83451-2

NO. 37002-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFF ALAN JONES

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 APR 23 PM 1:51
STATE OF WASHINGTON
BY
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 00-1-01046-8

BRIEF OF APPELLANT

ROGER A. HUNKO, WSBA# 9295
Attorney for Appellant
The Law Office of Wecker-Hunko
569 Division Street, Suite E
Port Orchard, WA 98366
(360) 876-1001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. INTRODUCTION 1

B. ASSIGNMENT OF ERRORS 1

1. THE TRIAL COURT ERRED BY REFUSING TO APPLY THE TIME DEFENDANT SERVED PRIOR TO RE-SENTENCING THAT WAS IN EXCESS OF THE PERIOD OF INCARCERATION ORDERED DURING RE-SENTENCING, AGAINST THE PERIOD OF TIME OF COMMUNITY CUSTODY ORDERED BY THE COURT AT RE-SENTENCING 1

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

1. IS THE SENTENCING COURT REQUIRED TO GIVE CREDIT FOR THE TIME SERVED IN CUSTODY PRIOR TO SENTENCING (APPROXIMATELY 81 MONTHS) FOR NOT ONLY THE INCARCERATION PERIOD ORDERED BY THE COURT AT SENTENCING (51 MONTHYS) BUT ALSO CREDIT FOR ANY TIME IN EXCESS OF THE SENTENCE OF INCARCERATION PREVIOUSLY SERVED AGAINST ANY PERIOD OF COMMUNITY CUSTODY ORDERED IN THE CASE AT SENTENCING? 1

D. STATEMENT OF THE CASE 2

E. SUBSTANTIVE FACTS 3

F. ARGUMENT 4

1. STATUTES REQUIRE THE COURT TO ORDER CREDIT FOR TIME SERVED ON COMMUNITY CUSTODY 5

2. FAILURE TO GIVE CREDIT FOR TIME SERVED IS A VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND STATE OF WASHINGTON 8

G. CONCLUSION 9

H. RELIEF REQUESTED 10

TABLE OF AUTHORITIES

United States Supreme Court

North Carolina v. Pearce, 395 U.S.711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)..... 8, 9

Washington State Supreme Court

In re Pers. Restraint of Schillereff, 159 Wn.2d 649, 650, 152 P.3d 345 (2007) 5

State v. Gocken, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) 8

State v. Williams, 149 Wn.2d 143, 65 P.3d 1214 (2003) 4

State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007) 8

Constitutional Provisions

U.S. Const. Amend. V 4

Washington State Constitutional Provisions

Wash. Const. Art. 1 §9 4

Statutes

RCW 9.94A.030 (4) 9

RCW 9.94A.030 (5) 5

RCW 9.94A.030 (38) 9

RCW 9.94A.120 (17) 3, 4, 5, 7

RCW 9.94A.170 (3) 6, 7, 8

RCW 9.94A.195 7

RCW 9.94A.207 7

A. INTRODUCTION

The defendant, Clifford Jones, appeals the trial court's ruling denying the defendant credit for the time served in custody prior to his re-sentencing towards the period of court order community custody. Mr. Jones' appeal is based upon statutory construction of the law as it was when the acts occurred which gave rise to the conviction, and based upon equal protection and double jeopardy provisions of the United States Constitution and the Constitution of the State of Washington.

B. ASSIGNMENTS OF ERRORS

1. THE TRIAL COURT ERRED BY REFUSING TO APPLY THE TIME DEFENDANT SERVED PRIOR TO RE-SENTENCING THAT WAS IN EXCESS OF THE PERIOD OF INCARCERATION ORDERED DURING RE-SENTENCING, AGAINST THE PERIOD OF TIME OF COMMUNITY CUSTODY ORDERED BY THE COURT AT RE-SENTENCING.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. IS THE SENTENCING COURT REQUIRED TO GIVE CREDIT FOR THE TIME SERVED IN CUSTODY PRIOR TO SENTENCING (APPROXIMATELY 81 MONTHS) FOR NOT ONLY THE INCARCERATION PERIOD ORDERED BY THE COURT AT SENTENCING (51 MONTHS) BUT ALSO CREDIT FOR ANY TIME IN EXCESS OF THE SENTENCE OF INCARCERATION PREVIOUSLY SERVED AGAINST ANY PERIOD OF COMMUNITY CUSTODY ORDERED IN THE CASE AT SENTENCING?

D. STATEMENT OF THE CASE

Procedural History

Appellant was convicted of Child Molestation in the First Degree and sentenced for that crime on November 20, 2000. The crime was committed from November , 1998 to November 1999. CP 102. He was sentenced by the trial court to a period of confinement above the standard range based upon an exceptional sentence of 130 months with 36 months of community custody following his term of incarceration. Eventually, the Appellant filed a personal restraint petition and that petition was granted by the Court of Appeals on January 9, 2006. CP 77. The matter was remanded to the trial court for re-sentencing.

On April 30, 2007, Appellant was re-sentenced by the trial court to a term of 51 months incarceration. CP 83, PR 7. The court ordered 36 months of community custody. RP 7. The trial court gave appellant credit for the time he served up to the 51 months of incarceration time. RP 8. Appellant filed a Motion for Relief of Judgment pursuant to CrR 7.8(b)(4). The court denied that motion with the Findings of Fact and Conclusions of Law for Hearing on Defendant's CR 7.8 Motion presented to the court and signed by the court on November 2, 2007. CP 102. On October 19, 2007, during the hearing on the Defendant's Motion for Relief of Judgment, the court refused

to give any credit for time served while incarcerated beyond the 51 month sentence of incarceration against the period of community custody ordered by the court. RP 33.

Appelant filed a notice of appeal in a timely manner on November 19, 2007. CP 103.

E. SUBSTANTIVE FACTS

Appellant plead guilty to one count of Child Molestation in the First Degree and was sentenced on that charge on November 20, 2000. The allegations that gave rise to the conviction occurred between November, 1998 and November 1999. CP 102. Following unsuccessful direct appeal and personal restraint petitions, Appellant filed a second personal restraint petition which was granted by Division II of the Court of Appeals. The case was remanded to the trial court for re-sentencing. Re-sentencing occurred on April 30, 2007. The trial court sentenced Appellant to 51 months incarceration and 36 months of community placement custody. CP 80, RP 8. The sentencing court granted Appellant credit for the time he had served pursuant to RCW 9.94A.120 (17)[1], for the 51 months of incarceration. Appellant had served 81 months prior to the April 30, 2007 sentencing. CP 81. The court refused to grant credit for the additional 30

---

[1]Statute citations are to the 1999 Revised Code of Washington rather than the current version.

months served in custody towards the community placement custody portion of the sentence. RP 33.

Appellant moved the court for relief from judgment concerning the 36 months of community placement custody. The court denied the motion and entered written findings of fact and conclusions of law. CP 102.

F. ARGUMENT

Summery of Argument

The trial court erred in refusing to credit pre-sentence incarceration time in excess of the incarceration time ordered by the court at the time of sentencing, against the period of community custody ordered by the court which is a violation of RCW 9.94A.120 (17). In addition the failure to credit pre-sentence incarceration time in excess of the incarceration time ordered by the sentencing court at the time of sentencing against the period of community custody ordered by the court at the time of sentencing violates the constitutional provisions of the double jeopardy clauses as set forth in the Fifth Amendment to the Constitution of the Untied States and Article 1 Section 9 of the Constitution of the State of Washington.

Standard of Review

The review of this case is a de novo review of error of law in sentencing, *State v. Williams*, 149 Wn. 2d 143,65 P.3d 1214 (2003).

Argument

1. STATUTES REQUIRE THE COURT TO ORDER CREDIT FOR TIME SERVED ON COMMUNITY CUSTODY[2]

In imposing sentence, the 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." RCW 9.94A.120 (17)[3]. The statute requires the court to give credit for time served in confinement. *In re Pers. Restraint of Schillereff*, 159 Wn.2d 649, 650, 152 P.3d 345 (2007).

The record is clear that Mr. Jones served 81 months prior to the most recent re-sentencing. RP 4 and 5.

"Community custody," is defined, in pertinent part, as "that portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to . . . served in the community subject to controls placed on the offender's movement and activities by the department." RCW 9.94A.030(5) (emphasis added, irrelevant statute citations omitted)[4].

---

[2] Eric Bowman provided significant help in the writing of this brief.

[3]This statute has been renumbered and is now found at RCW 9.94A.505 (6).

[4]This definition has also been renumbered and the statutes cited within this definition have been renumbered. For the purposes of the argument, the old or new statute number cited within the statute are not particularly helpful.

"Community custody," as defined above, is a subset of "confinement."

The relevant statutes require the sentencing court to give credit for pre-sentence confinement when sentencing a person under the Sentencing Reform Act. Since community custody is a type of confinement, though less restrictive than a locked up confinement, the 30 months of pre-sentence confinement not credited to the 51 month sentence should be credited to the less restrictive community custody confinement.

RCW 9.94A.170 (3)[5] in part provides: "Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason. . ." The state relied, in part, on this statute to argue against the crediting of pre-sentence confinement time against the 36 months of community custody. CP 91 page 5 of 6. However, before a period of confinement is tolled, it must be imposed. Pre-sentence confinement may not toll any post sentence community custody, because the community custody period had not yet been ordered. At the time of Mr. Jones service of the pre-sentence confinement, there was nothing to toll as far as this sentence is concerned. The position of having pre-sentence confinement tolling post sentence

---

[5]Now RCW 9.94A.625 (3).

community custody would put RCW 9.94A.170(3) and RCW 9.94A.120 (17) in direct conflict. One can not give credit for confinement and toll the period of confinement for the same period of actual confinement. The courts should read the two statutes together, giving the appropriate meaning to both to allow for the two statutes to both have effect. The second portion of RCW 9.94A.170 (3) makes it even more clear that the statute is crafted to apply only to post sentence confinement. That portion provides: " . . . However, if an offender is detained pursuant to RCW 9.94A.207 or 9.94A.195 and is later found not to have violated a condition or requirement of community custody, time spent in confinement due to such detention shall not toll the period of community custody, community placement, or community supervision." Both RCW 9.94A.207 and RCW 9.94A.195 applied to violations of conditions of a sentence and violations of conditions of community placement or custody. These are both post-sentencing proceedings where a person subject to being confined in jail pending hearing on a violation of the terms of sentence or community custody or placement.

It is clear from the plain language of RCW 9.94A.170 (3) that the statute applies to post-sentence confinement.

2. FAILURE TO GIVE CREDIT FOR TIME SERVED IS A VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF THE CONSTITUTIONS OF THE UNITED STATES AND STATE OF WASHINGTON.

The double jeopardy clauses of the state[6] and federal[7] constitutions guarantee three separate protections, including the protection against "multiple punishments for the same offense." *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (citations omitted); *accord State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). The double jeopardy clause also requires that punishment already served be fully credited on re-sentencing if an initial sentence is reversed as unlawful. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)[8].

In Pearce, the court held "the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence

---

[6] Const. art. I, § 9 provides: "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

[7] In relevant part, the Fifth Amendment to the United States Constitution provides: "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb ..."

[8]Portions of the Pearce holdings have been overruled in *Alabam v. Smith*, 490 U.S. 794, 109 S. S. Ct. 2201, 104 L. Ed. 2d 865 (1989), however, the portion of the Pearce case concerning the issue of credit for all time served remains intact.

upon a new conviction for the same offense." Pearce, at 718-19 (note omitted).

Mr. Jones was re-sentenced following a successful personal restraint petition, where the original sentence was illegal. CP 77.

As previously stated, community custody is a subset of confinement by definition of statute. When the sentencing court declines to give credit for the entire time of confinement when re-sentencing Mr. Jones, it violates the double jeopardy clauses of the state and federal constitutions. The trial court must give credit for prior confinement against all confinement ordered in the re-sentencing. Confinement includes both total confinement as defined by RCW 9.94A.030 (38) and community custody confinement as defined by RCW 9.94A.030 (4)[9].

G. CONCLUSION

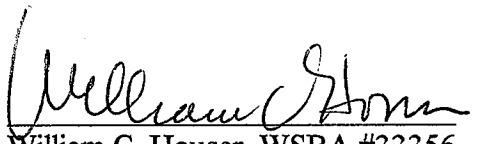
The trial court erred as a matter of law in failing to give credit for the 30 months of confinement served prior to sentencing in excess of the 51 month standard sentence imposed by the court towards the 36 months of community custody ordered by the court.

[9]The citations are to the Revised Code of Washington 1999 version.

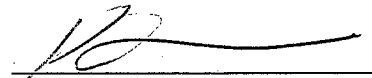
H. RELIEF REQUESTED

The Appellant ask this court to remand this case to the trial court with directions to enter a judgment and order giving credit for time served in confinement in excess of 51 months towards the 36 month period of community custody ordered by the court at the time of sentencing.

Respectfully Submitted this 22nd day of April, 2008.



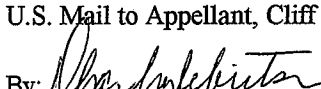
William C. Houser, WSBA #33356
Associate Attorney



Roger A. Hunko, WSBA#9295
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 22 day of April, 2008, I cause a true correct original of the Brief of the Appellant to be served on the following in the manner indicated: via U.S. Mail, David Ponzoham Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; a copy hand-delivered to, Jeremy A. Morris, Kitsap County Prosecutor's Office, 614 Division Street, MS-35, Port Orchard, WA 98367; and a copy via U.S. Mail to Appellant, Cliff Jones, 9118 Hipkins Road SW, Lakewood, WA 98498.

By: 
Olga Inglebritson, Legal Assistant

FILED
COURT OF APPEALS
DIVISION II
08 APR 23 PM 1:51
STATE OF WASHINGTON
BY
DEPUTY