

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28582-1-III

Respondent,

)

)

) **Division Three**

v.

)

)

LINDA JEANE FELLER,

) **UNPUBLISHED OPINION**

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Appellant.

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)

Kulik, C.J. — Linda J. Feller appeals from the trial court’s order revoking her residential drug offender sentencing alternative (DOSA) sentence based on violations of conditions of community custody. We affirm the revocation of Ms. Feller’s DOSA. We remand for a determination of the time Ms. Feller spent in compliance with community custody prior to the DOSA revocation so that such time may be applied as a credit toward the current period of community custody.

FACTS

On March 25, 2009, Ms. Feller was sentenced for unlawful possession of a controlled substance. The standard range sentence for her offense was 12 to 24 months,

but the court granted her a sentence requiring her to serve 24 months in community custody, conditioned on her entering and remaining in certified residential chemical dependency treatment for three to six months. The conditions of community custody also included: not using illegal controlled substances, successful completion of an approved substance abuse treatment program, testing to monitor drug-free status, and reporting as directed to her community corrections officer.

From the outset, Ms. Feller did not comply with the conditions of community custody. The Department of Corrections (DOC) filed a violation report with the court on April 8, 2009, alleging Ms. Feller did not enter inpatient treatment as originally scheduled on March 26, and that she failed to report to the DOC within 72 hours of her release from jail confinement as ordered by the court. When Ms. Feller failed to appear for a show cause hearing, the court issued an arrest warrant. The court held a hearing on the violations and released Ms. Feller on her own recognizance to address medical issues so that she could enter inpatient treatment. She was again advised to report to the DOC as directed.

The DOC submitted a second violation report, alleging Ms. Feller failed to report as directed on July 8. After a motion hearing, the court ordered that Ms. Feller be taken into custody until her transport to an inpatient drug treatment program at American

Behavioral Health Services (ABHS) on July 23.

The DOC submitted a third violation report, alleging Ms. Feller had (1) used cocaine on or about July 23, 2009; (2) used cocaine on or about August 2, 2009; and (3) failed to remain in chemical dependency treatment for three to six months by being discharged on August 10. The alleged violations were based upon information received from ABHS that Ms. Feller's urinalysis (UA) test results were positive for cocaine when she entered treatment on July 23 and again on August 2. Ms. Feller was discharged from treatment on August 10 for using cocaine since her admission to the program. Ms. Feller's community corrections officer, Kendra Prichard, recommended that the court revoke the DOSA sentence and send Ms. Feller to prison.

At the violation hearing, the court considered the violation reports and took live testimony from Ms. Prichard and Ms. Feller. Ms. Feller denied using cocaine in July or August 2009. The court found that Ms. Feller did commit the two violations for using cocaine and was, consequently, discharged from treatment. The court revoked Ms. Feller's DOSA sentence and imposed an 18-month standard range sentence followed by community custody for a range of 9 to 12 months. The court ordered that she receive credit for jail time served prior to the community custody revocation. The trial court did not give her any credit for prerevocation community custody time toward her newly-

imposed 9- to 12-month community custody term. Ms. Feller appeals.

ANALYSIS

Standard of Proof. An individual facing a DOSA revocation hearing for violations allegedly committed while in community custody is afforded the following procedural due process protections set forth in *Morrissey v. Brewer*: (a) written notice of the claimed violations of parole, (b) disclosure of evidence against him, (c) an opportunity to be heard in person and to present witnesses and documentary evidence, (d) the right to confront and cross-examine adverse witnesses, (e) a neutral and detached hearing body, and (f) a written statement by the fact finder as to the evidence relied on and reasons for revoking community custody. *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

The standard of proof is a preponderance of the evidence, which ensures a violation finding will be based on “‘verified facts and . . . accurate knowledge.’” *In re Pers. Restraint of McKay*, 127 Wn. App. 165, 168-69, 110 P.3d 856 (2005) (quoting *In re Pers. Restraint of McNeal*, 99 Wn. App. 617, 628, 994 P.2d 890 (2000)); *see also* WAC 137-104-050(14). The standard of proof here is the lowest in the burden of persuasion hierarchy—beyond a reasonable doubt; clear, cogent, and convincing; and preponderance of the evidence. *State v. Paul*, 64 Wn. App. 801, 807, 828 P.2d 594

(1992).

Citing no authority, Ms. Feller challenges the written findings and conclusions because they do not mention any standard of proof. However, that presumption is contained in the court's oral decision:

The dirty UAs, now we see an initial one when you get there, several or multiple clean ones, and then the one that got you thrown out. The test result was like five times higher than the first one when you were initially tested. So that *persuades me* that there has been a violation of the DOSA, which now I will need to turn to what do we do about it.

Report of Proceedings (RP) at 39 (emphasis added).

The law is well settled that we may resort to the trial court's oral decision to ascertain the legal and factual basis upon which the trial court predicated its finding,¹ or to interpret written findings of fact and conclusions of law to the extent the oral decision does not contradict the written findings. *See State v. Hinds*, 85 Wn. App. 474, 486, 936 P.2d 1135 (1997).

Resort to the oral opinion here confirms that the trial court applied the correct preponderance standard. And the court based its decision on the evidence of the positive drug tests. The court obviously disbelieved Ms. Feller's testimony that she did not willfully or otherwise use cocaine. We will not disturb that credibility determination.

¹ *See Schmechel v. Ron Mitchell Corp.*, 67 Wn.2d 194, 197, 406 P.2d 962 (1965).

State v. Chapman, 78 Wn.2d 160, 164, 469 P.2d 883 (1970). The trial court did not err.

Community Custody Credit. RCW 9.94A.660(8) provides:

In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

But this statute is not applicable to Ms. Feller because it was not yet in effect on the date she committed her drug possession crime—July 31, 2008. This provision first appeared in a 2008 amendment and was codified as RCW 9.94A.660(10). *See* Laws of 2008, ch. 231, § 30. The effective date of the amendment was August 1, 2009. *See* Laws of 2008, ch. 231, § 61. Any sentence imposed under the authority of the Sentencing Reform Act of 1981 must be in accordance with the law in effect at the time the offense was committed. RCW 9.94A.345. This concept applies to sentencing alternatives as well. *See* Laws of 2000, ch. 26, § 1.

Prior to enactment of RCW 9.94A.660(8), an offender was entitled to receive credit for the community custody portion of the sentence if the offender was in compliance with the conditions of the sentence. *See In re Pers. Restraint of Albritton*, 143 Wn. App. 584, 594, 180 P.3d 790 (2008). However, under the plain language of the tolling statute, an offender was not entitled to credit for any periods of absence from

supervision without prior approval. *Id.* Absent evidence to the contrary, the presumption is that tolling begins on the date the offender fails to report, not the date of the offender's last contact with the DOC. *Id.* at 594-95.

Here, the record creates factual issues as to whether Ms. Feller was in compliance with conditions of community custody for certain time periods prior to her July 8 failure to report and for other days she was in compliance with inpatient treatment requirements. At the close of the proceedings in the trial court, defense counsel asked whether Ms. Feller would be given credit "for the 19 days she spent inpatient." RP at 44. The court denied any credit for inpatient treatment.

Consistent with *Albritton*, we remand the matter to the superior court for the limited purpose of determining Ms. Feller's time spent in compliance with community custody prior to the DOSA revocation. Any credit shall be applied toward her current period of community custody.

Conclusion. We affirm the DOSA revocation. We remand for the limited purpose of determining time spent in compliance with community custody prior to the DOSA so that such time may be applied toward the current period of community custody.

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A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.