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NO. 63959-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN LANE,

Appellant.

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FILED IN THE COURT OF APPEALS
DIVISION ONE

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

The Honorable John Meyer, Judge
Michael Rickert, Judge

REPLY BRIEF OF APPELLANT

DANA M. LIND
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. STATEMENT OF FACTS IN RESPONSE TO CROSS-APPEAL

The state is cross-appealing the sentencing court's grant of five months worth of credit for time served towards Lane's sentence. See Respondent's Brief and Cross-Appeal (RB) at 1, 16-20.

The instant Skagit County offense purportedly occurred on August 8, 2008, although Lane was not charged at that time. CP 12; RP (7/15/09) 27. In November 2008, when the current Skagit charge was filed, Lane was in Whatcom County jail charged with theft of a motor vehicle. RP 27. He thereafter pled guilty to second degree theft in Whatcom and went to prison to serve a 22 month sentence. RP 27.

In January or February 2009, Lane sent a request to the Skagit County prosecutor's office for transfer to Skagit County to deal with the current case, which was then outstanding. RP 27-28; RCW 9.98.010 (intrastate statute providing for disposition of untried indictments).

At sentencing for the instant Skagit offense on July 15, 2008, the state acknowledged that under RCW 9.94A.589,¹ the

¹ Indeed, the law presumes concurrent sentencing:

court entertained unfettered discretion to order the sentence to run concurrently with the one imposed in Whatcom. RP 26. While also acknowledging Lane's offense "isn't the crime of the century," the prosecutor nevertheless sought the high end (of 43 to 57 months)² to run consecutively to the Whatcom sentence. RP 28. The defense sought the low end to run concurrently. RP 37.

The court decided to take the middle ground and imposed the high end – 57 months – to run concurrently to the Whatcom charge. RP 54.

The defense proposed that Lane should receive credit beginning on February 19, when he was arraigned in Skagit County on this charge. RP 54. The court agreed, despite the prosecutor's protestations that under RCW 9.94A.505(6), the court lacked authority to do so. RP 44, 55.

3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589.

² RP 29.

ARGUMENT IN RESPONSE TO CROSS APPEAL

As it did below, the state argues that the court lacked authority to grant credit for time served since the date of arraignment for the current offense under RCW 9.94A.505(6). That statute provides:

(6) 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.

Emphasis added.

By virtue of the word “solely,” the state argues the court is without authority to grant credit for confinement time served prior to sentencing unless that confinement time was served solely in regard to the offense for which the offender is being sentenced. RP 44. The state misreads the statute, however, and its argument should be rejected.

The word “shall” in a statute indicates a mandatory directive. See e.g. State v. Krall, 125 Wash.2d 146, 881 P.2d 1040 (1994). Accordingly, RCW 9.94A.505(6) imposes a mandatory duty on the court to grant credit for all time served prior to sentencing *if* that confinement time was served *solely* in regard to the offense for

which the offender is being sentenced. This language, however, does not prohibit the court from granting credit for all time served prior to sentencing under circumstances when the confinement time was *not* served solely in regard to the offense for which the offender is being sentenced. In order to read the statute as the state suggests, the word “only” would have to be inserted before the word “shall,” to read:

The sentencing court shall [only] 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.505(6) (adding and emphasizing “only” in brackets).

The fact that the Legislature did not include the word “only” indicates the sentencing court has discretion in that respect, which is in keeping with RCW 9.94A.589(3), which allows the court discretion to impose a concurrent sentence where the current offense was committed while the defendant was not under sentence for a felony, but where prior to sentencing, the defendant received an intervening felony sentence. RCW 9.94A.589(3). In other words, under the circumstances present here. Since the court has authority to impose concurrent sentences, it makes

sense the court can run them from the time the defendant starts to serve time on the current offense, i.e. the date of arraignment in this case.

The state's cross-appeal here is the same as that raised and abandoned by the state, albeit in Snohomish County, in State v. Stewart, 136 Wn. App. 162, 149 P.3d 391 (2006). Stewart was charged on July 1, 2004, with attempting to elude a police officer (cause no. ending in 514-1) and booked on that charge on July 9, 2004. On August 4, 2004, he was booked on a theft charge under a separate cause no. (ending in 851-4). And on December 22, 2004, he was booked on a murder charge, also under a separate cause no. (ending in 026-3). Stewart remained in custody from the date he was booked on the eluding charge, July 9, 2004, until the date he was sentenced, October 18, 2005. Stewart, 136 Wn. App. at 164.

Stewart pled guilty to the theft charge on August 26, 2005, and to the eluding charge on September 21, 2005. Stewart, 136 Wn. App. at 164. On September 28, 2005, the state filed an amended information in the murder case, alleging the following four charges: vehicular homicide, possessing stolen property,

possessing a controlled substance, and identity theft. Stewart pled guilty to all four counts. Id.

He was sentenced on all six convictions to concurrent, high end standard range sentences on October 18, 2005. At sentencing, Stewart argued the court should grant all six of his sentences credit for time served from July 9, 2004, until the date he was sentenced, October 18, 2005. The state argued that Stewart should not receive any credit for time served on the vehicular homicide (the longest sentence), on grounds he was never confined solely in regard to that offense. Stewart, 136 Wn. App. at 165 n.1. The trial court concluded it would violate double jeopardy if it did not credit Stewart's eluding, theft, and vehicular homicide offenses for time served from the date of booking on each charge. Stewart, at 165 n.1. Accordingly, the court gave Stewart credit for time served on the theft charge calculated from the date he was booked for theft, August 4, 2004, until October 18, 2005. For the vehicular homicide charge, the court gave Stewart credit for time served from the date he was booked under that cause number, December 22, 2004, until October 18, 2005. Stewart, at 164-65.

Stewart appealed his sentences arguing the trial court erred by refusing to grant him credit for time served on each of his six

sentences from the date of his initial booking on eluding. Stewart, 136 Wn. App. at 165. The state originally cross-appealed the judgment and sentence, but then withdrew its cross-appeal. Stewart, 136 Wn. App. at 165 n.1. Accordingly, this Court did not decide whether the court was authorized to grant Stewart credit since the date of arraignment for each respective sentence. It only addressed Stewart's argument that he was *entitled* to credit on all sentences from the date of booking on the eluding, which it resolved against Stewart. Stewart, 136 Wn. App. at 165 n.1, 166.

For at least two reasons, this Court should resolve the issue previously raised and abandoned by state against Skagit County. First, Skagit County's interpretation violates the rules of statutory construction. As stated above, in order to interpret the statute as the state suggests, the word "only" must be inserted after the word "shall." A basic rule of statutory construction applies here: where the language of a statute is unambiguous, no construction is needed. An important corollary is that exceptions and matters not present will not be read into a statute. King County v. Seattle, 70 Wash.2d 988, 425 P.2d 887 (1967). Importantly, RCW 9.94A.505(6) codifies double jeopardy principles. See e.g. In re Mayner, 41 Wn. App. 598, 601, 705 P.2d 284 (1985) (equal

protection and double jeopardy principles require credit for presentence and post-sentence probationary jail time); cf. In re Albritton, 143 Wn. App. 584, 594 n.6, 180 P.3d 790 (2008) (denial of credit for unrelated charges does not raise double jeopardy concerns). The statute does not limit the court's discretion to grant credit for time served pending trial on the current offense, in keeping with its authority to impose a concurrent sentence under RCW 9.94A.589(3). That the court has such discretion also makes logical sense because the offender's offender score is increased by the intervening conviction, although it did not exist at the time the current offense was committed. RCW 9.94A.525(1) (defining "prior conviction" as one that exists before the date of sentencing for the offense for which the offender score is being computed).

Second, the cases cited by the state do not support its position. In fact, State v. Davis³ actually supports Lane's interpretation. Davis was sentenced to 25 years in Montana in 1988. Pursuant to an interstate detainer request, he was transferred to Snohomish and arraigned on a robbery charge on June 5, 1991. Following his conviction, the court ordered his sentence to run concurrently with the Montana conviction. Davis

wanted credit on his Snohomish sentence for time served on the Montana conviction *prior to his arraignment on his Snohomish County charge*. As the state summarized in its brief, “this Court concluded the trial court did not err in granting Davis credit only for the pretrial time served on the Snohomish County charge, starting on June 5, 1991 [the date of arraignment].” BR (citing Davis, 69 Wn. App. at 637, 641 P.2d 1283). What the Davis court did is exactly what the trial court did here. Davis would support the state’s position if the court credited Lane’s Skagit sentence with time spent in Whatcom prior to his arraignment in Skagit. But that is not what the court did.

The state’s reliance on State v. Williams⁴ is similarly strange. Williams was arrested for robbery and held in King County jail pending trial. He was on probation at the time, and his parole was immediately suspended at the time of arrest, and he was held as a state prisoner. The sentencing court denied Williams’ request for credit for presentence time on the robbery, reasoning it was imposing a *consecutive* sentence, and the court was satisfied Williams would receive credit for that time on his prior offense.

³ State v. Davis, 69 Wn. App. 634, 849 P.2d 1283 (1993).

⁴ State v. Williams, 59 Wn. App. 379, 796 P.2d 1301 (1990).

Williams, 59 Wn. App. at 381. Williams does not address concurrent sentences under RCW 9.94.589(3).

In short, the state has presented no authority to support its position that the court was without authority to grant Lane credit for time served since arraignment on the current offense. On the contrary, the state has presented authority supporting the trial court's actions in this case.

C. CONCLUSION

For the reasons stated above, this Court should deny the state's cross-appeal. For the reasons stated in the opening appellate brief, this Court should reverse Lane's conviction, as it was based on evidence of an unduly suggestive show-up identification.

Dated this 23rd day of July, 2009.

Respectfully submitted
NIELSEN, BROMAN & KOCH



DANA M. LIND, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

Today I deposited in the mails of the United States of America, properly addressed, sealed envelope containing a copy of the report of the Appellate Court, including a copy of the document to which this declaration is attached.

SKagit County TT
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

J. Sloan 7-23-10
Name Done in Seattle, WA Date