

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AJELINA LOUISE ROTH LEWIS,
Appellant.

No. 2 CA-CR 2014-0391
Filed May 26, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County
No. S0200CR201000285
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Appellant Ajelina Lewis appeals from her convictions and sentences, after retrial, for second-degree murder and tampering with evidence. As the sole issue on appeal, she alleges the trial court erred in calculating its award of presentence incarceration credits and claims she is entitled to an additional 516 days of presentence incarceration credits. Finding no error, we affirm her convictions and sentences.

Background

¶2 We limit our recitation of the undisputed facts to those relevant to Lewis's claim. When Lewis was taken into custody and charged with murder on March 17, 2010, she was already awaiting trial, in Cochise County Cause No. CR201000150, for unrelated offenses committed in February 2010. In that earlier case, Lewis pleaded guilty to possession of a narcotic drug for sale and tampering with evidence, and, on May 28, 2010, the trial court sentenced her to consecutive terms of imprisonment totaling 2.5 years. The court awarded her seventy-five days of presentence incarceration credit against the first prison term only, awarding no credit for the second, consecutive sentence imposed.

¶3 After a jury trial in 2011, Lewis was convicted of first-degree murder and tampering with evidence. On August 15, 2011, the trial court sentenced her to life imprisonment without the possibility of release for twenty-five years for the murder conviction and to a consecutive, 1.75-year prison term for the tampering conviction, both to be served consecutively to the sentence she was already serving in No. CR201000150. Consistent with the calculation

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in Lewis's presentence report, and without objection by the state, the court awarded Lewis 516 days of presentence incarceration credit against her life sentence.

¶4 After sentencing, but before Lewis's appeal was perfected, she filed a motion to vacate judgment pursuant to Rule 24.2(a)(3), Ariz. R. Crim. P., asking the trial court to "vacate [her] convictions and sentences" based on prosecutorial error during closing argument. The court granted the motion, and her appeal from the original judgment was dismissed. The state appealed from the court's order vacating the judgment, and we affirmed the court's ruling. *State v. Lewis*, No. 2 CA-CR 2011-0334 (memorandum decision filed Feb. 5, 2013).

¶5 After a new trial in 2014, Lewis was convicted of second-degree murder and tampering with evidence. She had already completed her sentence in CR201000150, and, at sentencing, the state challenged the presentence report's calculation of 1681 days of presentence incarceration credit, arguing that if Lewis's murder sentence was consecutive to her sentence in CR201000150, she was not entitled to credit for the 702 days she had served pursuant to it.¹ The trial court sentenced her to sixteen calendar years' imprisonment for the murder conviction and a consecutive, 1.75-year term for the tampering conviction. Lewis did not object to the state's proposed calculation, which limited her presentence incarceration credits to 979 days, and the court adopted it, awarding 979 days of credit against her sentence for murder, with no credit

¹ According to the state's argument at sentencing, its calculation was based on the assumption that Lewis had been imprisoned for her sentence in No. CR201000150 on June 2, 2010, and had completed that sentence on May 4, 2012. Lewis did not dispute this representation or the state's calculation that she had served 702 days pursuant to that sentence.

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applied to her second, consecutive sentence for tampering with evidence.²

Discussion

¶6 On appeal, Lewis argues she was “improperly denied credit for pre-sentence incarceration” because, in its original judgment, the trial court “had . . . awarded 516 days credit for time served,” and because the state had not objected to or appealed from that award. She further asserts, “These time credits do not match up with the state’s proposed reduction of 702 days.” Lewis acknowledges that when she was sentenced in 2011, after her first trial in this case, she was already serving the sentence imposed for CR201000150. But she maintains, without citation to the record, that “[t]he 516 days credit” awarded in the court’s original, vacated judgment was “for time spent in custody separate and apart from the sentence” in CR201000150. Thus, according to Lewis, she “is entitled to the time credits she was originally awarded (516 days) in addition to the 979 days of credit for the period of time in custody from May 4, 2012, for a total of 1,495 days presentence incarceration.”

¶7 In her reply to the state’s argument that she waived a claim of fundamental error by failing to raise it in her opening brief, Lewis maintains that “[s]entencing error constitutes fundamental error.” We review the trial court’s calculation of presentence incarceration credits de novo. *State v. Bomar*, 199 Ariz. 472, ¶ 5, 19 P.3d 613, 616 (App. 2001). We find no error, much less fundamental error, in the trial court’s award of presentence incarceration credits after retrial.

¶8 Lewis’s argument is unsupported by the record or relevant law. Section 13-712(C), A.R.S., provides,

²After retrial, the trial court again stated its intent that Lewis’s sentences be consecutive to those imposed, and already completed, in CR201000150.

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If a sentence of imprisonment is vacated and a new sentence is imposed on the defendant for the same offense, the new sentence is calculated as if it had commenced at the time the vacated sentence was imposed, and all time served under the vacated sentence shall be credited against the new sentence.

But “[w]hen consecutive sentences are imposed, a defendant is not entitled to presentence incarceration credit on more than one of those sentences, even if the defendant was in custody pursuant to all of the underlying charges prior to trial.” *State v. McClure*, 189 Ariz. 55, 57, 938 P.2d 104, 106 (App. 1997).

¶9 Notwithstanding this authority, Lewis contends she was entitled to the presentence incarceration credit awarded in the trial court’s November 2011 judgment, arguing “[t]here is no legal basis” to conclude the trial court’s 2011 award of presentence incarceration credit was voided by its order vacating her convictions and sentences. But our supreme court has explained that an order granting a new trial does not merely “suspend[] the original judgment pending the new trial”; rather, “[a] vacated judgment lacks force or effect and places parties in the position they occupied before entry of the judgment.” *Nielson v. Patterson*, 204 Ariz. 530, ¶ 12, 65 P.3d 911, 914 (2003). The state never cross-appealed from the original judgment, because Lewis’s appeal from that judgment was dismissed before any cross-appeal was due.³ When the state

³In suggesting that “the state did not raise the issue of time credits in its appeal,” Lewis appears to be referring, without citation, to our supreme court’s holding in *State v. Dawson* that, on review of a defendant’s appeal from his convictions, an appellate court lacks jurisdiction to correct an illegally lenient sentence unless the state has filed a cross-appeal. 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990). But *Dawson* is inapposite. The trial court’s original judgment was never before us on review; the state appealed only from the court’s order vacating that judgment. *Lewis*, No. 2 CA-CR 2011-0334, ¶ 1.

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appealed from the order vacating the original judgment, it was not required to preserve any potential challenge to that judgment in the event it was restored through the state's appeal. *See id.* ¶ 15 (party not required to file "protective cross-appeal" from vacated judgment previously entered in its favor).

¶10 Moreover, we agree with the state that "no reasonable basis exists" to disturb "the legally proper and justifiable" award of presentence incarceration credit after retrial. Contrary to Lewis's assertion, all of the 516 days of presentence incarceration previously awarded in the trial court's vacated judgment was also attributable to time spent in custody for pre- and post-sentence custody in CR201000150. And, when Lewis was sentenced in CR201000150 on May 28, 2010, she was credited for the presentence incarceration time served after her arrest and incarceration on this murder charge. Accordingly, she is not entitled to a "double credit windfall," which has been "deemed impermissible" by this court. *McClure*, 189 Ariz. at 57, 938 P.2d at 106, quoting *State v. Cuen*, 158 Ariz. 86, 87, 761 P.2d 160, 161 (App. 1988).

Disposition

¶11 For the foregoing reasons, Lewis's convictions and sentences are affirmed.