IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Petitioner/Cross-Respondent*,

v.

KEVIN JASON AUGUSTINIAK, *Respondent/Cross-Petitioner*.

No. 1 CA-CR 15-0270 PRPC
FILED 7-6-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2007-008968-001 DT
The Honorable Peter C. Reinstein, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART AND DENIED IN PART; SENTENCE MODIFIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Robert E. Prather
Counsel for Petitioner/Cross-Respondent

David Goldberg Attorney at Law, Fort Collins, CO
By David Goldberg
Counsel for Respondent/Cross-Petitioner

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Donn Kessler joined.

J O N E S, Judge:

¶1 Both parties petition for review of the superior court's order granting in part and dismissing in part a petition for post-conviction relief filed by Kevin Augustiniak. For the reasons below, we grant review, grant relief on the State's petition for review, and deny relief on Augustiniak's cross-petition. Accordingly, Augustiniak's sentence is modified to reflect 3,279 days of presentence incarceration credit.

FACTS AND PROCEDURAL HISTORY

I. Federal Proceedings

¶2 In 2003, Augustiniak was indicted in federal district court on one count of committing a violent crime in aid of racketeering activity. *See* 18 U.S.C. § 1959(a)(1).[1] The charge alleged that Augustiniak murdered a person to gain entrance to, maintain, or increase his position in an enterprise engaged in racketeering activity. A superseding indictment in 2005 added a second charge alleging Augustiniak also kidnapped the victim. *See* 18 U.S.C. § 1959(a)(1). The superseding indictment further charged Augustiniak with engaging in numerous "racketeering activities" in violation of 18 U.S.C. § 1962. These racketeering activities included the alleged kidnapping and murder of the victim. The federal charges were premised upon the kidnapping and murder of the victim and referenced Arizona Revised Statutes (A.R.S.) §§ 13-1104 (second-degree murder) and -1304 (kidnapping).

¶3 In 2006, the federal government moved to dismiss the federal charges alleging only that dismissal was "in the interests of justice at this time." In March 2006, the federal district court dismissed the case against Augustiniak after he had spent 841 days in federal custody.

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[1] Absent material changes from the relevant date we cite a statute's current version.

II. State Proceedings

¶4 In November 2007, the State indicted Augustiniak for first-degree murder and kidnapping, as well as other felony offenses, arising from the same events as the original federal charges. In October 2011, Augustiniak pleaded guilty to second-degree murder and was sentenced to 23.5 years' imprisonment.

¶5 Augustiniak filed a petition for post-conviction relief of-right, in which he argued his plea was not knowing, intelligent, and voluntary because his counsel had been ineffective. Augustiniak alleged he was pressured and coerced into the plea and that there was a mistake of fact regarding the requirement of community supervision after his sentence. He also argued: (1) he was entitled to presentence incarceration credit for time spent in federal custody; (2) the State's prosecution after the dismissal of a federal case based upon the same conduct violated double jeopardy; and (3) the superior court erred when it imposed an aggravated sentence. Augustiniak filed a contemporaneous motion for post-conviction discovery to support his claim that his conviction violated double jeopardy. In that motion, Augustiniak sought production of all written communication between the Maricopa County Attorney and the United States Attorney "regarding any aspect of this case" for the past thirteen years, including all correspondence, emails, telephone logs, telephone messages, and case files and notes regarding oral conversations.

¶6 The superior court found the claims regarding community supervision and credit for time in federal custody were colorable and ordered an evidentiary hearing on those issues to commence in February 2015. The court summarily dismissed the remaining issues. The court also denied Augustiniak's motion for discovery on the grounds that he failed to show good cause because the materials Augustiniak provided in support of his motion did not establish a colorable claim for a double jeopardy violation.

¶7 At the time scheduled for the evidentiary hearing, the parties advised that a hearing was no longer necessary. Instead, the parties presented a written stipulation, in which they agreed the superior court would vacate the conviction and sentence, Augustiniak would plead guilty to second-degree murder, and the court would impose a stipulated sentence of 20.5 years' imprisonment. In return, Augustiniak would forego raising any claims regarding community supervision or ineffective assistance of counsel in the context of sentencing. However, Augustiniak would be permitted to pursue his claim for credit for time spent in federal

custody.[2] And although the stipulation did not reference the other issues, defense counsel expressed his belief that the parties intended they remain open to review.

¶8 The superior court accepted the parties' stipulation and immediately held a change of plea hearing. During that hearing, the court conducted the standard colloquy. Augustiniak personally informed the court he wanted to plead guilty, his plea was not the result of force or threats, no one made any promises outside of the plea agreement, and he wished to waive his constitutional rights. The parties agreed the court could consider the factual basis from the previous plea as the basis for this second plea. As part of that factual basis, Augustiniak admitted he killed the victim. The court accepted the plea, after which Augustiniak waived time and the court immediately sentenced him to the stipulated term of 20.5 years' imprisonment. The court awarded him 3,279 days of credit for presentence incarceration.

¶9 The superior court took the issue of the time Augustiniak spent in federal custody under advisement and later granted Augustiniak an additional 841 days of presentence incarceration credit for that time. Both parties timely petitioned for review.

DISCUSSION

I. Presentence Incarceration Credit for Time in Federal Custody

¶10 In its petition for review, the State argues the superior court erred when it credited Augustiniak for 841 days spent in federal custody. We review the interpretation and application of statutes *de novo*. *State v. Hansen*, 215 Ariz. 287, 289, ¶ 6 (2007) (citing *Pima Cty. v. Pima Cty. Law Enforcement Merit Sys. Council*, 211 Ariz. 224, 227, ¶ 13 (2005), and *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 308, ¶ 2 (2003)).

¶11 A defendant is entitled to credit for "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense." A.R.S. § 13-709(B) (2001) (renumbered as A.R.S. § 13-712(B) by 2008 Ariz. Sess. Laws, ch. 301, § 27 (2d Reg. Sess.) (effective Jan. 1, 2009)). If the time spent in the custody of a non-Arizona agency was not "pursuant to" the Arizona offense for which the defendant was ultimately convicted and sentenced, however, the defendant is not

[2] It is unclear why Augustiniak decided not to proceed with the evidentiary hearing, at least on the presentence incarceration issue, after the superior court had found it colorable. *See supra* ¶ 6.

entitled to credit for that time. *State v. Horrisberger*, 133 Ariz. 569, 570 (App. 1982) (holding the defendant's custody in another state, resulting from an arrest for alleged offenses in that state, was not "pursuant to" the Arizona offense for which he was convicted); *see also State v. Cecena*, 235 Ariz. 623, 626-27, ¶¶ 10, 15 (App. 2014) (remanding for an evidentiary hearing to determine whether the defendant was confined in Mexico "pursuant to the Arizona charge"). A defendant who seeks credit for time spent incarcerated by a foreign sovereign must show that the Arizona charge for which the defendant was ultimately convicted and sentenced was the "but for cause" of the time spent in the custody of the other sovereign. *Cecena*, 235 Ariz. at 626, ¶ 10 (citing *People v. Bruner*, 892 P.2d 1277, 1286-87 & n.11 (Cal. 1995)); *see also State v. Mahler*, 128 Ariz. 429, 430 (1981) (confirming that presentence incarceration credit is appropriate for time spent "in the custody of another [jurisdiction] pursuant to an arrest *for an Arizona offense*") (emphasis added) (citing *Walsh v. State ex rel. Eyman*, 104 Ariz. 202, 208-09 (1969)).

¶12 The record reflects Augustiniak spent 841 days in federal custody "pursuant to" an indictment for federal racketeering charges in violation of 18 U.S.C. § 1959 and 18 U.S.C. § 1962. At the time, there were no charges pending against Augustiniak in Arizona courts, and the State did not ultimately charge, convict, or sentence Augustiniak for any federal racketeering crimes. Further, there is no evidence the State asked federal authorities to initiate, maintain, or otherwise prolong Augustiniak's federal custody as a result of any Arizona offense for which Augustiniak was convicted. Therefore, Augustiniak did not spend any time in federal custody "pursuant to" an Arizona offense that resulted in the underlying conviction and sentence. That some of the federal racketeering charges were based, in part, upon the same murder for which Augustiniak later pleaded guilty is of no consequence. The act of committing the murder was not the "but for" cause of his federal custody; rather, the "but for" cause of his federal custody was the federal racketeering activity.

¶13 For these reasons, we grant relief on the State's petition for review, vacate the award of an additional 841 days of presentence incarceration credit, and modify Augustiniak's sentence to reflect a credit of 3,279 days of presentence incarceration as of the date of sentencing.

II. Voluntariness of Plea

¶14 In his cross-petition for review, Augustiniak argues his plea was not knowing, intelligent, and voluntary because: (1) trial counsel at the time he entered his first plea was ineffective by misrepresenting the weakness of Augustiniak's defense and not providing him all the materials

needed to make an informed decision regarding whether to accept the plea offer, and (2) he entered into the plea as a result of undue pressure and coercion. We deny relief.

¶15 All claims regarding ineffective assistance of counsel presented by Augustiniak occurred in the context of his first plea, entered in October 2011. As noted above, however, the superior court allowed Augustiniak to withdraw from the October 2011 plea pursuant to the parties' stipulation. Augustiniak's current counsel then negotiated a new plea agreement, which Augustiniak accepted. Therefore, the present conviction and sentence did not result from the October 2011 plea, the action or inaction of his former counsel, nor any circumstance that existed at the time of the first plea, which he claims was involuntary.

¶16 Further, Augustiniak does not present a credible argument that his second plea in February 2015 was involuntary. First, he specifically advised the superior court, on the record, that it was voluntary. Second, at the time Augustiniak accepted the second plea, he had already claimed the first plea was involuntary and was therefore uniquely aware of the purported defects. To allow Augustiniak to assert the second plea was deficient as a result of the same ineffective assistance of counsel that he alleged rendered the first plea involuntary, would mean Augustiniak's participation in the February 2015 change of plea hearing, and everything he advised the court during that hearing, was a sham. Augustiniak may not manipulate the proceedings in such a manner.

III. Double Jeopardy

¶17 Augustiniak also argues his conviction in State superior court for the same murder that formed the basis of the earlier federal racketeering charges violated double jeopardy. Augustiniak does not contest that a state and federal government may prosecute and punish a defendant for a single act that violates both state and federal law. *United States v. Lanza*, 260 U.S. 377, 382 (1922); *State v. Flores*, 218 Ariz. 407, 413, ¶ 15 (App. 2008) (citing *Abbate v. United States*, 359 U.S. 187, 194-95 (1959)). He argues, however, that *Bartkus v. Illinois* created an exception to the general rule and provides that double jeopardy bars a second prosecution in state court when the state is "merely a tool of the federal authorities" and the state prosecution "was a sham and a cover for a federal prosecution, and thereby, in essential fact,

another federal prosecution." 359 U.S. 121, 123-24 (1959). Augustiniak contends the exception applies here.[3] We deny relief.

¶18 Nothing within the materials Augustiniak provided in support of his double jeopardy claim suggests the State was "merely a tool" of the federal government or that the federal government somehow initiated, directed, or controlled the State's prosecution. While those materials show contact and cooperation between state and federal investigators, even *Bartkus* recognized that such cooperation "is the conventional practice between the two sets of prosecutors throughout the country" and does not alone "sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution." *Id*. at 123-24.

IV. Motion for Discovery

¶19 Finally, Augustiniak argues the superior court erred in denying his motion for discovery. A trial court has "inherent authority to grant discovery requests in [post-conviction relief] proceedings upon a showing of good cause." *Canion v. Cole*, 210 Ariz. 598, 600, ¶ 10 (2005) (citing *State v. Van Den Berg*, 164 Ariz. 192, 196 (App. 1990), and then *Carriger v. Stewart*, 132 F.3d 463, 466 (9th Cir. 1997)). Again, there is nothing within the materials presented by Augustiniak to suggest the *Bartkus* exception applies. *See supra* ¶ 18. Thus, Augustiniak's motion appears nothing more than a fishing expedition. As such, Augustiniak establishes no basis upon which we can find the court abused its discretion in denying his motion for discovery.

CONCLUSION

¶20 We grant review, grant relief on the State's petition for review, and modify Augustiniak's sentence to reflect 3,279 days of

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[3] For purposes of this decision only, we assume without deciding that *Bartkus* actually created an exception. *See, e.g., United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008) ("There is some room for debate over whether the *Bartkus* exception is just narrow or whether it is indeed real."); *United States v. Angleton*, 314 F.3d 767, 773-74 (5th Cir. 2002) (suggesting the *Bartkus* exception "exists, if at all, only in the rarest of circumstances"); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994) (noting some courts have "inferred" the existence of an exception "alluded to" in *Bartkus*); *United States v. Brocksmith*, 991 F.2d 1363, 1366 (7th Cir. 1993) (questioning whether *Bartkus* created any exception).

presentence incarceration credit. We deny the relief requested by Augustiniak in his cross-petition.

AMY M. WOOD • Clerk of the Court
FILED: AA