

1 **III. STATEMENT OF THE CASE:**¹

2 On November 22, 1993, defendant, Sylvester Mahone, was charged with one count
3 of rape in the second degree under cause number 93-1-044363-6. CP 1-3. On February
4 28, 1994, defendant entered an *Alford*² plea to the reduced charge of assault in the third
5 degree. CP 4-8. On April 7, 1994, defendant was sentenced to 62 days confinement, and
6 24 months on community supervision. CP 17-24.

7 Subsequently, on March 14, 1995, defendant was charged with one count of murder
8 in the second degree under cause number 95-1-01236-3. CP 138-139. Defendant entered
9 another *Alford* plea on September 22, 1995. CP 140-144. On October 24, 1995, defendant
10 was sentenced to 178 months. CP 149-159. On November 18, 2005, the judgment and
11 sentence was corrected to add two years of community placement. CP 373-374.

12 Defendant was eventually released on the cause number ending in 236-3 and
13 commenced community placement for both cause numbers. RP 5. Defendant was brought
14 before the court on four violations on April 23, 2010³. RP 4. Defendant had consumed
15 both cocaine and methamphetamine and had two GPS violations. RP 4. The State and
16 probation recommended 60 days for each violation per case for a total of 240 days on each
17 case. RP 4, 12. Defendant admitted to consuming both drugs and admitted that his GPS
18 had not been charged. RP 10, 11. The court found all four violations and ordered
19 defendant to serve 60 days per violation, per case, and that time would run consecutive.
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24 ¹ The State is only including facts relevant to the current issue on appeal.

25 ² *North Carolina v. Alford*, 400 U.S. 25; 91 S. Ct. 160; 27 L. Ed. 2d 162 (1970).

³ The Verbatim Report of Proceeding is mistakenly attributed to Judge Bryan Chushcoff. In the transcript, the judge is referred to as "ma'am" multiple times and the orders from that day were signed by Judge Vicki Hogan. RP 8, 12, 15 and CP 510-511, 125-126.

1 RP 16, CP 510-511,125-126. Defendant did not object to the violations running
2 consecutive. RP 16-17⁴.

3 Defendant filed these timely notices of appeal. CP 127-129, 512-514.

4 **IV. LAW AND ARGUMENT:**

5 A. THE TRIAL COURT PROPERLY EXERCISED ITS
6 DISCRETION IN SENTENCING DEFENDANT TO
7 CONSECUTIVE PROBATION VIOLATIONS UNDER RCW
8 9.94B.040(3)(c) WHERE THE CASES WERE ORIGINALLY
9 SENTENCED SEPARATE AND CONSECUTIVELY.

10 RCW 9.94A.589 concerns consecutive or concurrent sentences. A defendant's
11 sentences are presumed to run consecutive when a defendant is already under sentence for
12 a felony, and then commits another felony. RCW 9.94A.589(2)(a). It is also presumed
13 that the terms of community custody can start during a current term of community custody,
14 yet remain consecutive. RCW 9.94A.589(2)(b).

15 (2)(a) Except as provided in (b) of this subsection, whenever a person
16 while under sentence for conviction of a felony commits another felony
17 and is sentenced to another term of confinement, the latter term shall not
18 begin until expiration of all prior terms.

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

RCW 9.994A.589(2)(a) & (b).

⁴ No formal objection was made by defendant. Defendant did swear at the judge after the court's order, but did not object.

1 RCW 9.94B.040 concerns the procedures a court can use and the penalties a court
2 can impose when a defendant is out of compliance with a condition of their sentence.

3 RCW 9.94B.040. Specifically, RCW 9.94B.040(3)(c) states:
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5 (c) The state has the burden of showing noncompliance by a
6 preponderance of the evidence. If the court finds that the violation has
7 occurred, it may order the offender to be confined for a period not to
8 exceed sixty days for each violation

9 RCW 9.94B.040(3)(c).

10 In the instant case, defendant pleaded guilty to a reduced charge of assault in the
11 third degree. CP 4-8. Defendant was sentenced on April 7, 1994, under cause number 93-
12 1-04436-6, to 62 days in custody and 24 months of community supervision. CP 17-24.
13 Less than a year after being sentenced, and while still on community custody, defendant
14 committed the crime of murder in the second degree. CP 138-139. Defendant was
15 sentenced on this new crime under cause number 95-1-01236-3 on October 24, 1995. CP
16 14-159. The mandates of RCW 9.94A.589(2)(a) clearly indicate that the second crime was
17 to run consecutive to the first crime. In addition, RCW 9.94A.589(2)(b) contemplates that
18 while the term of community custody from the first crime would start running again when
19 defendant was released on the second crime, the two terms of community custody do not
20 automatically become concurrent. They run at the same time but they are still consecutive.
21 RCW 9.94A.589(2)(b).

22 Defendant was found to have committed four separate violations. RP 16, CP 125-
23 126, 510-511. Under RCW 9.94B.040(3)(c), the court can sentence defendant to 60 days
24 per violation. Case law has determined that a court does not abuse its discretion when it
25 orders that time for multiple violations be served consecutively. *State v. McDougal*, 120

1 Wn.2d 334, 348, 841 P.2d 1232 (1993). The court was within its discretion in ordering the
2 violations to run consecutively.

3 Defendant cites to *State v. Taplin*, 55 Wn. App. 668, 779 P.2d 1151 (1989) as being
4 controlling in this case. However, defendant's case is distinguishable. In *Taplin*, the
5 defendant had pleaded guilty under two separate cause numbers. *Taplin*, 55 Wn. App. at
6 669. However, the cases were sentenced at the same time, and the sentences were to run
7 concurrent. *Id.* At a subsequent violation hearing, the court ordered violations under each
8 cause number, and had the violations in the two cases run consecutively to each other. *Id.*
9 The Court of Appeals found that regardless of how many sentences were being served
10 concurrently, the court could only impose 60 days per violation and not per case. *Id.* at
11 670-71.
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13 Defendant's case is distinguishable. In the instant case, defendant's sentences were
14 never run concurrent. In fact, defendant committed his second crime while on community
15 custody for the first. Defendant has cited no case law and no authority that authorizes a
16 court to effectively change the very structure of two judgment and sentences by ordering
17 what have always been consecutive sentences to run concurrently. There simply is no
18 authority to authorize the trial court to essentially amend a judgment and sentence in this
19 manner. What RCW 9.94A.589(2)(a) mandates is that when a defendant commits a felony
20 while under sentence for another felony, the terms of confinement are consecutive.
21 Because the trial court's order was in line with the statutes, did not abuse its discretion and
22 because this case is distinguishable from *Taplin*, this Court should affirm the trial court's
23 order.
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3 **V. CONCLUSION:**

4 For the foregoing reasons, the trial court did not err in ordering defendant to 60
5 days for each violation, and in ordering that those violations be served consecutively and
6 that the two cases remain consecutive to each other. The respondent respectfully requests,
7 therefore, that the trial court's orders be affirmed.

8 DATED: August 13, 2010.

9 MARK LINDQUIST
10 Pierce County
11 Prosecuting Attorney

12 MELODY M. CRICK
13 Deputy Prosecuting Attorney
14 WSB # 35453

15 Certificate of Service

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant/respondent a true and correct copy/copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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18 8-13-10 Theresa
Date Signature