison to serve the unexpired period of community custody. Instead, the imposition of 84 months “with no DOSA” required him to re-serve the time he’d already spent on community custody under the DOSA sentence.

C. The SRA does not authorize a sentencing court to change a final DOSA sentence into a non-DOSA sentence.

A sentencing court has inherent authority to correct an erroneous sentence. *State v. Kilgore*, 167 Wn.2d 28, 41-42, 216 P.3d 393 (2009). However, the trial court lacks authority to modify a final judgment and sentence except as authorized by statute. *State v. Harkness*, 145 Wn.App. 678, 684-685, 186 P.3d 1182 (2008) (citing *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989)). The existence of express statutory authority for certain types of modifications precludes implication of authority for other types of modifications. *Harkness*, at 685 (citing *State v. Brown*, 108 Wn.App. 960, 33 P.3d 433 (2001)). In *Harkness*, the defendant sought

and received an order modifying her sentence from a standard range sentence to a DOSA sentence. The Court of Appeals reversed, holding that the trial court lacked authority to change the sentence. *Id., supra.*

Here, the trial court purported to change Mr. Davis's sentence from a DOSA sentence to a sentence "with no DOSA," while correcting the erroneous standard range. Order Modifying Judgment and Sentence, Supp. CP. As in *Harkness*, the court lacked authority to make this change. *Harkness, supra.* The court should have modified the sentence to correct the standard range, prison term, and community custody term without changing the sentence from a DOSA to a non-DOSA sentence. *Kilgore, supra; Harkness, supra.* In the alternative, the trial court should have granted Mr. Davis's request for credit for time served, so that he would be in the same position as he would have been had the court originally based its DOSA sentence on the correct standard range.

Because the sentencing court lacked statutory authority to modify the sentence, the modification is unlawful. *Harkness, supra.* Accordingly, the Order Modifying Judgment and Sentence must be vacated, and the case remanded with instructions to correct the Amended Judgment and Sentence to reflect the correct standard range (68+-100 months), DOSA prison term (42 months), and community custody term (42 months). *Id.*

II. IF THE ERROR IS INVITED, MR. DAVIS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. If defense counsel invited the unlawful sentence modification, Mr. Davis was denied the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The guarantee extends to counsel’s performance at sentencing. *See, e.g., State v. McGill*, 112 Wn.App. 95, 47 P.3d 173 (2002).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

In this case, it is unclear why the court decided to include language changing Mr. Davis's DOSA sentence into a non-DOSA sentence. It is likely that all parties believed that the corrected DOSA sentence (42

months prison/42 months community custody) would be equivalent to an 84-month non-DOSA sentence. If the error can be attributed to defense counsel, Mr. Davis was denied the effective assistance of counsel.⁵

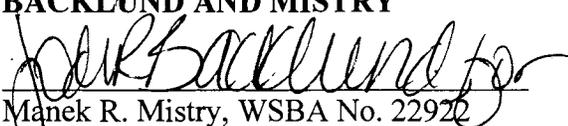
In any event, the unlawful modification order must be vacated, and the case remanded to the trial court to correct the Amended Judgment and Sentence.

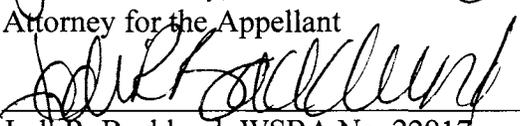
CONCLUSION

For the foregoing reasons, the Order Modifying Judgment and Sentence must be vacated. The case must be remanded with instructions to correct the Amended Judgment and Sentence.

Respectfully submitted on April 30, 2010.

BACKLUND AND MISTRY


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⁵ The erroneous order appeared on defense counsel's pleading paper.

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CERTIFICATE OF MAILING

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I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 30, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 30, 2010.



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