

NO. 285821-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
SEP 16 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

LINDA J. FELLER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 08-1-00807-3

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ADRIENNE M. FARABEE, Deputy
Prosecuting Attorney
BAR NO. 32859
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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ISSUES

1. Were the court's Findings of Fact sufficient to show that the defendant's Drug Offender Sentencing Alternative (DOSA) was properly revoked?
2. Was the trial court statutorily barred from granting the defendant time served for the time spent in community custody?

STATEMENT OF THE CASE

The defendant plead guilty to Unlawful Possession of a Controlled Substance on February 25, 2009, and was sentenced on March 25, 2009, and given the Drug Offender Sentencing Alternative (DOSA), in a residential facility. (CP 12-22). As per RCW 9.94A.660, she was given 24 months of community custody. (CP 18).

The defendant's troubles with regard to the DOSA began in July of 2009. Due to a medical condition, she had not entered into the residential treatment program on March 26, 2009, as originally scheduled. (CP 27). The defendant did not meet her obligations to report to the Department of Corrections (DOC), nor enter the

residential treatment facility. (CP 24). The defendant first missed her appointment with DOC on July 7, 2009. (CP 27). The defendant told her Community Corrections Officer (CCO) that she was too ill to report to the DOC, and was subsequently instructed by her Community Corrections Officer to report the next day, 07/08/09, after court. (CP 27).

On July 8, 2009, she did not report again, giving the excuse that she had 'passed out in her bathroom.' (CP 27). The defendant's CCO informed her that if she were truly that ill, she would need to schedule an appointment with her doctor. (CP 27).

The defendant did appear on July 9, 2009, though late by almost eight hours, and advised she was going to the doctor at 5:00 p.m. that day. (CP 27). The defendant was told to return the next day, (07/10/09) with information regarding her current medical situation. (CP 27). The defendant failed to contact DOC on July 10,

2009, and a telephone call revealed the defendant cancelled her appointment with her doctor. (CP 28). The defendant called on 07/10/09, and informed the DOC that she would have her appointment on 07/13/09. (CP 28).

On July 13, 2009, Officer Pritchard made telephone contact with defendant, and was advised by her that she was attempting to set up an appointment with the doctor on this date. (CP 28). The defendant provided multiple stories as to why she cancelled her doctor's appointment, none matching the information provided by the physician's office. (CP 28). On July 14, 2009, CCO, Officer Pritchard, phoned the doctor's office, and learned the defendant had picked up some paperwork, but had not seen the doctor. (CP 28).

The defendant reported to the DOC on July 14, 2009, with the paperwork, which provided no information as to if her condition was such that she could enter the facility. (CP 28). She was

then taken into custody, until her bed date of July 23, 2009, and was transported to her Residential DOSA treatment facility, American Behavioral Health Services. (CP 30).

It appeared the defendant was on track to successfully complete her DOSA, until August 10, 2009. (CP 31). The DOC received information that the defendant was being discharged from American Behavioral Health Services due to drug use while in treatment. (CP 31). She had provided two positive urinalysis (UA) samples, one on 07/23/09, and one on 08/02/09. (CP 31). The second sample, indicating that she had been using drugs while in the facility, was grounds for ejection from the program. (CP 31). The defendant was taken into custody by community corrections officers in Spokane, Washington, and placed in the Spokane County Jail. (CP 31).

The Court held a hearing to see if the defendant's DOSA sentence would be revoked, and after considering all the evidence, found that

the defendant had committed three separate violations of the DOSA agreement. (CP 39). The defendant was sentenced to 18 months imprisonment, and given no credit for time served in community custody. (09/04/09, RP 43-44).

The defendant now appeals that decision. (CP 41)

ARGUMENT

- 1. The court's Findings of Fact were sufficient to show that the defendant's DOSA sentence was properly revoked.**

The defendant's reliance on the court's oral statements is improper. The court's Findings of Fact are embodied in the document produced by the court, consisting of CP 38-40. Washington courts have long held the rule that "a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time ... and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into findings, conclusions, and judgment." *Hanson v. Estell*, 100 Wn. App. 281,

290-291, 997 P.3d 426 (2000) (quoting *DGHI Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963))).

A Judge conducting a Bench Trial is presumed to know the law. See *State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. 661, 681, 828 P.2d 565(1992). The defendant points to no case law that states that a Judge must expressly notate the standard of proof, and provides no evidence that the trial court applied an improper standard of proof. The presumption is not overcome by a completely silent record.

In re Personal Restraint Petition of McKay, does require that the State prove its case in a DOSA revocation hearing by a preponderance of the evidence. *Id.* at 127 Wn. App. 165, 168, 110 P.3d 856 (2005). What *McKay* does not do is establish that the trial court Judge must include the

standard of proof in the findings it produces as a result of that hearing. The facts of *McKay* bear this out. In *McKay*, Ms. McKay was not given a trial by a member of the independent judiciary, but rather by a DOC hearings officer. *Id.* 127 Wn. App. at 167. Furthermore, she was informed that the standard of proof would be fairly low, 30 percent to 35 percent. *Id.* The Court stated that this was in effect a standard of 'some evidence in the record.' *Id.* The case had nothing to do with whether judicially authored findings must bear the standard of proof embedded within them. *In re McNeal*, likewise simply establishes that the burden of proof is "preponderance of the evidence." *In re McNeal*, 99 Wn. App. 617,619, 994 P.2d 890 (2000).

2. The trial court was statutorily barred from granting the defendant time served for the time she spent in community custody.

The defendant incorrectly states that, "When a DOSA sentence is revoked, an offender should

receive credit for the community custody portion of the sentence..." (App. Brief at 6). However, this is in direct conflict with RCW 9.94A.660(8), which 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. (emphasis added).

RCW 9.94a.660(8).

Therefore, the defendant is not entitled to receive credit for her community custody time, per statute.

The defendant cites to *In re Albritton*, 143 Wn. App. 584, 794, 180 P.3d 790 (2008), to support her argument that she was entitled to receive credit for time served in community custody. (App. Brief, 6-7). However, *In re Albritton*, refers to credit given for *time spent in confinement* for violating conditions of a DOSA sentence, and does not support the defendant's argument to receive credit for community custody.

The State agrees the defendant should receive credit for any time that was served in jail custody, however, the trial judge was statutorily correct to deny the defendant credit for time served in community custody.

CONCLUSION

For the reasons stated above, the defendant's DOSA sentence should be affirmed and any credit for community custody be denied.

RESPECTFULLY SUBMITTED this 15th day of
September 2010.

ANDY MILLER

Prosecutor



ADRIENNE M. FARABEE, Deputy

Prosecuting Attorney

Bar No. 32859

OFC ID NO. 91004

ORIGINAL

COURT OF APPEALS, DIVISION III
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STATE OF WASHINGTON,

Respondent,

NO. 285821

vs.

DECLARATION OF SERVICE

LINDA J. FELLER,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on September 15, 2010.

David N. Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005

U.S. Regular Mail, Postage Prepaid
 Legal Messenger
 Facsimile

LINDA J. FELLER
GENERAL DELIVERY
PASCO, WA 99301

U.S. Regular Mail, Postage Prepaid
 Legal Messenger
 Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on September 15, 2010.


PAMELA BRADSHAW