

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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DIVISION II
2016 MAR 17 PM 1:15
STATE OF WASHINGTON
BY DEPUTY

In re the
Personal Restraint Petition of

JAMES R. RESOP,

Petitioner.

No. 47678-9-II cons. w/ 481880-1E

ORDER DISMISSING PETITION

James R. Resop seeks relief from personal restraint imposed after the Department of Corrections (DOC) terminated his early release and returned him to prison to serve the remainder of his sentence on a 2007 burglary in the first degree conviction. Resop contends DOC lacked authority to rescind his earned early release credit, to declare him ineligible to earn early release credit again on the same offense, and to reset his community custody term back to 18 months. In his consolidated petition, Resop seeks relief from personal restraint following an October 2014 conviction for taking a motor vehicle without permission¹. He contends the sentencing court erred in ordering his 2014 sentence to run consecutively to his 2007 sentence.

To be entitled to relief, Resop must show that his restraint is unlawful. RAP 16.4; *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). In 2006, Resop pleaded guilty to burglary in the first degree and received a 116-month sentence,

¹ Resop originally filed timely CrR 7.8 motions, which the superior court transferred to this court as personal restraint petitions.

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which is the statutory maximum for his crime. The sentencing court also imposed a community custody range of 18 to 36 months, which DOC modified to 18 months.

After earning 1,186 days of early release credit, Resop was released from prison into community custody in September 2013. After he violated the terms of his community custody several times, DOC terminated his early release and returned him to prison to finish his maximum term of confinement. Also during his community custody term, Resop took a motor vehicle without permission. He pleaded guilty and the court sentenced him to 72 months. The court ordered the 2014 sentence to run consecutively to the time remaining on the 2007 sentence. Resop argues that the early release credit he earned has vested and that DOC lacks authority to rescind that credit and require him to serve additional time in confinement. He further argues the court erred in running his sentences consecutively rather than concurrently.

The law in effect when Resop committed his offense explains that if an offender violates any condition or requirement of community custody, DOC may transfer the offender to more restrictive confinement to serve up to the remainder of his sentence, less credit for time served in community custody. *In re Pers. Restraint of Flint*, 174 Wn.2d 539, 550, 277 P.3d 657 (2012); former RCW 9.94A.737(1) (2005). Consequently, DOC may return an offender to total confinement to serve the period of earned early release previously applied to his sentence, less the number of days he served in community custody. *Flint*, 174 Wn. App. at 551. This discretion is now codified under RCW 9.94A.633(2)(a).

Resop alleges in his reply brief that this result violates the ex post facto prohibition. "A law that imposes punishment for an act that was not punishable when

committed or increases the quantum of punishment violates the ex post facto prohibition.” *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004). DOC is applying the law in effect when Resop committed burglary in the first degree in 2007. Resop’s allegation that DOC has acted unlawfully fails.

Next, Resop argues he is eligible to earn release time on his 2007 conviction while serving the remainder of his sentence. But, Resop is not serving his original post-revocation prison term. He is serving the early release time in prison after having lost that time due to violations of community custody. RCW 9.94A.737 governs confinement terms due to violations. RCW 9.94A.737 does not require the DOC to offer early release time to an offender who is serving prison due to having lost early release time. To do so would be to undermine the purpose of RCW 9.94A.737, which is to provide consequences to offenders who violate sentence conditions while on community custody. To allow an offender to earn back what he already lost would reduce the effectiveness of the incentive under RCW 9.94A.737 to remain violation free.

Next, Resop argues his community custody time on the 2007 burglary conviction should be reduced because he already served a portion on the community custody time before he was returned to prison. When revoking Resop’s earned credit, DOC reduced his sentence by the number of days Mr. Resop was in community service. Because Resop received credit for the time served in community custody, the community custody clock was set back to zero. He still needs to serve his full 18 months of community custody upon release from prison.

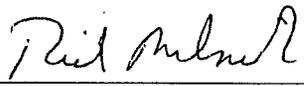
Last, Resop argues the court erred by running his 2007 and 2014 sentences consecutively rather than concurrently. His 2014 judgement and sentence states, “The

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sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced.” Appendix to PRP (no. 48188-0-II) at 2; Exhibit 3 to DOC’s response to consolidated PRP (no. 47678-9-II) at 5. RCW 9.94A.589(2)(a) provides, “whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.” Because statutory authority supports the court’s sentence, Resop’s challenge to his consecutive sentences fails as does his assertion that his restraint is unlawful. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b), and the petitioner’s request for the appointment of counsel is denied.

DATED this 17th day of March, 2016.



Acting Chief Judge, Pro Tem

cc: James R. Resop
Pierce County Clerk
County Cause No(s). 07-1-01842-7 and 14-1-03662-2
Mark E. Lindquist, Pierce County Prosecuting Attorney
Mandy Rose, AAG