

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 08/23/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0247 PRPC
)
Respondent,) DEPARTMENT C
)
v.) Maricopa County
) Superior Court
RICHARD EUGENE JOHNSON,) No. CR2001-090873-001DT
)
Petitioner.)
)
) **DECISION ORDER**
)
)
_____)

Petitioner Richard Eugene Johnson seeks review of the dismissal of his petition for post-conviction relief. Presiding Judge Maurice Portley, and Judges Margaret H. Downie and Michael J. Brown, have considered this petition for review and, for the reasons stated, grant review and grant relief. We modify the award of presentence incarceration credit and add 365 days, for a total award of presentence incarceration credit of 784 days.

PROCEDURAL BACKGROUND

Johnson pled guilty to two counts of attempted child molestation, class three felonies and dangerous crimes against children. There were no sentencing agreements "except that if the defendant is placed on probation on Count 1 and Count 2, it

shall be lifetime probation and he shall be required to serve one year flat in jail on each count consecutively without work furlough."

At sentencing, the trial court placed him on lifetime probation on each count, and pursuant to the plea agreement, ordered that Johnson be incarcerated for a total of two years (one year on each count).

Later, after admitting that he had used cocaine, the trial court revoked his probation. Johnson was sentenced to concurrent, presumptive ten-year terms, with credit for 419 days of presentence incarceration. The presentence incarceration credit included only one of the two one-year periods Johnson spent incarcerated pursuant to his probation.

Johnson filed a timely notice of post-conviction relief. He raised two claims in his petition: one alleged ineffective assistance of counsel, and the other alleged that he was entitled to additional credit for 365 days of presentence incarceration (the second, or consecutive, year he spent incarcerated as a condition of his probation on Count 2). After the State argued Johnson's counsel had not been ineffective, it also claimed that Johnson was not entitled to credit for the

additional year he had spent in custody. The State reasoned that even though the two one-year jail terms were served consecutively, the probation terms were concurrent, as were the ten-year prison terms. Thus, the State concluded, "[T]he [judicial officer] did in fact accord Defendant the credit to which he was entitled. Since the sentences were to run concurrently, the credit from the consecutive sentences previously imposed was to be served concurrently."

The trial court summarily dismissed the petition "for the reasons stated in the response." Johnson filed an unsuccessful motion for rehearing. He then filed this petition for review and asked whether he is entitled to an additional credit for the second, or consecutive, 365 days for the time he spent incarcerated as a condition of his probation.

ANALYSIS

It is undisputed Johnson spent 784 days in jail prior to the imposition of his prison sentences. Of that time, 730 days were served as a condition of probation; 365 days on Count 1, and 365 days on Count 2. Presentence incarceration credit is governed by Arizona Revised Statutes ("A.R.S.") sections 13-

712(B) (2010), and -903(F) (2010).¹ The statutes are "companion" statutes, and should be interpreted consistently. *State v. Chavez*, 172 Ariz. 102, 104, 834 P.2d 825, 827 (App. 1992). "A.R.S. sections 13-709(B) and -903(F) were companions in enactment, see 1977 Ariz. Sess. Laws 678, 713, 719, and address the related subjects of pre-probationary and probationary credit. We believe it proper to interpret them consistently." *Id.*

Section 13-712(B) states that "All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment [imposed]." Though seemingly contradictory to the literal language of the statute, the statute has been interpreted to require that credit be awarded against all sentences imposed which are ordered to run concurrently. *State v. Cruz-Mata*, 138 Ariz. 370, 375, 674 P.2d 1368, 1373 (1983). The requirement is necessary to achieve the legislative purpose of the statute; to wit: to reduce the number of days served in prison by the number of days the inmate spent in presentence custody. If the credit were not applied to all

¹ We cite to the current version of the statutes because there have been no changes material to this decision.

concurrent sentences, the time served in prison by an inmate would not be reduced, and the credit would be "illusory" and the effect of the statute would be "without meaning."

In *Cruz-Mata*, the defendant spent time in custody pursuant to only one of the offenses for which he was sentenced to prison. However, our supreme court held that the defendant was entitled to the presentence incarceration credit against another prison sentence ordered to run concurrently. The court explained:

We think the remedy is to credit appellant's time spent in presentence custody to each concurrent sentence. This does not grant appellant a windfall. The result will be that the time he must serve in prison before he is eligible for parole will be reduced by the actual number of days spent in presentence custody. See *State v. Thomas*, 133 Ariz. 533, 652 P.2d 1380 (1982) (applying credit for presentence custody against the minimum 25-year portion of the sentence). Stated another way, the term of imprisonment minus the number of days spent in presentence custody equals the length of incarceration in prison. In this case, appellant's minimum term of imprisonment is 25 years minus 260 days credit for presentence custody which equals 24 years, 105 days to be served in prison before he is eligible for parole.

Id. at 375, 674 P.2d at 1373.

In comparison, § 13-903(F) states, "Time spent in custody under § 13-901, subsection F shall be credited to any sentence of imprisonment imposed upon revocation of probation." Like *Cruz-Mata*, Johnson is entitled to credit against his concurrent sentences for all time actually spent in custody. He does not receive any windfall because the time Johnson must serve in prison will be reduced by the actual number of days he spent in custody.

The State's argument that although Johnson served the two jail terms consecutively, he ultimately was sentenced to concurrent terms, and thus the jail terms should be treated as concurrent, has effectively been rejected by *Cruz-Mata*. If the State is correct, and Johnson was only entitled to credit for one year against both sentences, he would effectively serve eleven years for each offense. However, adopting the interpretation set forth in *Cruz-Mata*, and awarding credit for both years ("all time actually spent in custody") Johnson effectively serves the sentence imposed, ten years for each offense.

We vacate the trial court's order of January 4, 2010, summarily dismissing the post-conviction relief proceeding, and we modify the sentencing minute entry of August 6, 2008, and award presentence incarceration credit for a total of 784 days against both sentences.

/s/

MAURICE PORTLEY, Presiding Judge