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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ADAM CHIEF LEWIS, Appellant

FROM THE COURT OF APPEALS NO. 44393-7-II
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00815-1

Supplemental BRIEF OF RESPONDENT

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this matter.

B. DECISION

The decision under review is *State v. Lewis*, 185 Wn.App. 338, 344 P.3d 1220 (2015), published by the Court of Appeals, Division II on December 30, 2014, reversing the decision of the trial court with respect to Mr. Lewis's credit for time served. A copy of the opinion of the Court of Appeals is attached.

C. STATEMENT OF THE CASE

Mr. Lewis was booked into the Clark County jail on May 13, 2011, on two unrelated cases. The first case involved a lead count of burglary in the first degree (cause number 11-1-00815-1), committed on May 2, 2011, and the second case involved a lead count of assault in the first degree (cause number 11-1-00816-9), committed on May 5, 2011. CP 168, 218. An Information was filed in both of these cases on May 26, 2011. CP 1, 193. Some 89 days later, on August 10, 2011 (and while still in custody on the first two cases), Mr. Lewis was charged with failure to register as a sex offender, which was committed on April 19, 2011. CP 181. Some 387 days after the charge was filed in the failure to register case (and 476 days

after Mr. Lewis was first brought into custody), Mr. Lewis pled guilty on the failure to register case, CP 158. He was given 387 days of credit for time served on the failure to register case, and the court imposed a sentence of 50 months in prison. CP 158-159. For purposes of clarity, the State will refer to the burglary case as “A,” the assault case as “B,” and the failure to register case as “C.”

Mr. Lewis pled guilty to A on October 26, 2012, and B on November 5, 2012, and was sentenced on both cases on December 14, 2012. CP 5, 168, 199, 218. At sentencing, the parties disagreed about how much credit for time served Mr. Lewis was entitled to on A and B. The suggestions varied from zero days¹, to 89 days (the period between the arrest on A and B and the charge on C), 476 days (the period between the arrest on A and B and the day Mr. Lewis was sentenced on C)², to 581 days (the total time between the arrest on A and B and the sentencing on A and B). RP 33-73.

Both parties agreed that the sentences on all three cases should be concurrent. The trial court believed that by carving 492 days out of the

¹ The prosecutor, Alan Harvey, made this argument in his sentencing memorandum. By the time the parties argued the credit for time served issue before the trial court at the sentencing hearing, Mr. Harvey evidently realized the folly of this position and agreed that at a minimum, Mr. Lewis should get credit for the time period between May 13, 2011, and August 10, 2011. Oddly, he calculated that time period as 59 days, when it is actually 89 days. RP 51-52.

² Defense counsel was the only one who suggested this time period as a possibility. RP 60.

581 day period between Mr. Lewis's initial incarceration on A and B and his sentencing on A and B, and only giving him the remaining 89 days, it would result in an unlawful hybrid sentence because in practice, Mr. Lewis would serve 387 days longer on his sentences on A and B, in spite of the fact that the sentences were ordered to run concurrent. RP 57-58. Stated another way, the trial court believed that a sentence cannot be deemed concurrent unless each and every part of it is running at the same time as each and every part of any other sentence to which it is ordered to be concurrent. The court said: "I'm—I'm a little hung up on that year period, what you think should happen to that period...Aren't I in effect, though, making that one year run consecutive?" RP 55, 58. Defense counsel asked that Mr. Lewis be given all 581 days, but alternatively argued that Mr. Lewis at least be given 476 days (the period of time from the initial booking on A and B and the sentencing on C). RP 59-60, 62.

The trial court awarded Mr. Lewis 581 days of credit for time served on A and B, saying, "In order for me to ensure that your time is run concurrently, I need to give you credit time served back to the May 13th—May the 13th, 2011, when you were arrested and charged on [A and B]."

RP 71. The defendant received a total sentence of 332 months. CP 221. The State filed a notice of appeal.³

The following time periods are relevant to this case:

1. The period of time in which Mr. Lewis was in pre-trial confinement status as to charges A and B. This period lasted **89** days.
2. The total period of time in which Mr. Lewis was in pre-trial confinement status on all three charges A, B, and C. This period lasted **476** days. (**476** days on A and B, specifically, and **387** days in which C was running alongside A and B in a pre-trial confinement status.)
3. The period of time after which Mr. Lewis pled guilty in case C and began serving his 50 month sentence on C. This period began on August 31, 2012. There were **105** days in between the day Mr. Lewis began his sentence on C and the day on which Mr. Lewis was sentenced on A and B.

In a published opinion, the Court of Appeals held that Lewis was entitled only to 88 days of credit for time served—the first time period

³ The deputy prosecutor who filed both the appeal and the State's brief at the Court of Appeals is not the undersigned counsel. Undersigned counsel substituted into this case when the deputy prosecutor who handled this case parted ways with the Clark County Prosecutor's Office. Oral argument was not conducted in this case.

noted above.⁴ With respect to the first time period, the Court observed that Mr. Lewis was at least entitled to credit for the time period between May 13, 2011, to August 9, 2011, on each case (A and B). *State v. Lewis*, 185 Wn.App. 338, 346, 344 P.3d 1220 (2014). With respect to the second time period, the Court held that Lewis was not entitled to credit on A or B for the time period after he was charged, but not yet sentenced, on C. *Id.* With respect to the third time period, the Court held that Lewis was not entitled to credit on A and B for this time period because he was serving a sentence, and was no longer entitled to credit for time served on other matters in which he was still in a pre-trial status. *Lewis* at 347.

D. ISSUES PRESENTED FOR REVIEW

I. HOW MUCH CREDIT FOR TIME SERVED MUST MR. LEWIS BE AFFORDED ON CASES A AND B IN ORDER TO COMPORT WITH BOTH RCW 9.94A.505(6) AND THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION?

The issue before the Court is whether the Court of Appeals erred when it held that Mr. Lewis was not entitled to 581 days of credit for time served on each of the two cause numbers at issue here (cases A and B), but

⁴ This the time period between May 13, 2011 to August 10, 2011 is 89 days, but the Court of Appeals cut off the date at August 9, 2011 (not counting the date of charging for case C), arriving at 88 days. *State v. Lewis*, 185 Wn.App. 338, 346, 344 P.3d 1220 (2014).

rather was entitled to 88 days of credit for time served on each of those cases.

The State submits that the Court of Appeals may have erred, but not for the reasons set forth by Mr. Lewis.

This Court has stated:

Fundamental fairness and the avoidance of discrimination and possible multiple punishment dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence. Otherwise, such a person's total time in custody would exceed that of a defendant likewise sentenced but who had been able to obtain pretrial release. Thus, two sets of maximum and mandatory minimum terms would be erected, one for those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release. Aside from the potential implications of double jeopardy in such a situation, it is clear that the principles of due process and equal protection of the law are breached without rational reason.

Reanier v. Smith, 83 Wn.2d 342, 346-47, 517 P.2d 949 (1974)

As the Court of Appeals observed, RCW 9.94A.505(6) cannot be constitutionally applied by its plain terms. *Lewis* at 345. RCW 9.94A.505(6) states: "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." Under the plain language of this statute, a defendant who is

incarcerated on more than one case would not get pre-trial credit for *any* of his time spent in jail awaiting trial because there is no way for him to be held “solely” on one charge or the other. But the statute cannot be applied in that way, because such an application would violate the Fourteenth Amendment’s guarantee of equal protection. *Lewis* at 345, *Reanier v. Smith* at 346-47.

...[A]pplying the statute in such a manner simply does not comport with the principles of due process and equal protection that entitle an offender to credit for time served. Regardless of how many offenses an offender has been charged with, an offender serving pretrial confinement would be disadvantaged because he is serving pretrial confinement while a more affluent defendant facing the same charges may not.

Lewis at 345.

Here, the Court of Appeals ordered credit for time served in the amount of 88 days on *each* case, A and B, without discussion or analysis about why the time was being applied to each case. The State’s review of the published authority on this subject suggests that so long as an offender is given credit, one way or the other, for every minute he spent in pre-trial confinement (as opposed to it simply evaporating), then equal protection concerns are satisfied. In discussing credit for time served under RCW 9.94A.505(6), Washington Practice states, “If, however, the offender is confined on two charges simultaneously, any time not credited towards

one charge must be credited towards the other.” 13 B SETH A. FINE AND DOUGLAS J. ENDE, WASHINGTON PRACTICE: CRIMINAL LAW, § 3603 (2014-2015 ed.), citing *In re Schaupp*, 66 Wn.App. 45, 49-50, 831 P.2d 156 (1992). This would appear to suggest that the narrowest application of this statute that would still comport with equal protection would be to give Mr. Lewis 88 days of credit on *either* A or B, but not both.

But the State does not argue this, and believes the Court of Appeals correctly determined that the credit for time served (in whichever amount is determined to be the correct amount) should be awarded in an equal amount on each case, A and B. The reason is that if credit for time served is awarded on only one of the two cases, the principles of equal protection will be violated in a similar manner as if it were denied entirely. For example, if a defendant is booked and charged on two different cases on the same day, and is sentenced on both on the same day, and receives a one year sentence on each count, to run concurrently, and the defendant served exactly one year in jail before being sentenced, and is given credit for the year he has served on only one of the cause numbers, then he would actually end up serving two years rather than one. By giving him credit for time served on only one of the two cases, he would be left with another year to serve on the other case. A wealthy defendant who bailed

out of jail at the inception of the case, however, would serve a gross of one year on both charges because he would not have served any time in jail up to that point. Such an application of the statute would seem to violate the principle of equal protection espoused in *Reanier*, as well as notions of fundamental fairness and the proportionality goal of the SRA.

The question becomes whether Mr. Lewis is entitled only to 89 days of credit for time served on A and B, or whether he is entitled to 476 days of credit. The State respectfully submits he is entitled to 476 days of credit on A and B.

During the 476 day period between May 13, 2011 and August 31, 2012, Mr. Lewis was sitting on multiple charges simultaneously. He was in a pre-trial confinement status as to all charges, having not begun serving a sentence on any of them. It is true that charge C was filed several months after charges A and B. But it makes little sense to stop the pre-trial confinement credit clock, for lack of better term, at the point of charging for C. If it is appropriate to allow each simultaneous case to get credit for time served in the full amount of time that the defendant sat pre-trial on that case, then the pre-trial confinement credit on A and B should not have arbitrarily stopped at the point of filing for C. The “clock” on A and B should have kept running for the duration of the time that Mr. Lewis remained in pre-trial confinement status. Then, at the point at which

Mr. Lewis began serving a sentence (which was on August 31, 2012), the pre-trial confinement credit clock should stop as to all three simultaneous cases. The 105 days that Mr. Lewis was in the jail after he began serving his prison sentence on C should be credited only to C.

In *State v. Stewart*, 136 Wn.App. 162, 149 P.3d 391 (2006), the defendant was charged with various crimes encompassed in three different cause numbers. His pre-trial confinement on the first case began on July 9, 2004. His pre-trial confinement began on the second case on August 4, 2004. His pre-trial confinement on the third case began on December 22, 2004. *Stewart* at 163. He was sentenced on all three cases on the same day. *Id.* The Court of Appeals affirmed the trial court, which awarded credit for time served in each case in the exact amount of time between the date the charged was filed (and he was booked) on each case and the date of sentencing. *Stewart* at 166-69. While *Stewart* differs from Mr. Lewis's case in that he was sentenced on all cause numbers on the same day, as opposed to commencing a sentence on one charge before all of the cause numbers were sentenced (as in this case), the application of *Stewart* to this case compels a result of 476 days of credit for time served. In *Stewart* the trial court did not arbitrarily stop the clock on the first pre-trial confinement credit period at the time the second charge was filed. Instead,

the pre-trial confinement credit clock ran on all the cases until such time as Mr. Stewart began serving a sentence.⁵

In contrast, the Court of Appeals in this case arbitrarily stopped the pre-trial confinement credit clock on A and B at the time of the charging/booking on C, when the clock on A and B actually should not have stopped until Mr. Lewis began serving a prison sentence (on case C, on August 31, 2012). Stated another way, the Court of Appeals essentially back-dated the date on which Mr. Lewis began serving his sentence on C to the date he was booked/charged on C. But credit for time served merely describes the amount of time credited against a sentence after it begins. Concurrency of sentences does not affect this. When a sentence is ordered to run concurrent with another sentence, concurrency is prospective, not retrospective. *State v. Watson*, 63 Wn.App. 854, 859, 822 P.2d 327 (1992) (“For this reason ‘concurrently,’ as used in regard to prior sentences, can only mean that the last sentence imposed will overlap the prior sentences, not that it will terminate at the same time. In other words, ‘concurrently’ is simply used in contradistinction to ‘consecutive.’”) *Watson* at 859.

⁵ The issue on appeal in *Stewart* was Mr. Stewart’s contention that he should be given credit for time served on all three cause numbers from the first moment he was booked into jail, even though the latter two charges did not even exist at that time. *Stewart* at 165. The Court of Appeals held that Stewart was not entitled to credit for time served on the latter two cases during a time when they had not even been filed. *Stewart* at 166-69.

In this case, where case C carries a shorter sentence than cases A and B, back-dating the first day of the sentence on C worked to Mr. Lewis's detriment because it effectively carved out 387 days of credit for time served that Mr. Lewis would have received on A and B (the longer sentences) had the Court of Appeals in this case adopted the same approach that it adopted in *Stewart*. The State submits that pursuant to the principles outlined in *Stewart*, and because fairness requires it, Mr. Lewis should receive 476 days of credit for time served on A and B, not 89.

Mr. Lewis should not, however, receive 581 days of credit. On August 31, 2012, Mr. Lewis began serving a department of corrections sentence on case C. He was no longer in a pre-trial confinement status, despite the fact that he was still pending trial on A and B. It is well settled that when a defendant is serving a sentence, he cannot receive credit for time served on other cases. *Watson* at 859; *In re Schaupp*, 66 Wn.App. 45, 50, 831 P.2d 156 (1992); *State v. Davis*, 69 Wn.App. 634, 641, 849 P.2d 1283 (1993), *In re Costello*, 131 Wn.App. 828, 833-34, 129 P.3d 827 (2006). First, RCW 9.94A.505(6) does not allow it. Although this statute cannot be applied strictly according to its plain language, courts must nevertheless apply the narrowest application of the statute that would still comport with the constitution. When a defendant is given credit for time served on one case for time spent in jail serving a sentence on another

case, he is receiving double credit—which the statute prohibits. *State v. Williams*, 59 Wn.App. 379, 381, 796 P.2d 1301 (1990); *Costello* at 834-35. Second, an indigent defendant serving a sentence is no longer situated differently than a wealthy defendant serving a sentence. That is, the requirement that a defendant receive credit for all pre-trial confinement is necessary so that he is not treated more harshly than a wealthy defendant who remained free pending trial. But after a sentence is imposed, it is irrelevant whether a defendant has the means to bail out of jail. He cannot bail out because he is serving a sentence, not because he lacks money. *Lewis*, supra, at 347. The Court of Appeals in this case correctly observed:

Furthermore, Lewis is not entitled to credit for time served under the principles of equal protection. Once Lewis was sentenced for failing to register as a sex offender, he was no longer able to be released from confinement. Therefore, the distinction here is between a person being confined as the result of a sentence and a person being confined as the result of the inability to secure bail. This distinction is unrelated to the prohibited distinction between rich and poor which would violate the constitutional principles underlying credit for time served. The distinction between a person being confined as a result of a sentence and a person being confined pretrial as a result of an inability to secure bail is a distinction well within the legislature's authority to make. As a result, principles of equal protection do not entitle Lewis to credit for time served after he was sentenced for failing to register as a sex offender. Therefore, the trial court erred by giving him credit for time served for the period between September 1, 2012 and December 14, 2012.

Lewis at 347. (Internal citation omitted).

Based on the foregoing argument and citation to authority, the State submits that Mr. Lewis is entitled to 476 days of credit for time served on cases A and B.

II. **THE PROSECUTOR DID NOT VIOLATE LEWIS'S RIGHT TO EQUAL PROTECTION BASED ON HIS CHARGING DECISION.**

For the first time in his petition for review, Lewis claims that the manner in which these cases were charged violated his constitutional right to equal protection. He argues, without citation to apposite authority, that when the prosecutor charged these entirely separate cases on different charging documents, Lewis was denied equal protection. Lewis did not make this argument at the trial court. He did not make this argument at the Court of Appeals. The Court of Appeals has not had an opportunity to review this claim.

Lewis's argument rests on matters not within the record. He baldly suggests that the prosecutor could have charged all of these crimes, which were committed on different dates and not related, on the same Information. But he does not argue, as he must, that joinder was proper under CrR 4.3. He does not even discuss joinder. He also baldly suggests that the prosecutor elected to resolve the cases separately. See Petition at page 11. But his assertions lack citation to the record. As the prosecutor

noted during the sentencing hearing, it is the defendant who decides whether and when he will plead guilty. RP 64. Indeed, Mr. Lewis pled guilty on case A in the absence of a plea agreement with the State. RP 4. A prosecutor cannot force a defendant to plead guilty, and a prosecutor cannot dictate when a guilty plea will occur. The court that sentenced Mr. Lewis on case C was free to set sentencing out so that C could be sentenced at the same time as A and B, assuming Mr. Lewis was convicted of those offenses. The record in this case is silent about why the Superior Court elected not to exercise its discretion in this manner. Mr. Lewis asks this Court to assume facts that are not in the record, which this Court should decline to do. “It is a long standing rule that we do “”not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.’”” *State v. Love*, --Wn.App.--, --P.3d—(2015).

Lewis’s argument is bereft of citation to authority. Other than *Reanier*, supra, which stands for the unremarkable and agreed-upon proposition that a defendant may not be forced to forfeit any time he spends in custody—that he must be given credit, one way or another, for every minute he spends in jail (*Reanier* at 346), Lewis cites no apposite

authority in support of this argument. He cites none of the cases that discuss selective prosecution, such as *City of Kennewick v. Fountain*, 116 Wn.2d 189, 802 P.2d 1371 (1991), *State v. Talley*, 122 Wn.2d 192, 858 P.2d 217 (1993), or *State v. Bridges*, 91 Wn.App. 102, 955 P.2d 833 (1998). He entirely fails to address the settled principle that “[p]rosecutors are given broad discretion in determining what charges to bring and *when to file them.*” *Kennewick v. Fountain* at 194 (emphasis added), citing *State v. Dixon*, 114 Wn.2d 857, 862-63, 792 P.2d 137 (1990), *State v. Lidge*, 111 Wn.2d 845, 850, 765 P.2d 1292 (1989), *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984). There are readily discernible policy reasons for allowing prosecutors discretion on when to file charges. Although a crime has been committed, the investigation may not be complete. A charge filed too soon could result in speedy trial problems. A charge filed too soon can also compromise an investigation with regard to potential co-defendants. The Court should not be in the position of dictating to the prosecuting attorney, employing hindsight, when a charge should have been filed or when an investigation should have been completed. Lewis’s equal protection claim lacks merit.

E. CONCLUSION

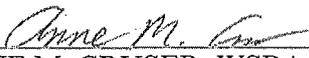
The State respectfully asks this Court to modify the decision of the Court of Appeals insofar as it awards Mr. Lewis 89 days of credit for time served rather than 476 days, and asks this Court to affirm the Court of Appeals in all other respects.

DATED this 31st day of July, 2015.

Respectfully submitted:

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION II

BY 
DEPUTY

STATE OF WASHINGTON,

Appellant,

v.

ADAM CHIEF LEWIS,

Respondent.

No. 44393-7-II

Consolidated with:

No. 44396-1-II

PUBLISHED OPINION

LEE, J. — The State appeals Adam Chief Lewis' sentence on two separate cases, arguing that the trial court improperly calculated the amount of credit for time served. The trial court gave Lewis (1) credit for time served that he had previously received credit for in an unrelated resolved case and (2) credit for time served on an unrelated judgment and sentence. Because Lewis received credit for time served more than once, we reverse and remand to the trial court to recalculate the amount of credit for time served.

FACTS

On May 13, 2011, Lewis was arrested in Clark County for numerous crimes. On May 26, 2011, Lewis was charged with first degree burglary and first degree robbery under cause number 11-1-00815-1 (burglary charges) and first degree burglary, two counts of first degree assault, two counts of first degree kidnapping, two counts of unlawful possession of a firearm under cause number 11-1-00816-9 (assault charges). Lewis remained incarcerated in the Clark County Jail.

On August 10, 2011, while in pretrial incarceration for the burglary charges and assault charges, Lewis was charged with failure to register as a sex offender (cause number 11-1-01336-

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7). Lewis pleaded guilty to the failure to register as a sex offender charge on August 31, 2012, and was sentenced to 50 months' confinement. The trial court calculated his credit for time served on the failure to register conviction starting on August 10, 2011 (387 days). Lewis began serving his sentence for the failure to register conviction on August 31, 2012.

Lewis pleaded guilty to the burglary charges on October 26, 2012, and pleaded guilty to the assault charges on November 5, 2012.¹ Lewis was sentenced on both the burglary charges and the assault charges on December 14, 2012. At sentencing for the burglary charges and assault charges, Lewis requested that his credit for time served be calculated based on the entire time he had been incarcerated since his original arrest on May 13, 2011 (581 days). The trial court agreed with Lewis and calculated his credit for time served at 581 days. The State filed a motion for reconsideration, which the trial court denied.

The State appeals the calculation of Lewis's credit for time served. The State argues that Lewis should have received credit for only the period of time from his arrest until he was charged with failure to register.

ANALYSIS

The State argues that the trial court erred because the unambiguous language of the statute governing calculation of time served, RCW 9.94A.505(6), limits credit for time served to time served on the charge for which the defendant is being sentenced. Lewis argues that the trial court properly calculated his credit for time served based on the constitutional principles of equal protection

¹ Lewis pleaded guilty to one count of first degree assault and one count unlawful possession of a firearm. It appears that the other counts with which he was charged under cause number 11-1-00816-9 were dismissed.

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underlying the statute codifying the right to credit for time served. Based on both RCW 9.94A.505(6) and the constitutional principles underlying credit for time served, the trial court miscalculated Lewis' credit for time served; at the time of sentencing, Lewis was not entitled to credit for any time served after August 10, 2011.

Here, we are required to address a question of statutory interpretation and application of a constitutional principle. We review questions of statutory interpretation *de novo*. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131, *cert. denied*, 131 S. Ct. 318 (2010). Similarly, we review constitutional issues *de novo*. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

A defendant is entitled to credit for time served based on constitutional principles of due process and equal protection. *Reanier v. Smith*, 83 Wn.2d 342, 346, 517 P.2d 949 (1974). And 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.’” *In re Pers. Restraint of Costello*, 131 Wn. App. 828, 833, 129 P.3d 827 (2006) (quoting *State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990)). Our Supreme Court recently explained the constitutional principles underlying credit for time served:

In [*Reanier*, 83 Wn.2d at 346], this court held that “an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial” was entitled to credit for time served upon sentencing. The court based its decision on “principles of due process and equal protection” and on “potential implications of double jeopardy.” [*Reanier*, 83 Wn.2d at 347]. It reasoned that a contrary decision would result in two separate sets of sentencing ranges—one for “those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release”—and concluded that such a sentencing regime would not survive rational basis review. [*Reanier*, 83 Wn.2d at 346-37]. . . .

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The *Reanier* decision absolutely bars the legislature from distinguishing between rich defendants and poor defendants for the purpose of credit for time served, but the legislature remains free to draw many other distinctions.

State v. Medina, 180 Wn.2d 282, 292-93, 324 P.3d 682 (2014).

The legislature has codified the procedure for calculation of credit for time served in RCW 9.94A.505(6). RCW 9.94A.505(6) states:

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.

Our objective in interpreting a statute is to ascertain and carry out the legislature's intent. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). We begin with the plain language of the statute. *Evans*, 177 Wn.2d at 192. If the plain language of the statute is unambiguous, our inquiry ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The Sentencing Reform Act does not generally authorize giving credit for time served on other sentences. *State v. Watson*, 63 Wn. App. 854, 859, 822 P.2d 327 (1992). Under the plain language of the statute, credit for time served refers solely to the offense for which the offender received a sentence. *Watson*, 63 Wn. App. at 860. Our courts have been clear that statute governing credit for time served entitles a defendant to "nothing more than the constitution require[s]." *State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990). Neither RCW 9.94A.505(6) nor the constitution allow a defendant to receive "twice the amount of credit for the time he or she actually served in jail while awaiting trial and sentencing." *Williams*, 59 Wn. App. at 381.

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In *Williams*, the defendant was charged with second degree robbery, and while awaiting trial he was detained pursuant to suspension of his parole on a previous charge. 59 Wn. App. at 380. At sentencing on the robbery, the defendant requested credit for the 70 days of presentence confinement. *Williams*, 59 Wn. App. at 381. The trial court denied the request because the 70 days of confinement would be credited toward the sentence he had received on the prior charge. *Williams*, 59 Wn. App. at 382. On appeal the defendant argued that he was entitled to credit for time served under former RCW 9.94A.120(12) (1998)² because “but for” the robbery charge he would not have been incarcerated. *Williams*, 59 Wn. App. at 381. The court noted that such an interpretation would lead to defendants being entitled to “twice the amount of credit for the time he or she actually served in jail while awaiting trial and sentencing,” a result the court labeled absurd. *Williams*, 59 Wn. App. at 381.

With the foregoing principles in mind, we turn to the trial court’s calculation of Lewis’s credit for time served. As an initial matter, there are three distinct time periods that factor into the calculation of Lewis’s credit for time served. The first period is from May 13, 2011 (the date Lewis was originally arrested and started serving time in pretrial confinement for the burglary charges and assault charges) until August 9, 2011. The second period is from August 10, 2011 (the date Lewis was charged with failure to register as a sex offender and began serving time in pretrial confinement for the burglary charges, assault charges, and failure to register charges) until August 31, 2012 (the date Lewis was sentenced on the failure to register charge). The third period

² The legislature recodified former RCW 9.94A.120 as RCW 9.94A.505 in Laws of 2001, ch. 10, § 6. The language of the statute remained the same.

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is from September 1, 2012 (the date Lewis began serving time for the failure to register conviction) until December 14, 2012 (the date Lewis was sentenced on the burglary charges and assault charges).

Under the plain language of the statute, Lewis would not be entitled to credit for any of the time he served prior to his sentencing on December 14. RCW 9.94A.505(6) requires calculation of time served to be limited to confinement solely in regard to the offense for which the offender is being sentenced. Here, for example, the sentencing court would start with determining the sentence for a single offense such as the burglary charge. Then, the statute requires the sentencing court to determine how much time the offender spent incarcerated *solely* on that offense. In this case, Lewis did not spend any time incarcerated solely on any offense for which he was sentenced. Therefore, if this court were to strictly apply the statute, the sentencing court erred by giving Lewis credit for any time served.

However, applying the statute in such a manner simply does not comport with the principles of due process and equal protection that entitle an offender to credit for time served. Regardless of how many offenses an offender has been charged with, an offender serving pretrial confinement would be disadvantaged because he is serving pretrial confinement while a more affluent defendant facing the same charges may not.

This is the exact distinction the constitution prohibits the legislature from making. *Medina*, 180 Wn.2d at 292-93. Therefore, an offender is entitled to receive credit for any *pretrial* confinement he serves, provided he does not receive double credit by applying the same credit for time served on multiple sentences. *Williams*, 59 Wn. App. at 381.

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For the reasons explained below, application of these principles results in Lewis receiving credit for time served for the first period of time between his arrest on May 13, 2011 and August 9, 2011. But, he does not receive credit for time served after the State charged him with the failure to register on August 10, 2011.

A. MAY 13, 2011 – AUGUST 9, 2011

As of his sentencing on the burglary and assault charges, Lewis had not received any credit for the time he spent in pretrial confinement prior to being charged with failure to register. Although he did not serve any of this time incarcerated solely on a particular offense for which he was sentenced, it would violate due process and equal protection to completely deny him any credit for this time. And, because Lewis was sentenced for all burglary and assault charges on the same date, he would not be receiving double credit for this time. Accordingly, the trial court properly gave Lewis credit for the time served between May 13, 2011 and August 9, 2011.

B. AUGUST 10, 2011 – AUGUST 31, 2012

The trial court also gave Lewis credit for time served between August 10, 2011, when he was charged with the failure to register, and August 31, 2011, when he was sentenced on the failure to register. This was improper because it resulted in Lewis receiving double credit for this period of time.

When Lewis was sentenced on the failure to register charge, the trial court gave him credit for time served from the date he was charged with the failure to register (August 10, 2011) to the date of sentencing (August 31, 2012). When the trial court gave Lewis credit for the same period of time toward his sentence on the burglary and assault charges, Lewis received credit for this time

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served twice, which is improper. *Williams*, 59 Wn. App. at 381. Accordingly, the trial court erred by giving Lewis credit for time served between August 10, 2011 and August 31, 2012 toward his sentence on the burglary and assault charges.

C. SEPTEMBER 1, 2012 – DECEMBER 14, 2012

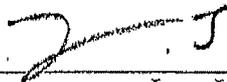
Lewis also is not entitled to credit for time served for any of the time he was incarcerated following imposition of his sentence for his failing to register as a sex offender conviction. After he was sentenced for failing to register as a sex offender, Lewis clearly was not serving time solely on the burglary and assault charges. *In re Pers. Restraint of Schillereff*, 159 Wn.2d 649, 651-52, 152 P.3d 345, *cert. denied*, 551 U.S. 1135 (2007); *Watson*, 63 Wn. App. at 859-60. Therefore, he was not entitled to credit for time served between September 1, 2012 to December 14, 2012 under the plain language of RCW 9.94A.505(6).

Furthermore, Lewis is not entitled to credit for time served under the principles of equal protection. Once Lewis was sentenced for failing to register as a sex offender, he was no longer able to be released from confinement. Therefore, the distinction here is between a person being confined as the result of a sentence and a person being confined as the result of the inability to secure bail. This distinction is unrelated to the prohibited distinction between rich and poor which would violate the constitutional principles underlying credit for time served. *Medina*, 180 Wn.2d at 292-93. The distinction between a person being confined as a result of a sentence and a person being confined pretrial as a result of an inability to secure bail is a distinction well within the legislature's authority to make. As a result, principles of equal protection do not entitle Lewis to credit for time served after he was sentenced for failing to register as a sex offender. Therefore,

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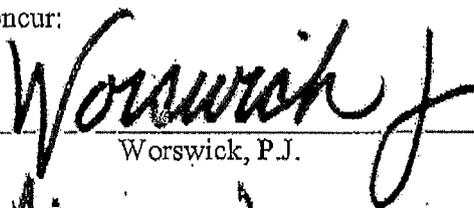
the trial court erred by giving him credit for time served for the period between September 1, 2012 and December 14, 2012.

Here, the trial court incorrectly calculated the amount of credit for time served that Lewis is entitled to receive. Accordingly, we reverse and remand to the trial court for a hearing, with Lewis present, to calculate Lewis' credit for time served consistent with this opinion.

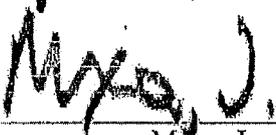


Lee, J.

We concur:



Worswick, P.J.



Maxa, J.

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A copy of this email and attachment are being sent to appellant's counsel of record, John Hays, at the following email address: jahayslaw@comcast.net

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