

**FILED**

JUN 04, 2014

Court of Appeals  
Division III  
State of Washington

No. 31648-3-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CHARLOTTE DELENE BERGEN,

Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT  
Honorable Michael S. Mitchell, Judge Pro Tem - Sentencing hearing  
Honorable M. Scott Wolfram, Judge - Motion hearing

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A. RESTATEMENT OF APPELLANT’S ISSUES.....1

B. RESPONDENT’S ANSWER TO APPELLANT’S ISSUES.....1

C ARGUMENT IN REPLY TO STATE’S RESPONSE.....1

1. Review is appropriate where the error is capable of repetition yet evades review and is of continuing and substantial public interest.....2

2. The sentencing court did not have statutory or inherent authority to order an additional period of incarceration once the residential Drug Offender Sentencing Alternative (“DOSA”) sentence had been granted.....2

3. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.....6

D. CONCLUSION.....7

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>January v. Porter</i> , 75 Wn.2d 768, 453 P.2d 876 (1969).....	3
<i>In re Post-Sentence Review of Cage</i> , No. 31848-6-III (Wash. Ct. App. June 3, 2014).....	2, 3
<i>Matter of Guardianship of Hayes</i> , 93 Wn.2d 228, 608 P.2d 635 (1980)....	3
<i>State v. Blazina</i> , 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010, 311 P.3d 27 (No. 89028-5, 2013).....	6–7

<i>State v. Duncan</i> , No. 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. March 25, 2014), petition for review filed April 24, 2014.....	6
<i>State v. Hale</i> , 94 Wn. App. 46, 971 P.2d 88 (1999).....	4
<i>State v. Harkness</i> , 145 Wn. App. 678, 186 P.3d 1182 (2008).....	3
<i>State v. Murray</i> , 118 Wn. App. 518, 77 P.3d 1188 (2003).....	3
<i>State v. Paige–Colter</i> , noted at 175 Wn. App. 1010, 2013 WL 2444604, review granted, 178 Wn.2d 1018, 312 P.3d 650 (No. 89028-5, 2013).....	7
<i>State v. Shove</i> , 113 Wn.2d 83, 776 P.2d 132 (1989).....	3–4

**Statutes**

Wash. Const. art. 4, § 6.....	3
RCW 9.94A.660 (7)(a).....	5
RCW 10.01.160.....	6

**Court Rules**

CrR 3.2.....	5
CrR 3.2(f)(1).....	5
CrR 3.2(f)(2).....	5

**A. RESTATEMENT OF APPELLANT’S ISSUES**

1. Review is appropriate where the error is capable of repetition yet evades review and is of continuing and substantial public interest.
2. The sentencing court did not have statutory or inherent authority to order an additional period of incarceration once the residential Drug Offender Sentencing Alternative (“DOSA”) sentence had been granted.
3. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.

**B. RESPONDENT’S ANSWER TO APPELLANT’S ISSUES**

1. The challenge to the detention order is moot with no relief possible.
2. The court did not abuse its discretion in detaining the defendant pending treatment in order to better effectuate the goals of the DOSA.
3. The court did not abuse its discretion in imposing legal financial obligations.

**C ARGUMENT IN REPLY TO STATE’S RESPONSE**

Primarily Ms. Bergen relies upon her Brief of Appellant to address the issues raised by the State. Additionally she states as follows in direct Reply.

1. Review is appropriate where the error is capable of repetition yet evades review and is of continuing and substantial public interest. The trial court invited this Court to give it guidance. Whether a court under the circumstances of this case has statutory authority and/or discretion is precisely the issue. This appeal squarely raises statutory interpretation and inherent authority issues as matters of first impression. It is also likely this issue will reoccur in Walla Walla County and throughout the state. *See* Brief of Appellant, 13–17. Review is appropriate so that this court may issue a definitive opinion. *Accord, In re Post-Sentence Review of Cage*, No. 31848-6-III, *Slip Opinion* 3–4 (Wash. Ct. App. June 3, 2014).

2. The sentencing court did not have statutory or inherent authority to order an additional period of incarceration once the residential Drug Offender Sentencing Alternative (“DOSA”) sentence had been granted. The appellant contends the s court did not have (1) statutory or (2) inherent authority to order an additional period of incarceration pending an available “bed date” once the court imposed the residential DOSA sentence.

As to (1), the State agrees the DOSA statute is silent whether pre-entry incarceration may be ordered once a residential treatment sentence has been imposed. Brief of Respondent (“BOR”), 9–10. The State argues

a court may use its “judicial power” to fill in the silence, relying on *Matter of Guardianship of Hayes*, 93 Wn.2d 228, 608 P.2d 635, 638 (1980). *Id.* Its reliance is misplaced. In *Hayes*, the court held that a superior court has jurisdiction to entertain and act upon a guardian ad litem’s petition for an order authorizing sterilization of a mentally incompetent person under the broad grant of judicial power in Washington Const. art. 4, § 6. in the absence of any statutes regulating or restricting such sterilization. 93 Wn. 2d at 229–30, 232–33. Here, there is a statute. *Hayes* is irrelevant.

The State disputes that the Order of Detention was an unauthorized modification of the sentence. BOR, 9. The trial court did not have any authority to modify the judgment and sentence to include pre-entry incarceration. “After final judgment and sentencing, the court loses jurisdiction to the DOC.” *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008); see also, *In re Post-Sentence Review of Cage*, supra, *Slip Opinion* 5–6 (citing *January v. Porter*, 75 Wn.2d 768, 773-74, 453 P.2d 876 (1969)). This leaves no room for inherent authority to be exercised by the sentencing court. *State v. Murray*, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003). A sentence imposed under the SRA may be modified only if it meets statutory requirements relating directly to the modification of sentences. *Harkness*, 145 Wn. App. at 685 (citing *State v.*

*Shove*, 113 Wn.2d 83, 89, 776 P.2d 132 (1989)). Examples include earned early release time as determined by the DOC, authorized furlough or leave of absence, serious medical issues, clemency or pardon, partial confinement for reestablishment in the community, or reduction in sentence due to prison overpopulation. *Id.* A court commits reversible error when it exceeds its sentencing authority under the SRA. *State v. Hale*, 94 Wn. App. 46, 53, 971 P.2d 88 (1999). Here, there was no statutory basis and the court's imposition of incarceration pending entry into a treatment program exceeded its authority to modify the judgment and sentence.

As to (2), the State cites no relevant authority granting a court the discretion to order post-sentencing incarceration pending entry into a treatment program. BOR, 11–12. This is a penalty not authorized by the legislature. It is an unauthorized modification of sentence. It is a constitutionally deficient compelling of obedience where the legislature has already factored obedience into the DOSA scheme. If Ms. Bergen does not meet the contingency of **entering and remaining** in a treatment program, the statute provides adequate remedies of revocation or

modification of the alternative sentence.<sup>1</sup> The legislature has established the sentence. Absent a statutory grant of authority, the superior court lacked inherent authority to order the additional incarceration challenged on appeal.

The State argues the Order of Detention stands apart from the DOSA scheme, and is independently authorized by provisions of CrR 3.2. BOR, 7–8. However, Criminal Rule 3.2, titled “Release of Accused”, is limited to pre-sentence matters. Here, Ms. Bergen had already been sentenced. CrR 3.2 does not apply.<sup>2</sup>

The State summarily concludes, without citation to supporting authority, that the order of pre-emptive detention was a “discretionary act well within the authority of the superior court.” BOR, 12. It further mis-

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<sup>1</sup> RCW 9.94A.660 provides in pertinent part:

(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.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) 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.

<sup>2</sup> The State cites portions of CrR 3.2 concerning delay of pre-sentence release in the event of intoxication (BOR, 8, citing CrR 3.2(f)(1)) and mental illness requiring evaluation for possible commitment (BOR, 9, citing CrR 3.2(f)(2)). The facts here do not involve pre-sentence release. Further, intoxication and mental illness were not discussed in the record nor did the court rely upon them in ordering detention pending entry into a drug-related DOSA treatment program.

informs the court by stating the trial court “determined that it had discretion to detain the Defendant until her bed date in order to effectuate the intent of the DOSA statute. II RP 5.” BOR, 5. The court instead said simply that where a statute is silent, a court always has discretion to fill in the void, as follows:

THE COURT: I think because [the DOSA statute] is really silent, the Court has discretion. And I'm sure if I have screwed this up, the Court of Appeals will tell me, but at this point I'm going to continue her in. And I understand [defense counsel's] argument.

II RP 5.

3. The directive to pay based on an unsupported finding of ability to pay legal financial obligations and the discretionary costs imposed without compliance with RCW 10.01.160 must be stricken from the Judgment and Sentence.

Appellant relies upon her arguments previously set forth in the Brief of Appellant, 17–24. Ms. Bergen is aware this Court recently issued an opinion holding this issue may not be challenged for the first time on appeal. *See State v. Duncan*, No. 29916-3-III, 2014 WL 1225910, at \*2-6 (Wash. Ct. App. March 25, 2014), petition for review filed April 24, 2014. However, whether this issue can be raised for the first time on appeal is now pending before the Washington Supreme Court in *State v. Blazina*,

No. 89028-5<sup>3</sup>, consolidated with *State v. Paige-Colter*, No. 89109-5<sup>4</sup>.

Oral argument took place in those cases on February 11, 2014. Therefore, Ms. Bergen raises this issue in order to preserve her argument, should the Washington Supreme Court effectively overrule this Court's opinion in *Duncan*.

#### **D. CONCLUSION**

For the reasons stated here and in the brief of appellant, this court should determine the issue of pre-emptive detention is not moot and address its merits, and the Order Detaining<sup>5</sup> should be vacated with directions that the appellant be given future credit for pre-admission incarceration in the event the DOSA sentence is revoked in the future. The matter should also be remanded to strike the express finding of present and future ability to pay Legal Financial Obligations and remove the directive to make monthly payments, and to strike the imposition of discretionary costs from the Judgment and Sentence.

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<sup>3</sup> *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010, 311 P.3d 27 (2013).

<sup>4</sup> *State v. Paige-Colter*, noted at 175 Wn. App. 1010, 2013 WL 2444604, review granted, 178 Wn.2d 1018, 312 P.3d 650 (2013).

Respectfully submitted on June 4, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 4, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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<sup>5</sup> CP 56-57