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NO. 63498-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

FREDDI LEVI HARRIS,

Appellant.

REC'D
JAN 05 2010
King County Prosecutor
Appellate Unit

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

The Honorable Michael J. Fox, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE STATE'S FAILURE TO RECOGNIZE THIS AS A
CASE OF FIRST IMPRESSION RESULTS IN
MISCHARACTERIZATION AND SPECULATION.

In its statement of the facts, the State suggests counsel below “conceded” he was not arguing the court was required to give Harris credit for time served. Brief of Respondent (BOR) at 4. The State instead posits the entire basis of Harris’s motion as an appeal to the court’s discretion. BOR at 4.

The State, however, mischaracterizes both Harris’s initial motion and the issue he asked the court to address. This mischaracterization is evidenced by the State’s failure to recognize the issue presented as one of first impression in Washington. That issue is: “should Appellant be awarded credit for time served during his deportation proceedings in Canada when it appears he was detained in custody because of the outstanding bench warrant in Washington state?” Brief of Appellant at 1.

The State asserts Harris is raising the mandatory granting of credit for time served under RCW 9.94A.505(6)¹ for the first time on appeal. BOR 5-7. That assertion is wrong. In the written motion, Harris submitted he should receive credit for the time he served in Canada

¹ RCW 9.94A.505(6) provides: “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.”

because he was detained “at least in part” as a result of the warrant issued in this case. CP 86. In the memorandum, counsel cited RCW 9.94A.505 as the statutory basis for the motion. CP 87. Counsel also argued in the memorandum that Harris was not being held for any other criminal acts and that the credit being requested was not applicable to any other crime. CP 88. Finally, when the court asked counsel if he had anything else, counsel said he would stand on the written materials. RP 8.

The issue is clear. Harris invoked RCW 9.94A.505 as the basis for his claim in his written materials, and counsel’s last words below were that he would stand on his written materials. The State’s assertion here to the contrary has no support in the record.

The State also claims the question of whether credit should be granted when a defendant is being detained by Canadians for purposes of deportation to face sentencing on a criminal charge in Washington is not one of first impression. BOR at 7-8. The State, however, fails to cite to a single case addressing the application of RCW 9.94A.505(6) to persons detained in Canada. After diligent investigation, no such case has been found. Thus, the issue does appear to be one of first impression. In recognizing this as a case of first impression, this Court should also consider whether the statements by counsel below discussing the Canadian

immigration proceedings represents a concession of statutory mandate to award credit for time served solely in regard to the offense as the State claims here,² or whether it merely reflects an attempt to deal with an issue for which there is no precedent.

The State also places much reliance on the question of whether Washington's 50-State warrant issued in this case could have led to extradition from Canada. BOR at 8-9. This argument does not follow from the language of the statute and places form over substance.

The statute requires credit be granted whenever the "confinement was solely in regard to the offense for which the offender was being sentenced." RCW 9.94A.505(6). The statute says nothing about warrants, extradition or deportation proceedings. Thus, contrary to the State's assertion,³ nothing in the plain language of the statute requires the State to execute its warrant authority, and nothing precludes granting credit where a person is being held pending release to Washington authorities based on the sort of informal agreement with Canadian authorities seen here.

Looking at the substance of the transaction in this case, it takes only a cursory examination of the documents appended to Harris's motion to recognize that the only way Harris was going to be released from

² BOR at 6-7.

³ BOR at 9.

Canadian confinement was into the hands of Washington authorities in a scheduled exchange at the border. CP 89, 92, 95. There is absolutely nothing in the record to suggest the Canadians would release Harris at the border to proceed into the United States free from confinement.

As discussed in the opening brief, Canada's default position on immigration matters is to release the person facing removal while the procedures are pending. BOA at 11-13. The fact Harris sought asylum in Canada may have lengthened his stay there, but it was the jeopardy he faced in Washington that led the Canadian authorities to the decision to detain him while his immigration proceedings were pending.

In regard to the State's implicit argument, that the Canadians must have been holding Harris under some sort of de facto Washington authority before credit is required,⁴ nothing in the statute requires detention be legally or factually under Washington "authority." The statute merely requires confinement be "solely in regard to the offense." RCW 9.94A.050(6). By challenging the lack of citation to legal authority on the precise application of RCW 9.94A.505(6) to persons being detained during the pendency of their Canadian immigration removal and asylum procedures, the State merely acknowledges what it contradicted above – that this is an issue of first impression in Washington. BOR 7-8, 9-10.

The State argues Harris's Canadian confinement was because he was subject to removal – or deportation – proceedings. BOR at 10-11. Again, as discussed in the opening brief, the fact Harris was subject to removal would not have led to his confinement absent the additional factor of the Washington sentencing. BOA at 11-17. The record indicates Harris was confined solely in regard to his Washington conviction.

Without citation to any factual basis or legal authority, the State asks this Court to assume the possibility the Canadian authorities detained Harris because they found him to be a danger to the public. BOR at 12. Nowhere in the record, however, is there any basis for this Court to draw such a conclusion. As discussed in the opening brief, the record clearly indicates the Canadian authorities considered Harris a flight risk in light of his Washington sentencing. See BOA at 15-16 (discussing CP 93-94).

In making this argument, however, the State implies counsel below attempted to mislead the court. The State points out that counsel below had obtained several hundred pages of documents regarding Harris's detention in Canada. BOR at 10. The State also points out counsel provided the court with only eight redacted pages in support of Harris's motion.⁵ BOR at 10. Then, in regard to its contention Harris might have

⁴ BOR at 9.

⁵ The only redactions obvious in the documents presented appear to be in an NCIC database entry alerting the Canadian authorities to Harris's warrant status. CP 90. The

been detained because the Canadian authorities found him to be a danger to the public, the State argues, “because the defendant has failed to provide documents showing the reasons for his detention, he must rely on pure speculation.” BOR at 12. Implicit in this argument is the totally unwarranted assertion that counsel below was playing “hide-the-ball” with the court.

In his declaration to the court, counsel below said several hundred pages of documents pertaining to Harris’s detention and his political asylum application were received. CP 85. Counsel also said the contents of the documents indicated Harris’s continued detention in Canada “was based in large part on the fact that there was an outstanding warrant in the United States.” CP 85.

In characterizing these documents, counsel had an obligation of candor to the tribunal not to make false statements of fact or to offer evidence he knows is false. RPC 3.3(a)(1), (4).⁶ A comment to RPC 3.3, regarding representations by a lawyer, says,

State fails to mention who was responsible for the redactions. In any event, it does not appear the redacted material has any significance to this appeal.

⁶ RPC 3.3 provides in part:

- (a) A lawyer shall not knowingly:
 - (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

....

[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

RPC 3.3 (comment 3).

The State, however, asks this Court to imply counsel below violated this obligation by not disclosing purported information that might indicate Harris was detained because the Canadians supposedly believed him to be dangerous. Absolutely nothing in this record supports such an inference to any degree. Counsel below informed the court the Canadian immigration documents demonstrated Canadian authorities were aware of Harris's warrant status in Washington and his "continued detention in Canada was based in large part upon the fact that there was an outstanding warrant in the United States." CP 85. Counsel also presented selected documents indicating the Canadian authorities detained Harris because the Washington warrant rendered him a flight risk. CP 93-94. Without contrary information, that should be a sufficient statement of the record.

The State, however, tries to support its assertion the Canadians detained Harris because they considered him to be dangerous with reference to Harris's current armed robbery conviction and his prior drug

(4) offer evidence that the lawyer knows to be false.

conviction. BOR at 12. Harris, however, had already served his time on the drug conviction prior to his trial on the robbery, and there was no indication he was armed at the time he was apprehended for that offense. CP 73. As for whether the Canadian authorities considered Harris to be dangerous on the basis of the armed robbery itself, the immigration documents show the Canadians knew about Harris's armed robbery charge in 2003, and yet released him on conditions following his immigration arrest for an admissibility hearing. CP 93. Clearly if the fact of the armed robbery charge itself were sufficient to warrant the Canadians detaining Harris as a danger to the public, he would not have been released following his initial immigration arrest.

The State again argues the sole basis for awarding credit served outside the state is confinement under the authority of a Washington warrant. BOR at 12-13. As discussed above, the statute merely requires confinement "solely in regard to" the relevant offense. RCW 9.94A.505(6). Here, the Canadians not only engaged in removal proceedings against Harris, they detained him during the pendency of those proceedings because they perceived him to be a flight risk. That perception was engendered by the fact of Harris's robbery conviction and the outstanding warrant related to that conviction. CP 93-94.

The nature of Harris's detention is shown by the degree of coordination between Canadian and Washington authorities to ensure Harris would not only be removed from Canada, but that he would be released from Canadian custody directly into the custody of Washington authorities. CP 92, 95. Had the Canadians not been detaining Harris "in regard to" his Washington offense, no such coordination would have been required to effect an independent Canadian purpose of removing Harris from the country.

Finally, in regard to the State's response to Harris's asserted error – that the court below applied the wrong legal standard to support its decision not to give credit – the State applies the wrong test. BOR at 13. In the opening brief, Harris argued the court below applied the wrong legal standard by deny credit for time served because Harris had sought asylum in Canada rather than dealing with the charges in Washington. BOA at 17-19. In support of this argument, Harris relies on State v. Brown,⁷ for the proposition that failure to credit time served while fighting extradition to Washington was error. BOA at 18.

Without addressing Brown, the State recognizes Harris's argument was addressed to the court's application of the wrong legal standard. BOR at 13. The State then states that "[b]eside arguing the court applied the

wrong legal standard, the defendant does not otherwise argue the court abused its discretion.” BOR at 13. Rather, the State contends Harris has to show “no reasonable person would have taken the position adopted by the trial court.” BOR at 13.

What the State fails to demonstrate is how a reasonable person would adopt the wrong legal basis to support an application of discretion. In Washington,

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on a legal error.

Jaeger v. Cleaver Const., Inc., 148 Wn. App. 698, 719, 201 P.3d 1028, rev. denied, 166 Wn.2d 1020 (2009) (citing State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)).

What happened here is that the court below applied the wrong legal standard and based its decision on legal error when it cited Harris’s attempt to avoid removal from Canada as a reason for denying credit for the time he spent detained during the pendency of those proceedings. See Brown, 55 Wn. App. at 756-57 (plain language of statute requires credit for time fighting extradition when current offense was the sole reason for

⁷ 55 Wn. App. 738, 780 P.2d 880 (1989), rev. denied, 114 Wn.2d 1014 (1990).

confinement). Regardless of how “reasonable” it may appear to deny Harris credit for the time he served while fighting removal from Canada directly into the hand of Washington authorities, Brown states the applicable law. The court’s decision contrary to the plain language of the statute and direct precedent is an abuse of discretion.

The court below was clearly unhappy with Harris because he left the courtroom, and went home to Canada, prior to receiving the jury’s verdict. That unhappiness, however, does not authorize the court to withhold credit for time served when that time was served solely in regard to the instant offense. That unhappiness also does not justify application of the wrong legal standard to render a decision on the motion asking for the credit Harris is entitled to.

This Court should reverse and remand with instructions to grant Harris credit for the time he was confined while he fought removal from Canada.

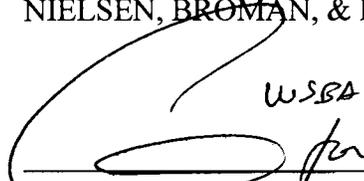
B. CONCLUSION

For the reasons discussed in the Brief of Appellant and above, this Court should remand with direction to grant Harris credit for time served while he was detained by Canadian immigration authorities.

DATED this 5th day of January 2010.

Respectfully submitted,

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DIVISION I**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 63498-4-1
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FREDDIE HARRIS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FREDDIE HARRIS
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P.O. BOX 881000
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF JANUARY, 2010.

x *Patrick Mayovsky*