

**FILED**  
**Dec 18, 2017**  
Court of Appeals  
Division III  
State of Washington

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

<b>In the Matter of the Personal Restraint</b>	)	<b>35454-7-III, consolidated with</b>
<b>of:</b>	)	<b>35621-3-III</b>
	)	
<b>AARON JOSEPH CUNNINGHAM,</b>	)	
	)	<b>ORDER DISMISSING PERSONAL</b>
<b>Petitioner.</b>	)	<b>RESTRAINT PETITION</b>
	)	
	)	

Aaron Joseph Cunningham is serving a sentence with the Washington Department of Corrections (DOC) related to his 2015 convictions on a guilty plea of eight counts of second degree identity theft and one count of second degree theft. The trial court imposed concurrent drug offender sentencing alternative (DOSA) sentences totalling 50 months, with 25 months served in prison and 25 months in community custody. After Mr. Cunningham violated the conditions of community custody, his DOSA was revoked and he was returned to prison to serve the remainder of his sentence. In this petition, he contends the DOC failed to credit him with time spent in federal custody on charges that were dismissed. He also filed a CrR 7.8 motion in superior court with the same claim.

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That motion was transferred to this court for consideration as a personal restraint petition, and has been consolidated with the original petition for review. CrR 7.8(c)(2).

Because Mr. Cunningham has had no alternative opportunity for judicial review of the DOC's action, he need only show that he is unlawfully restrained. RAP 16.4; *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010). He is currently under restraint due to his incarceration. That restraint is unlawful if the DOC's actions are unconstitutional or violate state law. *In re Pers. Restraint of Liptrap*, 127 Wn. App. 463, 469, 111 P.3d 1227 (2005). Mr. Cunningham must not rely on conclusory allegations, but must show with a preponderance of the evidence that the unlawful action caused him prejudice. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

Under RCW 9.94A.171(a) and (b), a term of confinement or community custody ordered in a Washington sentence is tolled during the time an offender has absented himself from confinement or from supervision without prior approval. Additionally, while an offender is serving community custody, other than for a sex offense, any period of community custody is tolled for "any period of time the offender is in confinement for any reason," unless the confinement is related to arrests for violations of the conditions of the sentence or of the terms of community custody. RCW 9.94A.171(3)(a).

Mr. Cunningham was held in federal custody for 155 days due to an unrelated weapons charge during his state DOSA period of community custody. The federal charge was dismissed and the federal hold was dropped in October 2016. He was returned to the DOC's custody in November 2016 and the DOC held a DOSA revocation hearing in December 2016. At that time, he was found guilty of several violations, including failures to report and a conviction of driving while license suspended. He contends the 155 days spent in federal custody should not have tolled his period of community custody because he did not voluntarily fail to report during the time he was held on a federal charge that was ultimately dismissed.

Under the clear relevant terms of RCW 9.94A.171(3)(a), however, community custody is tolled during “*any* period of time the offender is in confinement for *any reason*,” unless the confinement is due to arrests or sanctions for violation of the community custody conditions (emphasis added). *See State v. Jones*, 172 Wn.2d 236, 244-45, 257 P.3d 616 (2011) (citing similar language in former RCW 9.94A.170(3) (2008)). The statute provides no exception related to the “voluntariness” of the confinement.

Because Mr. Cunningham's 155 days in federal custody were unrelated to his Washington convictions and did not constitute sanction time under RCW 9.94A.171(3)(a), the DOC properly tolled the period of community custody for that

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confinement. His consolidated petitions for relief from personal restraint are therefore dismissed as frivolous. RCW 16.11(b). The court also denies his request for appointment of counsel. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150.

  
**ROBERT E. LAWRENCE-BERREY**  
**ACTING CHIEF JUDGE**