

No. 40240-8-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES DAVIS

Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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STATEMENT OF THE CASE

Except as otherwise cited below, Davis's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

I. THE ORDER MODIFYING JUDGMENT AND SENTENCE ENTERED AFTER DAVIS HAD BEEN ADMINISTRATIVELY TERMINATED FROM HIS DOSA PROPERLY REFLECTED A NON-DOSA STANDARD RANGE SENTENCE AND WAS LAWFULLY ENTERED.

David argues on appeal that the trial court "lacked authority to modify" his sentence when, in 2009, the trial court corrected the previously-erroneous standard sentencing range by modifying the judgment and sentence to also reflect the by-then-non-DOSA sentence and the correct standard range. Brief of Appellant 1-9. Davis argues that the trial court should have again entered a DOSA sentence when it modified his judgment and sentence--even though Davis' DOSA had been revoked. Id. Davis's argument seems illogical.

Respondent does not understand how it would have been proper for the trial court to, in essence, "re-impose" a DOSA in its modification order--when it knew the DOSA had been revoked. This is what Davis is arguing on appeal, but how would the trial court have had authority to do that? Unfortunately, it does not

appear that our laws contemplate the situation that occurred in this case.

"Whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) is an issue of law which is reviewed independently." State v. Harkness, 145 Wn.App. 578, 684, 186 P.3d 1182 (2008). In general, "a trial court has no inherent authority and only limited statutory authority to modify a sentence post judgment." Id., citing State v. Shove, 113 Wn.2d 83, 89, 776 P.2d 132 (1989). However, "[a] court has the authority to correct an erroneous sentence." State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). CrR 7.8(a) provides that "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own motion or on the motion of any party."

Whether an error is "clerical" under CrR 7.8(a) depends on "whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." State v. Rooth, 129 Wn.App. 761, 771, 121 P.3d 755 (2005)(quoting Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100(1996)).

Unfortunately, when it comes to applying the law to the facts of the present case, we see that this case has a somewhat convoluted sentencing history, complicated by a less-than-crystal-clear (and many times amended) DOSA statutory scheme. CP 2-9; CP10-17; Supp. CP; RCW 9.94A.660 (2003-2009). Nonetheless, at least in terms of the trial court's authority to make the correction to the previously-erroneous standard range, it seems clear the trial court had authority to make that particular correction pursuant to CrR 7.8(a). As to the propriety of modifying the judgment and sentence to reflect that Davis's DOSA had been revoked, the law is not so clear (in Respondent's view).

Davis was first sentenced pursuant to a guilty plea on January 8, 2004, to a non-DOSA sentence of 100 months plus 1 day. CP 2-9. Then, on November 21, 2004, apparently after fulfilling his part of an agreement with the State, Davis was resentenced and received a DOSA. CP 10-17. However, in the Spring of 2009, Davis was administratively terminated from the DOSA program. Supp.CP (Letter filed 11/09/09); Supp. CP (Letter filed 12/22/09). Then--after Davis had been terminated from DOSA-- the parties discovered an error in the standard range as it appeared in the 2005 amended judgment and sentence. Brief of

Appellant 3. Consequently, Davis's trial counsel prepared an order modifying judgment and sentence, to correct the standard range to "68 - 100 months" and "to reflect a total sentence of '84 months' with no Drug Offender Sentencing Alternative sentence." Supp. CP 25-26 (emphasis added). This order also amended the community custody period to twelve months, and further noted, "[t]his reflects the revocation of the DOSA and imposes the proper Community Custody range." Id. The trial court signed and entered the order. Id.

Thus, in the first place, Davis's trial counsel presented the order modifying the judgment and sentence and also signed off on the order. In this way, Davis's claimed errors regarding this order were invited, and he should not be able to raise these issues now. State v. Henderson, 114 Wash.2d 867, 870, 792 P.2d 514 (1990)(the invited error doctrine prevents a defendant from appealing an action of the trial court that the defendant himself procured.)¹ Secondly, the 2009 order modifying the judgment and sentence was entered, first and foremost, to correct a clear error in the standard range as it appeared in the amended judgment and

¹ This being so, Davis also claims his counsel was ineffective for proposing the allegedly unlawful order. Respondent briefly addresses that issue below.

sentence entered in 2005. Supp. CP 25-26; CP 10-17. Because this error was inadvertent and "clerical" as contemplated under CrR 7.8(a) and the cases cited above, it seems clear that the trial court did have authority to correct this particular error in the standard range pursuant to its authority under CrR 7.8(a).

Thirdly, Davis now claims the trial court had no authority to modify his sentence to a non-DOSA sentence--even though at the time the court entered that order, Davis's sentence was indeed no longer a DOSA--because it had been revoked by DOC. 12/24/09 RP 7,8; Supp. CP (both letters); Supp. CP 25,26. But how would the trial court have had authority in the modification order to re-designate Davis's sentence as a DOSA (as Davis now suggests)--when the trial court and the parties *knew* that was not correct because the DOSA had been revoked? Id.

Curiously, it also appears that Davis's argument that the trial court had no authority to modify his sentence post-judgment ironically would have apparently prevented the trial court (and the parties) from converting Davis's original sentence to a DOSA back in 2005 in the first place! Indeed, under State v. Harkness, supra (and cited in general by Davis), it appears that the trial court did not have authority back in 2005 to amend Davis's judgment and

sentence to change his original sentence to a DOSA in the first place! The Harkness Court held that the trial court there had no authority to change Harkness's original sentence to a DOSA, post-conviction. Harkness 145 Wn.App. at 685, citing State v. Shove, 113 Wn.2d 83, 89, 776 P.2d 132 (1989). But that is exactly what the trial court did in this case back in 2005 when it converted Davis's standard-range sentence to a DOSA. Thus, it appears that the trial court had no authority to convert Davis's sentence to a DOSA in the first place.²

Be that as it may, Davis's current reliance on Harkness to support his argument that the trial court did not have authority to enter an order modifying his sentence to *accurately* reflect that the DOSA had been revoked, is misplaced. In Harkness, as mentioned previously, the appellate Court held that the trial court did not have authority to amend the sentence post-judgment to a DOSA (which, is what was done in Davis's case back in 2005). Harkness, supra. Harkness did not involve the court amending the sentence to accurately reflect that the sentence was, in fact, *no longer a DOSA*. Id. That distinguishes Harkness from the facts here.

² Of course, that sentence was not appealed.

Unlike in Harkness, in the 2009 order modifying Davis's sentence, the trial court did not technically "change" *anything*, because the DOSA sentence had *already been "changed" by the Department of Corrections* when it revoked it. Supp. CP 25-26. Thus, all the 2009 order modifying the sentence did in this case was to formally, and accurately reflect that Davis's sentence was no longer a DOSA (because DOC had revoked it). Supp. CP 25-26. Because the order modifying the judgment and sentence accurately reflected the fact that Davis' DOSA had been revoked, the trial court did not err when it modified Davis's sentence to a standard range, non-DOSA sentence. This order should be affirmed.

Credit for Time Served

Furthermore, since Davis obviously gets credit for all of the time he previously served in prison on his DOSA, there is no danger that Davis will serve a "double" sentence. The DOSA statute in effect in 2003, which applies here, provided, in pertinent part:

[a]n offender who fails to complete the special drug offender sentencing alternative program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court and shall be subject to all rules relating to earned release time. . . . Sanctions may include. . . reclassifying the offender to serve the unexpired term of his or her sentence as ordered by the

sentencing court. If an offender is reclassified to serve the unexpired term of his or her sentence, the offender shall be subject to all rules relating to earned release time.

RCW 9.94A.660 (2003)(emphasis added). So, the 2003 DOSA statute gave credit for time served pursuant to DOC rules. What is not clear from this older statute, however, is whether Davis is entitled to credit for time he served on *community custody* while (if?) he was in *compliance* with all of the DOSA rules. The 2003 statutes do not seem to address this particular issue. However, a later version of this statute specifically states, "[a]n offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement." RCW 9.94A.660(10)(effective until August 1, 2009)(emphasis added). Thus, according to this later amendment, credit for time served is given only for the time spent in prison--not time the offender spends out in the community on community custody. Id.

Similarly, in yet another amendment to this statute, effective August 1, 2009, the Legislature further clarified the issue of credit for time served while on a DOSA:

In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the

offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

RCW 9.94A.660 (10)(8/1/09)(emphasis added). This is also the way the trial court interpreted the matter of credit for time served while on community custody in the present case. In court on December 24, 2009, the trial court stated that it was denying credit for time served while Davis was on community custody, explaining that Davis would not get credit while "[h]e's out running around and he will get credit for 774 days? No, unless the court of appeals determines differently. . . ." 12/24/09 RP 8. This ruling was certainly correct under the version of the DOSA statute in effect at the time of that hearing on December 24, 2009. RCW 9.94A.660(1)(effective 8/1/09). Unfortunately, the 2003 version of the DOSA statute (relevant here) is not so clear on this issue.

Respondent agrees with the trial court's sentiments on this issue--it certainly does not seem fair that a defendant who fails to complete his DOSA would also get credit for time served while out and about in the community. Moreover, the Legislature obviously agrees, since it later clarified the DOSA statute to allow credit only for the time spent in actual confinement. RCW 9.94A.660(10)(2009 versions). All in all, the trial court's ruling that Davis would not get

credit for time served while on community custody does not contradict any express provision of the 2003 DOSA statute. Accordingly, the trial court's decision on the credit for time served issue should be upheld.

II. BECAUSE THE ORDER MODIFYING THE JUDGMENT AND SENTENCE WAS PROPERLY ENTERED, DAVIS HAS NOT SHOWN HIS TRIAL COUNSEL WAS INEFFECTIVE FOR PROPOSING THAT ORDER

Davis also argues that his trial counsel was ineffective for agreeing to entry of the 2009 order modifying his judgment and sentence. This claim assumes that the trial court had no jurisdiction to enter this order or that the order was otherwise unlawful, and that Davis's trial counsel should have known this.

For the reasons previously discussed above, Respondent disagrees that the trial court erred when it entered the order that accurately reflected the fact that Davis's DOSA had been revoked. If, as the State believes, this order was properly entered, Davis's trial counsel was not ineffective for proposing it. This Court should agree, and should find that Davis's contrary arguments are not persuasive.

CONCLUSION

For all of the foregoing reasons, the trial court's 2009 order modifying Davis's judgment and sentence, and its order denying

credit for time served while on community custody, should be affirmed in all respects.

DATED this 7th day of July, 2010.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:

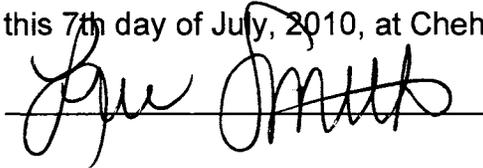

LORI SMITH, WSBA 27981
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Declaration of Service

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney, Jodi Backlund, as follows:

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Dated this 7th day of July, 2010, at Chehalis, Washington.



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