

COA NO. 43009-6-II

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

IN RE POST-SENTENCE REVIEW OF:

DOMINIC COMBS,

Respondent.

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

The Honorable Richard Brosey, Judge

BRIEF OF RESPONDENT

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A. ISSUES

1. Where the Department of Corrections alleges the existence of legal error based on facts not established at the trial level, must its post-sentence petition be dismissed because it is not limited to "errors of law?"

2. In light of established rules of statutory construction, does the trial court have authority to give credit for time served as part of its traditional sentencing function following revocation of a Drug Offender Sentencing Alternative?

B. STATEMENT OF THE CASE

Dominic Combs pled guilty to possession of methamphetamine with an offense date of May 13, 2011. CP 1. On July 13, 2011, the court imposed a Drug Offender Sentencing Alternative (DOSA), which required Combs to serve 24 months in community custody and remain in residential chemical dependency treatment for 3 to 6 months. CP 4-5.

On August 12, 2011, community corrections officer (CCO) Shirer filed a notice of violation, alleging a failure to comply with treatment and recommending revocation of the DOSA. CP 12-13. CCO Shirer was one of two witnesses listed for the DOSA revocation hearing. CP 15. At that hearing, which took place on October 19, the prosecutor noted "[w]e have

our witness present." RP¹ 2. Combs stipulated to the violation. RP 2-3. The court accepted the stipulation and revoked the DOSA. RP 3.

The prosecutor recommended a middle range sentence with 160 days credit for time served. RP 4. The prosecutor explained, "He was in custody starting May 13, when this offense occurred. He remained in custody all the way up until your Honor granted him release from the jail to go to treatment. We're giving him credit for that. He was brought back into custody. We're basically going from the violation date." RP 4. Based on the prosecutor's representation, the court gave Combs credit for 160 days. RP 6.

The court entered a written order revoking the DOSA and vacating the judgment and sentence entered on July 13, 2011. CP 16-17. The order provides "[a] separate, amended judgment and sentence remanding the Respondent to the custody of the Department of Corrections shall be filed consistent with this order." CP 17.

The court accordingly entered another judgment and sentence on October 19, 2011. CP 18-27. It specifies "This standard range Judgment and Sentence replaces the Residential DOSA Judgment and Sentence entered on July 13, 2011." CP 18. The court imposed 18 months

¹ The verbatim report of proceedings is referenced as follows: RP - 10/19/11.

confinement. CP 21. Consistent with what was ordered at the sentencing hearing, the judgment and sentence provides "The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served. The Plaintiff calculates credit for time served as 160 DAYS." CP 21. The warrant of commitment specified Combs "shall receive credit for time served prior to this date, as follows: 160 days." CP 28. The Department of Corrections (DOC) seeks review of the sentence pursuant to RCW 9.94A.585(7).

C. ARGUMENT

1. THE DOC'S POST-SENTENCE PETITION MUST BE DENIED BECAUSE REVIEW IS NOT LIMITED TO AN ERROR OF LAW.

The DOC's post-sentence petition for review turns on factual issues not established in the trial record. It is not limited to errors of law. The petition must therefore be denied.

RCW 9.94A.585(7) provides "The department may petition for a review of a sentence committing an offender to the custody or jurisdiction of the department. The review shall be limited to errors of law."² The requirements of the post-sentence review statute are strictly observed

² RAP 16.18(a) also states "[t]he review shall be limited to errors of law."

because they are in derogation of the common law. In re Sentence of Hilborn, 63 Wn. App. 102, 104, 816 P.2d 1247 (1991).

The statutory limitation on post-sentence review to "errors of law" must therefore be strictly construed. "To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option." Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973). The petition is not properly before this Court because review is not limited to an error of law. To demonstrate why, a brief overview of the DOSA statute is in order.

When the trial court determines that a drug offender is eligible for a DOSA, the court waives imposition of a sentence within the standard range and imposes an alternative sentence. RCW 9.94A.660. At any point during the DOSA sentence, the trial court may evaluate the offender's progress or determine if any violations of the conditions of the sentence have occurred. RCW 9.94A.660(7)(a). "The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment." RCW 9.94A.660(7)(c).

RCW 9.94A.660(7)(d) states "An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section."

The DOC challenges the credit for time served ordered by the trial court. It argues Combs cannot receive credit for time served on an unrelated charge. Petition at 1. The DOC also claims Combs cannot receive credit for time during which he absconded from supervision. Petition at 1. According to the DOC, the trial court committed legal error by giving Combs credit for these two periods of time.³ Petition at 1.

In contending the court misapplied its statutory authority and thereby committed an error of law, the DOC presumes the statutes it relies upon are applicable to the facts of Combs's case. But their applicability turns on what facts were established at the trial level.

³ In its petition, the DOC alleges counsel for DOC "notified the court and both parties by letter that the 160 days of credits included abscond time and time serving another cause. Exhibit 6, Letter from the Attorney General's Office. The letter requested that the court remove its notation regarding credits for time served and instead allow the DOC to calculate tolled time. Id. The court did not respond to the letter." Petition at 3. DOC counsel certifies in the petition that all reasonable efforts were made to resolve this dispute at the superior court level, representing she "sent a letter to the trial court and all parties notifying it that statute and case law did not allow credit for abscond time and time spent on other causes. Exhibit 6." Petition at 4-5. The letter referenced above is not in the record. The DOC identifies Exhibit 6 attached to the petition as the letter, but Exhibit 6 is actually a declaration from Ronda Larson.

Whether Combs was confined on another charge for 42 days is a factual issue not established at the trial level. Whether Combs failed to report for 47 days and thereby absconded from community custody is likewise a factual issue not established at the trial level.

A fact is "[s]omething that actually exists; an aspect of reality" and "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence or interpretation." Black's Law Dictionary 628 (8th Ed. 2004). This understanding of what constitutes a factual issue, as distinguished from its legal effect, comports with Washington law. A fact "is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981) (internal quotation marks omitted) (quoting Leschi Improvement Council v. Wash. State Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974)); see also State v. Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986) ("If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact, but if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.").

RCW 9.94A.585(7) limits post-sentence review to errors of law. Under case law, an "error of law" is "an error in applying the law to the

facts as pleaded and established." Westerman v. Cary, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994) (internal quotation marks omitted) (quoting In re Estate of Jones, 116 Wn. 424, 426, 199 P. 734 (1921)). "[T]he legislature is presumed to know the existing state of the case law in those areas in which it is legislating." Woodson v. State, 95 Wn.2d 257, 262, 623 P.2d 683 (1980). The definition of legal error set forth in the common law must be read into the post-sentence review statute.

The DOC argues an offender cannot receive credit for time served while confined on an unrelated charge. That is a correct statement of the law. See RCW 9.94A.505(6) ("The 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.").

But whether that law applies to Combs's case in calculating his credit for time served depends on what the facts are. The DOC alleges Combs in fact was confined on an unrelated charge for 42 days. But that alleged fact was not established before sentence was imposed on October 19. Without acknowledging it, the DOC is actually asking this Court to find that fact as the predicate for granting its petition. But RCW 9.94A.585(7) limits post-sentence review to errors of law. Errors of fact,

such as whether Combs was actually confined on an unrelated charge, are not amenable to the post-sentence review process.

If the alleged fact that Combs was incarcerated on a different charge for 42 days was established at the trial level, the legal effect of that fact is that Combs cannot receive credit for confinement on the cause number at issue here. And if the sentencing court gave Combs credit for confinement when Combs was in fact incarcerated on a different charge, that would have been an error of law amenable to post-sentence review under RCW 9.94A.585(7). But the factual allegation that Combs was incarcerated on a different charge was not established below. An error of law occurs in misapplying the law to the facts as established. Westerman, 125 Wn.2d at 302. Without establishing the operative fact below, there can be no legal error predicated on that fact.

The DOC also argues community custody time is tolled whenever an offender absconds from supervision. Petition at 7. That is a correct statement of the law. RCW 9.94A.171(2). But whether Combs failed to report to the community corrections officer for 47 days is an issue of fact not established at the sentencing stage and any factual error is not amenable to the post-sentence review process. If the alleged fact that Combs absconded from supervision was established at the trial level, the legal effect of that fact is that he cannot receive credit for that time period.

And if the sentencing court credited that time when in fact Combs had absconded, that would have been an error of law amenable to post-sentence review under RCW 9.94A.585(7). But the factual allegation that Combs absconded from community custody for 47 days was not established below.

The fact established at the trial level is that Combs absconded from treatment on July 23, 2011. CP 16. That is one day. Whether Combs failed to report to his CCO on or after July 23 was not established before sentence was imposed.

Leaving treatment on July 23 does not even count as being absent from "supervision" under RCW 9.94A.171(2). For that reason, the tolling period under RCW 9.94A.171(2) was not triggered for even one day based on the facts established at the trial level.

RCW 9.94A.171(2) provides "Any term of community custody shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed." Being absent from supervision occurs when an offender fails to report to his or her CCO on a required date. See In re Pers. Restraint of Albritton, 143 Wn. App. 584, 595, 180 P.3d 790 (2008) ("absent evidence to the contrary,

the presumption should be that tolling begins on the date the offender fails to report, not the date of the offender's last contact with his CCO.").

Here, the factual record does not show Combs failed to report to his CCO on a required date. He left treatment on July 23, 2011. But the treatment provider is not the entity responsible for his supervision under RCW 9.94A.171(2). The DOC was the entity responsible for supervision. See RCW 9.94A.030(5) (defining "community custody" as "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities *by the department.*") (emphasis added); RCW 9.94A.030(4) (defining "community corrections officer" as "an employee of the department who is responsible for carrying out specific duties *in supervision* of sentenced offenders and monitoring of sentence conditions.") (emphasis added).

According to the DOC, it has the exclusive authority to toll a period of community custody.⁴ In the absence of an established fact that Combs did not report to his CCO on a required date, there is no basis to conclude community custody tolled for any period of time.

⁴ The DOC has not argued that the treatment provider qualifies as the entity responsible for supervision under the tolling statute and thus authorized to toll that period.

Furthermore, RCW 9.94A.171(3)(a) specifies "inpatient treatment ordered by the court in lieu of jail time shall not toll the period of community custody." The time Combs spent in treatment as part of the DOSA did not toll the period of community custody.

A trial court cannot be deemed to have misapplied the law and thereby commit legal error when the fact necessary to show a misapplication of the law was not established at the trial level.⁵ The DOC is attempting to bootstrap factual issues into errors of law. The attempt must fail. If only errors of law were raised in the DOC's petition, there would have been no need for the DOC to append various exhibits to its petition as support for factual allegations not established at the trial level. See Ex. 3 and 4 to Petition (emails); Ex. 5 to Petition (DOC face sheet and chronos). The factual basis for credit for time served is the prosecutor's representation to the trial court at sentencing, not factual allegations set forth in the DOC's post-sentence review petition. RP 4.

There is a reason post-sentence review is limited to errors of law. Appellate courts do not find facts. State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003); Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009), review denied, 168 Wn.2d 1041 (2010).

⁵ Combs does not concede the accuracy of that DOC's factual allegations that were not established at the trial court level.

The legislature did not want appellate courts meddling with factual determinations made by a trial court, as shown by the plain language of the statute limiting review to errors of law. RCW 9.94A.585(7).

The legislature limited post-sentence review to errors of law because appellate courts are built to perform that role: "It is the function of an appellate court to determine questions of law." Mid-Town Ltd. Partnership v. Preston, 69 Wn. App. 227, 232, 848 P.2d 1268 (1993). The legislature, in creating the post-sentence review procedure, did not intend to create a convoluted review process where an appellate court would be forced into the position of having to review alleged factual errors leading to an improper sentence and then remanding for an evidentiary hearing to establish facts or resolve factual disputes. Review is limited to errors of law because legal errors can be swiftly and decisively dealt with on appeal, whereas factual issues are the sole province of the trial court.

The DOC, if it wishes to establish facts relevant to a sentence that may be imposed following DOSA revocation, had best avail itself of the opportunity to do so before the new sentence is imposed. The CCO filed the notice of violation. CP 12-14. The CCO was a listed witness for the revocation hearing. CP 15. The CCO or other DOC representative could easily have notified the parties and the trial court before sentence was imposed of its factual allegations relevant to credit for time served issues.

The DOC chose not to do so, either through negligence, indifference or imperiousness.

Complications arising from the DOC's failure to timely notify the court and parties of relevant factual issues are illustrated by this case. As represented by the county prosecutor in its response brief, Combs stipulated to revocation of his DOSA based on the understanding that he would receive credit for 160 days served. State Respondent's Brief at 3. Were this Court to grant the DOC's petition, the stipulation is rendered invalid, confounding the settled expectations of the parties and the trial court, necessitating a new revocation hearing and further expenditure of limited judicial resources. The petition should be denied because it is not limited to errors of law.

2. THE TRIAL COURT HAS THE AUTHORITY TO GIVE CREDIT FOR TIME SERVED WHEN IMPOSING SENTENCE FOLLOWING REVOCATION OF A DOSA.

The DOC contends only it has authority to calculate credit for time served following a DOSA revocation under RCW 9.94A.660(7)(d). Case law supports a contrary argument. Moreover, there is no statute anywhere that has been construed by the appellate courts to preclude the trial court from giving credit for time served at sentencing.

Statutory interpretation is a question of law reviewed de novo. State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). Particular

statutory provisions are not read in isolation divorced from context. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). Statutes are construed as a whole. State v. Smith, 65 Wn. App. 887, 891, 830 P.2d 379 (1992). Courts determine the plain meaning of a statute from the ordinary language used and will not add words where the legislature has not included them. Ruvalcaba v. Kwang Ho Baek, 159 Wn. App. 702, 710-11, 247 P.3d 1 (2011). Courts must assume the legislature means exactly what it says. Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). To the extent a statute is ambiguous, however, the rule of lenity requires resolution of that ambiguity in the defendant's favor. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999).

Subsection (7) of RCW 9.94A.660, which contains the credit for time served requirement following DOSA revocation, addresses the authority of the court to perform certain acts and enter certain orders in relation to the DOSA. In construing words used in a statute, courts take into consideration "the meaning naturally attaching to them from the context" and "adopt the sense of the words which best harmonizes with the context." State v. Jackson, 137 Wn.2d 712, 728-29, 976 P.2d 1229 (1999) (quoting McDermott v. Kaczmarek, 2 Wn. App. 643, 648, 469 P.2d 191 (1970)).

Under (7)(a), "the court" may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred. Under (7)(b), "the court" may modify the conditions of the community custody or impose sanctions "under (c) of this subsection." Under (7)(c), "the court" may order the offender to serve a term of total confinement within the standard range at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

Subsection (7) of RCW 9.94A.660 says nothing about the authority of the DOC to do anything. It only references the authority of the court. It follows that subsection (7)(d), governing credit for time served, is also addressed to the court. This is the sense of the words that "best harmonizes with the context." Jackson, 137 Wn.2d at 728-29. The context is the authority of the court to perform certain acts and enter certain orders in relation to the DOSA. Indeed, subsection (7)(d) expressly links itself to the trial court's authority under (7)(c): "An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section." RCW 9.94A.660(7)(d). The DOC does not have any authority

to order an offender to serve a term of total confinement under the DOSA statute. The court has this authority.

The natural reading of the statute is that the trial court, in exercising its authority to impose confinement following revocation, is also obligated to give an offender credit for time served. In interpreting a statute, courts favor a natural reading. See, e.g., State v. Sweany, ___ Wn. App. ___, 281 P.3d 305, 308 (2012) ("We hold that the term 'valued at' in RCW 9A.48.020(1)(d) refers to market value. This is the more natural reading of the statute."); State v. Ramos, 152 Wn. App. 684, 691, 217 P.3d 384 (2009) ("There is only one natural reading of this statute.").

Certainly nothing in the DOSA statute limits the authority to give credit for time served to the DOC. If the legislature intended the DOC to have exclusive authority to order calculate credit for time served, the legislature would be expected to say just that. See State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004) ("if the legislature wanted the age element in RCW 13.04.030(1)(e)(v) to refer to age at the time of commission, it could have used language indicating this.").

In State v. Davis, the court held the trial court erred in determining Davis was not entitled to credit for time served for community custody after his DOSA was administratively terminated by the DOC under former RCW 9.94A.660 (5) (2002). State v. Davis, 160 Wn. App. 471, 474, 248

P.3d 121 (2011).⁶ Under the DOC's logic, the trial court would have had no authority to order credit for time served because the DOC is solely responsible for calculating credit for time served following DOSA revocation. The holding of Davis is to the contrary. If the trial court was required as a matter of law to order credit for time served against "community custody" following the DOSA termination in Davis, it necessarily follows that a trial court has authority to order credit for time served against a term of confinement in Combs's case.

Even if the statutory language in RCW 9.94A.660(7)(d) is ambiguous, the rule of lenity requires this court to construe the statute in Combs's favor. Davis, 160 Wn. App. at 477. The DOC acknowledges it is arguable that RCW 9.94A.660(7)(d) authorizes the trial court to order credit for time served upon DOSA revocation. Petition at 8. The DOC, by the terms of its own argument, effectively concedes the rule of lenity must operate in favor of Combs.

Moreover, RCW 9.94A.505(6) provides "The sentencing court shall give the offender credit for all confinement time served before the

⁶ Under the DOSA statute as amended in 2008, community custody served during a DOSA sentence may not be credited against any community custody served after a failure to complete the DOSA sentence. RCW 9.94A.660(8) (eff. Aug. 1, 2009). The amended statute was not applicable in Davis because it took effect after the underlying offense at issue. Davis, 160 Wn. App. at 477 n.4.

sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." This general provision and the DOSA credit for time served provision should be construed in relation to one another: "Statutes relating to the same subject must be read together as a unified whole, to achieve a harmonious statutory scheme that maintains the integrity of the respective statutes." Johnson v. King County, 148 Wn. App. 220, 226, 198 P.3d 546 (2009).

The DOC argues the trial court's authority under RCW 9.94A.505(6) to order credit for presentence time does not apply in the context of a DOSA revocation because "such a context is not presentence." Petition at 8. The DOC offers no authority for that argument. See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after diligent search). Argument for which no authority is cited may not be considered on appeal and constitutes a concession that the argument lacks merit. King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 717, 846, 846 P.2d 550 P.2d 550 (1993); State v. McNear, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997).

The trial court has authority to "give the offender credit for all confinement time served before the sentencing." RCW 9.94A.505(6). It is indisputable that a sentencing hearing took place on October 19, 2011

and that a new or amended sentence was imposed on that date. RP 3-8; CP 18-27. In fact, the trial court vacated the DOSA sentence entered on July 13, 2011 and imposed a separate, amended judgment and sentence at the sentencing hearing. CP 17. The court plainly had authority under RCW 9.94A.505(6) to give Combs credit for all confinement time served before the sentencing took place on October 19, 2011.

An offender is constitutionally entitled to credit for confinement time served exclusively on the underlying charge for a period preceding revocation of probation. In re Pers. Restraint of Phelan, 97 Wn.2d 590, 597, 647 P.2d 1026 (1982). RCW 9.94A.505(6) "simply represents the codification of the constitutional requirement that an offender is entitled to credit for time served prior to sentencing." State v. Williams, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990). The DOC's argument that RCW 9.94A.505(6) does not apply in the context of a revoked sentence therefore fails. Time spent in confinement prior to revocation of a sentence qualifies as "time served before the sentencing" under RCW 9.94A.505(6).

Furthermore, the Sentencing Reform Act "requires courts to impose a determinate sentence," defined as "a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, [or] of community custody." State v. Winborne, 167 Wn. App. 320, 324 n.4, 273 P.3d 454 (2012) (quoting

RCW 9.94A.030(18)). Authorizing a court to give credit for time served as part of a sentence, regardless of whether that sentence is imposed following revocation, is wholly consistent with the statutory mandate to impose a determinate sentence.

The DOC asserts the sentencing court, in awarding credit for time served, barred the DOC from applying RCW 9.94A.171 in a particular manner. It claims "the trial court's order for credits in effect bars the DOC from applying the tolling statute to Combs's sentence." Petition at 9. The DOC relies on RCW 9.94A.171(3)(a), which states in part that "any period of community custody shall be tolled during any period of time the offender is in confinement for any reason[.]" The DOC also relies on RCW 9.94A.171(4), which states, "For terms of confinement or community custody, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision."

The apparent premise of the DOC's argument is that the court gave Combs credit for time served against his community custody term.⁷ The premise of the DOC's argument is false. The court did not apply credit to

⁷ DOC frames the issue as such: "*By crediting Combs's community custody term with the time he spent absconding from supervision and in confinement on other charges, did the sentencing court contravene legislative intent that the length of supervision 'not be curtailed by an offender's absence from the supervision for any reason including confinement.'*" Petition at 4 (emphasis added).

Combs's community custody term. The court applied credit to Combs's confinement term. The judgment and sentence references RCW 9.94A.505 and the warrant of commitment order 160 days credit for time served. CP 21, 28. RCW 9.94A.505(6) requires day-for-day credit be given towards a sentence of confinement. In re Pers. Restraint of Schillereff, 159 Wn.2d 649, 651-52, 152 P.3d 345 (2007); State v. Phelan, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983) ("A refusal to *fully* take into consideration presentence jail time against every aspect of a prison sentence infringes independently on at least two constitutional protections."); Williams, 59 Wn. App. at 382 (RCW 9.94A.505(6) codifies the constitutional requirement).

The tolling statute is not implicated in this case. The court did not give Combs credit against his term of community custody. The DOC identifies and attacks a problem that does not exist. The court imposed a sentence of confinement and gave credit towards that confinement.

Indeed, RCW 9.94A.660(8) expressly states "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."

In other words, an offender is not entitled to credit any period of pre-revocation time spent on community custody against a term of community custody imposed as part of the new sentence following revocation. Thus, whether community custody is tolled before revocation of the DOSA is irrelevant. Tolling does not matter because the community custody term cannot be credited against community custody imposed following revocation.

The DOC argues RCW 9.94A.660(7)(d), if construed to authorize the trial court to give credit for time served, would conflict with the DOC's tolling authority under RCW 9.94A.171(4). Petition at 8. Apparent conflicts in statutes must be harmonized whenever possible. State v. Bennett, 168 Wn. App. 197, 208, 275 P.3d 1224 (2012). There is no conflict here. To the extent the DOC believes factual information regarding a tolling period is relevant to the sentence, it may inform the trial court of such facts before sentence is imposed. In that manner, the DOC is allowed to establish the date for the tolling of the community custody portion of a sentence while the court is allowed to order credit for time served as part of its traditional sentencing function. As a practical matter, the DOC will always be in a position to do just that because the community corrections officer files the notice of violation and a recommendation that the DOSA be revoked.

The DOC contends the statutes do not conflict if one assumes they are both directed at the DOC. Petition at 9. But that approach resolves ambiguity in favor of the DOC. That is not the law. "If the language of a penal statute is ambiguous, the courts apply the rule of lenity and resolve the issue in a defendant's favor." State v. Knutson, 64 Wn. App. 76, 80, 823 P.2d 513 (1991).

The DOC devotes one paragraph in the petition to its separation of powers argument. That paragraph consists of boilerplate law on the subject. There is no attempt to meaningfully apply the separation of powers doctrine to the statutes at issue here. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290, review denied, 136 Wn.2d 1015, 966 P.2d 1278 (1998).

In any event, the branches of government "are not hermetically sealed and some overlap must exist." City of Fircrest v. Jensen, 158 Wn.2d 384, 393–94, 143 P.3d 776 (2006). It is the function of the judiciary to impose sentence. State v. Rice, __Wn.2d__, 279 P.3d 849, 858 (2012). Awarding credit for time served as part of a sentence is an established judicial function. A court does not violate the separation of powers doctrine by fulfilling its function of giving credit for time served as part of a sentence.

Finally, the DOC asserts the time period between commission of the underlying offense on May 13, 2011 and the day Combs was sentenced on October 18, 2011 is only 158 days, not 160 days. Petition at 2. The DOC does not explain how it reaches this conclusion, but it can only be reached by omitting May 13 and October 13 as credit qualifying days. The DOC's calculation is improper. Each day needs to be counted. Schillereff, 159 Wn.2d at 651 (petitioner entitled to three days credit for time served where arrested on February 10 and released on February 12 on bail). Combs was in custody on May 13 and October 18. RP 2, 6. Those two days must be included in the credit for time served calculation.

D. CONCLUSION

For the reasons stated, Combs requests that this Court deny the petition.

DATED this 17th day of August 2012

Respectfully Submitted,

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Transmittal Letter

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