

NO. 62983-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE: PERSONAL RESTRAINT OF

ANTHONY BOVAN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S REPLY BRIEF

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A. ARGUMENT.

THE PERTINENT STATUTES AND PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION REQUIRE CREDITING A PERSON'S SENTENCE WITH TIME THEY SPENT IN JAIL STEMMING FROM A SINGLE CASE

1. The State's misinterprets the statute and disregards the well-established requirement of crediting a sentence with the time the person spent in jail because of that sentence. The prosecution offers nonsensical statutory analysis and unreasonable policy arguments to deny Bovan credit from time he spent in jail under the guise of community custody. These arguments lack merit and should be disregarded.

The State correctly reports that In re Pers. Restraint of Phelan, 97 Wn.2d 590, 597, 647 P.2d 1026 (1982) (Phelan I), and State v. Phelan, 100 Wn.2d 508, 515, 671 P.2d 1212 (1983) (Phelan II), among other cases, require the State to credit a person's sentence with time spent in jail based on a certain specific offense. But the State claims the principle of Phelan and its progeny is inapplicable to this case by claiming that jail time served for community custody violations is a different "element" of a sentence than the initial prison term. Resp. Brief at 5. This distinction is nonsensical, as Bovan was serving a single sentence

imposed under a single cause number, and his “community” portion of the sentence was revoked based on his failure to comply with all conditions of community release. The well-established rules requiring Bovan to receive credit for time served plainly apply to jail time served based on failure to comply with all terms of a sentence.

The State argues that crediting a person with time the person spent in jail on community custody violations allows him to “reap the benefit” of prior bad behavior. Resp. Brief at 7. Apparently, the State views spending time in jail as a “benefit” to an individual who would otherwise be permitted to remain at liberty.

But this Court has recognized that jail time is a substantial incursion into a person’s liberty, and has never viewed it as a “benefit” to the incarcerated individual. See In re Restraint of McKay, 127 Wn.App. 165, 170, 110 P.3d 165 (2005) (“An inmate has a significant liberty interest in the expectation of community custody as opposed to incarceration, including the ability to be with family and friends, be employed or attend school, and to live a relatively normal life.”). Furthermore, this Court has explicitly rejected the State’s claim that community custody is a completely different entity from parole allowing different rules for denying basic liberty interests and protections to an individual who violates its

terms. In re Pers. Restraint of McNeal, 99 Wn.App. 617, 632-33, 994 P.2d 890 (2000) (rejecting State's claim that community custody is not like parole or that it involves a different liberty interest as that accorded a parolee).

The State claims that when a person is returned to jail for violating sentencing conditions imposed for a certain conviction, this part of a sentence is a completely different aspect of the sentence from the originally-ordered prison term, and thus, the person may not receive any credit for such jail time. Resp. Brief at 5-6. The State's aim is to divorce broadly applicable rules according credit to people for time served in custody from Bovan's circumstances, where he served additional jail time because he violated the conditions of his sentence. This Court rejected a similar argument in McNeal. 99 Wn.App. at 633.

The illogical nature of this theory is also shown by comparing it to a person who had bail revoked before trial because she did not obey bail conditions and then must await trial while in jail. This person is in custody because she violated bail conditions, and had she behaved properly she would not be in jail, yet she will receive credit toward a later sentence for all time spent in jail. This person receives credit for time in jail that results from her failure to

obey conditions of release, even though the person would not have been in jail had he or she complied with bail conditions. See Phelan II, 100 Wn.2d at 514.

Similarly, Bovan initially received credit for good behavior and was released early release from prison and required to obey certain conditions. Bovan did not obey all conditions of his release, and thus he was twice sanctioned to additional jail time, and after a third sanction, the State ordered him to return to prison for the rest of the term of community custody.

It is this jail time Bovan served for which the State refuses to give Bovan credit. The State's attempt to differentiate conditions of a sentence upon early release from the prison part of a sentence is unreasonable. Bovan's early release from prison and the sentencing conditions he was ordered to follow flowed from a singular offense and sentence. When the State requires him to spend time in jail because of this sentence, he is entitled to receive credit toward the maximum term of the sentence.

The State's statutory analysis also demonstrates its flawed reasoning. RCW 9.94A.737(1) provides that if DOC imposes a sanction on an offender on community custody, it must accord credit both for time the person was successfully on community

custody and the time the person was “in detention awaiting disposition of an alleged violation.” This statutory language does not deny credit to a person who has spent time in jail awaiting or serving sanctions. It plainly contemplates crediting a sentence with time spent awaiting sanctions. To the extent it does not expressly speak to previously imposed sanctions, it does so because it is obvious such sanction time would be credited. The State’s interpretation is simply unreasonable and contrary to well-established principles that a person whose liberty is taken away while on probation or parole must receive credit toward his or her sentence based on the time spent in jail or prison.

Finally, Bovan admitted to violating some conditions of community custody but he did not commit any egregious “bad behavior,” as the State posits. His technical violations cost him his liberty and under the mandatory operation of RCW 9.94A.737, he must serve the remainder of his community custody in prison. But he did not commit other crimes, and had he done so, he could have been separately prosecuted and his community custody status would have increased his offender score and the attendant standard sentencing range. The statute does not take into account the behavior underlying the community custody violations and thus

cannot be interpreted as a purely punitive measure intend to exact extreme amounts of prison time from an offender. Bovan violated his community custody on three occasions and thus lost his community status, but he is entitled to credit for the jail time he spent due to community custody violations after his early release was revoked and he lost his right to serve the remainder of his early release out of custody.

2. The important issues raised in this case merit review.

While this petition was pending, Bovan was released from custody. But the State agrees that this Court has not addressed this precise issue on other cases. Resp. Brief at 3. Because the issue will recur with frequency and yet continually evade review as the petition cannot be filed until the person has been sent back to prison to serve the rest of a community custody term, it is an important issue that should be reviewed. See In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002); In re Pers. Restraint of Liptrap, 127 Wn.App. 463, 470, 111 P.3d 1227 (2005).

Bovan had no prior opportunity to for judicial review and in his personal restraint petition, needs to show a violation of the constitution or laws of Washington. In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 147, 866 P.2d 8 (1994); RAP 16.4(c);

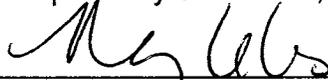
see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 817, 177 P.3d 1675 (2008). Here, he has shown both the erroneous deprivation of his right to liberty and his statutory entitlement to earned early release credit for time spent in jail and thus, this Court should find DOC improperly extended his incarceration by failing to credit him with earned time spent in jail.

B. CONCLUSION.

For the foregoing reasons and those argued in Petitioner's previously filed briefs, this Court should find the State improperly denied Bovan credit for time he spent in jail serving the terms of a single sentence.

DATED this 2nd day of November 2009.

Respectfully submitted,



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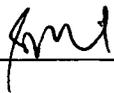
IN RE THE PERSONAL RESTRAINT PETITION OF)		
)	
ANTHONY BOVAN,)	NO. 62983-2-I
)	
Petitioner.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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