IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY WAYNE FELLAS, Appellant.	No. 38359-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — On December 1, 2006, the Clallam County Superior Court sentenced Anthony Wayne Fellas under former RCW 9.94A.660 (2005), the special drug offender sentencing alternative (DOSA) statute. On count I, unlawful possession of methamphetamine, a Class C felony under RCW 69.50.4013, the trial court sentenced Fellas to 12 months of confinement in the Department of Corrections (DOC) (it later amended the sentence by adding 6 months community custody). On count II, unlawful possession of a dangerous weapon, a gross misdemeanor under former RCW 9.41.250 (1994), the trial court sentenced Fellas to 365 days, of which 185 days were suspended for 24 months, and imposed 24 months of supervision. The sentences were to be served concurrently. Fellas previously appealed his methamphetamine possession conviction, which this court reversed and remanded for a new trial. *State v. Fellas*, noted at 143 Wn. App. 1033 (2008). On remand, the State decided not to retry Fellas on the

methamphetamine charge. Count I was dismissed and Fellas's legal financial obligations were adjusted to reflect that Fellas was convicted and sentenced only on count II, a gross misdemeanor. Subsequently, Fellas did not comply with a community custody sentencing requirement that he submit to random urinalysis. Fellas argued that compliance with random urinalysis testing was required for his felony methamphetamine conviction only and that this conviction had been reversed and then dismissed. The trial court stated that "[n]othing changed" with regard to his gross misdemeanor sentence because Fellas had appealed only his felony conviction (count I) and that the sentencing conditions attached to his gross misdemeanor sentence (count II) remained an enforceable part of a valid final sentencing judgment.[1] Report of Proceedings (June 20, 2008) at 6.

Fellas filed a motion to reconsider on July 3, 2008. On September 24, 2008, Fellas filed a notice of appeal, seeking appellate review "based on the dismissal of the felony charge [on remand from the Court of Appeals] on May 30, 2008, and the trial court's affirmation on September 5, 2008 that all conditions of the Judgment and Sentence remain in effect for the gross misdemeanor on which the defendant pleaded guilty in 2006." Clerk's Papers (CP) at 8 (alteration in original). We sent Fellas a letter indicating that his notice of appeal required a final appealable order. In response, the trial court filed an order dated October 7, 2008, titled "Order Affirming Original Conditions of Judgment & Sentence," which references an oral decision made on September 5, 2008. Fellas ordered transcripts of all post-mandate hearings.

[1] We note that because the Sentencing Reform Act of 1981, ch. 9.94A RCW, applies only to felony sentences, many counties file separate judgment and sentence documents to clearly differentiate the sentence imposed for misdemeanor and gross misdemeanor convictions from those imposed on a felony conviction.

In November 2008, the Washington Appellate Project took over Fellas's representation and in March 2009, moved for accelerated review under RAP 1.2 and RAP 18.12 "of the sentence imposed on June 6, 2008." Motion for Accelerated Review of Sentencing Error, *State v. Fellas*, No. 38359-4-II (Wash. Ct. App. filed Mar. 13, 2009). But on June 6, 2008, in answer to Fellas's question as to whether he was still under DOC supervision, Judge Williams clarified that there was no new sentence on count II, that the sentence for count I had been vacated, and that Fellas was still under DOC probation on count II. The record contains a minute order entered June 6, 2008, amending Fellas's legal financial obligations following the dismissal of count I and declaring that "all conditions of [judgment and sentence] remain." CP at 41. RCW 9.95.210(4) provides that, in granting probation, "the superior court may order the probationer to report to the secretary of corrections or such officer as the secretary may designate and as a condition of the probation to follow the instructions of the secretary." Fellas did not appeal the trial court's June 6, 2008 ruling.

Our court set Fellas's latest appeal for consideration as a motion on the merits under RAP 18.14. On July 24, 2009, Commissioner Schmidt concluded that the appeal was not clearly without merit and denied the motion on the merits to affirm.[2] We set the matter for oral argument and, on September 30, 2009, requested additional briefing.[3]

On appeal, Fellas did not challenge the conditions of his suspended sentence. Instead, he assigned error only as follows:

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[2] Our review of this court's records in Fellas's current appeal revealed no motion on the merits to affirm or deny.

[3] The parties' earlier briefing cited only cases involving felony sentences under Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, and did not address sentencing rules applicable to gross misdemeanor sentences.

> The court lacked statutory authority and violated Fellas's rights to due process and equal protection by refusing to credit his misdemeanor sentence with time he served on a concurrently imposed felony sentence after the felony was vacated and dismissed.

Br. of Appellant at 1.

But the September 24, 2008 notice of appeal was the first time Fellas sought review of his count II conviction or sentence. Fellas was not resentenced on count II after the dismissal of count I, which followed our opinion in Fellas's initial direct appeal. Fellas's judgment and sentence on count II, entered on December 1, 2006, has long been final. Fellas's appeal is, therefore, untimely. RAP 5.2(a) (notice of appeal must be filed within 30 days of the judgment and sentence); *see also* RCW 10.73.090-.130 (any post-conviction relief collateral attacks on a judgment or sentence must be filed within one year after the judgment becomes final). Here, the sentencing court made clear that the sentence on count II was unchanged and that the 24-month period of DOC supervision it had imposed for the gross misdemeanor ran from December 1, 2006, the date of his judgment and sentence. RCW 9.95.210(1) (giving a superior court the authority when sentencing a defendant for a gross misdemeanor to impose a period of community supervision up to the maximum term of the statutory sentence or 24 months, whichever is longer). Accordingly, even if Fellas's appeal was timely, he received credit for the time he was incarcerated solely on count I against his 24-month supervision time for count II, and Fellas's DOC supervision on count II expired no later than December 1, 2008.

In its supplemental brief, the "State notes that the probationary period has since expired, and DOC has ceased supervising Mr. Fellas under cause number 06-1-00403-3." Suppl. Br. of Resp't at 6 n.8. But during oral argument, the deputy prosecutor also indicated that Fellas had three probation violation proceedings that had been stayed and are pending below. No stay

orders appear in the record on review. Based on the state of the record submitted for our review, the matter is moot. A case is moot when a court can no longer provide effective relief. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). Generally, we dismiss an appeal if the question presented is moot and we can no longer provide effective relief unless the issue is capable of evading review and has substantial public importance. *DeFunis v. Odegaard*, 84 Wn.2d 617, 627-28, 529 P.2d 438 (1974). Here, the issue presented, even if timely, appears in such a bizarre factual and procedural context that it is not one of broad public import clearly affecting other cases. Accordingly, we decline to unravel it or address the matter further.

Based on the record the parties have presented for our review, Fellas's appeal appears moot and we dismiss it.

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

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

VAN DEREN, C.J.