

FILED

JUN 22 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 28582-1-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

LINDA J. FELLER,

Defendant/Appellant.

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Appellant's Brief

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in revoking Ms. Feller's DOSA sentence without finding by a preponderance of the evidence that she willfully committed the alleged violations.

2. The trial court erred in failing to credit Ms. Feller for the community custody portion of her DOSA sentence when she was in compliance with the conditions of the sentence.

*Issues Pertaining to Assignment of Error*

1. Was Ms. Feller's constitutional right to due process violated when the trial court revoked her DOSA sentence without first finding by a preponderance of the evidence that she willfully committed the alleged violations?

2. Was Ms. Feller entitled to receive credit for the community custody portion of her DOSA sentence when she was in compliance with the conditions of the sentence?

**B. STATEMENT OF THE CASE**

Ms. Feller's DOSA sentence was revoked following a revocation hearing, in which the court heard testimony from Ms. Feller as well as her community corrections officer. RP 6, 17, CP 38-40. The alleged violations included failure to report to DOC and being discharged from a

treatment facility for using cocaine. RP 7-9. The court ordered revocation without finding by a preponderance of the evidence that Ms. Feller willfully committed the alleged violations. The Court stated, “I find that all three of the allegations . . . have been proven to my satisfaction . . . I’m convinced that you don’t have what it takes—you don’t have it in you to successfully complete a DOSA-type sentence.” RP 39-40; CP 38-40.

In addition to imposing an 18-month prison sentence, the court imposed 9-12 months community custody following incarceration. The court made no mention of crediting Ms. Feller for the community custody portion of her DOSA sentence when she was in compliance with the conditions of the sentence. RP 43.

This appeal followed. CP 41-42.

## **C. ARGUMENT**

**1. Ms. Feller’s constitutional right to due process was violated when the trial court revoked her DOSA sentence without first finding by a preponderance of the evidence that she willfully committed the alleged violations.**

The serious nature of a proceeding resulting in revocation of a DOSA sentence requires a preponderance of the evidence standard of proof. In re Personal Restraint Petition of McKay, 127 Wn.App. 165, 168,

110 P.3d 856 (2005). This standard stems from the procedural due process protections established in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); see also In re Personal Restraint Petition of McNeal, 99 Wn. App. 617, 619, 994 P.2d 890 (2000); WAC 137-104-050(14) (department has obligation of proving allegations by a preponderance of the evidence).

Herein, the court ordered the revocation without finding by a preponderance of the evidence that Ms. Feller willfully committed the alleged violations. The Court merely stated, “I find that all three of the allegations . . . have been proven to my satisfaction . . . I’m convinced that you don’t have what it takes—you don’t have it in you to successfully complete a DOSA-type sentence.” RP 39-40; CP 38-40. Since the court did not find that Ms. Feller willfully committed the alleged violations by a preponderance of the evidence, its revocation order violated her constitutional right to due process.

**2. Ms. Feller was entitled to receive credit for the community custody portion of her DOSA sentence when she was in compliance with the conditions of the sentence.**

When a DOSA sentence is revoked, an offender should receive credit for the community custody portion of the sentence if the offender

was in compliance with the conditions of the sentence. In re Albritton, 143 Wn.App. 584, 794, 180 P.3d 790 (2008). But under the tolling statute, an offender is not entitled to receive credit for any periods of time that she is absent from supervision without prior approval. RCW 9.94A.171 (former RCW 9.94A.625); In re Pers. Restraint of Knapp, 102 Wash.2d 466, 470, 687 P.2d 1145 (1984). 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. Albritton, 143 Wn.App. at 795, 180 P.3d 790.

Herein, the record reveals periods of time before the revocation when Ms. Feller was in compliance with the community custody conditions of her sentence. For example, she was in compliance before she failed to report on 7/8/09 and during the time she spent in inpatient drug treatment from 7/23/09 until she was discharged on 8/10/09. See RP 7-9. Yet when the trial court ordered 9-12 months community custody following the revocation, it failed to credit Ms. Feller for the community custody portion of her DOSA sentence when she was in compliance with the conditions of the sentence. In accordance with the legal authority cited above, this case should be remanded to determine the amount of time Ms.

Feller was in compliance with the community custody conditions and credit her with that amount of community custody time.

**D. CONCLUSION**

For the reasons stated, the case should be remanded with instructions to determine whether Ms. Feller willfully committed the alleged violations by a preponderance of the evidence and, if she did, to credit Ms. Feller for the community custody portion of her DOSA sentence when she was in compliance with the conditions of the sentence.

Respectfully submitted June 22, 2010.

  
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