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17-P-1585

Appeals Court

COMMONWEALTH vs. WASHINGTON PEARSON.

No. 17-P-1585.

Middlesex. November 1, 2018. - August 7, 2019.

Present: Agnes, Blake, & Neyman, JJ.

Practice, Criminal, Mittimus, Sentence. Imprisonment, Credit for time served. Pretrial Detention.

Indictments found and returned in the Superior Court Department on October 25, 2012, and December 10, 2013.

A motion to correct the mittimus was considered by Douglas H. Wilkins, J., and a motion for reconsideration, filed on June 19, 2017, was considered by him.

Edward Crane for the defendant.  
Timothy Ferriter, Assistant District Attorney, for the Commonwealth.

NEYMAN, J. The defendant, Washington Pearson, was convicted of crimes stemming from multiple discrete acts committed in Norfolk and Middlesex counties. Following separate jury trials in the Superior Court in the respective counties where he committed the crimes, the defendant was convicted and

sentenced to concurrent sentences to State prison. The defendant now appeals from an order denying the application of jail credits for overlapping periods of pretrial detention on the separate cases brought in Middlesex County (Middlesex case) and Norfolk County (Norfolk case).<sup>1</sup> Specifically, he contends that because the trial in the Middlesex case and the trial in the Norfolk case stemmed from the same course of criminal conduct, the cases were "related," such that he "was entitled to apply the jail credit he received for his pretrial confinement against the highest sentence imposed in either case." We affirm.

Background. 1. Norfolk case. The Norfolk case stemmed from four incidents. On January 26, 2012, the defendant broke into a home on Centre Street in Brookline and stole various valuable items. On February 6, 2012, the defendant broke into a home on Verndale Street in Brookline and stole several items including credit cards. The credit cards were later used the same day at stores in Boston and Cambridge. On February 8, 2012, the defendant broke into an apartment on James Street in Brookline and stole various items including an engagement ring,

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<sup>1</sup> The present case stems from the denial of the defendant's motion to correct the mittimus in the Middlesex case. The defendant's direct appeal from the convictions in the Middlesex case is pending in a separate matter before this court. See docket 18-P-1302.

wedding band, and prescription pill bottle. Also on February 8, 2012, the defendant broke into a different apartment on James Street in Brookline and stole a camera, prescription pill bottle, and an "iPad" tablet computer.

2. Middlesex case. On February 3, 2012, the defendant broke into a home on Putnam Avenue in Cambridge and stole several valuable items including a laptop computer and jewelry. On February 7, 2012, the defendant broke into a home on Hancock Street in Cambridge and stole several items including jewelry and a credit card. The credit card was used later that day at a store in Cambridge. On February 8, 2012, the defendant attempted to break and enter into a home on Franklin Street in Cambridge, but the attempt failed.

On February 9, 2012, police officers arrested the defendant and his former wife at the defendant's residence in Lynn. The officers later obtained a warrant to search the defendant's residence, and located items from the burglarized residences along with items purchased with the stolen credit cards.

Both the defendant and his former wife were held in pretrial custody following the arrest. During that time, the defendant threatened his former wife by stating that "he knows girls" at the facility at which she was being held, and that her actions were being monitored.

3. Jury verdicts and sentencing. Following a jury trial in the Norfolk case, the defendant was convicted of four counts of larceny over \$250 and four counts of breaking and entering in the daytime with intent to commit a felony. The defendant received a sentence of six to eight years in State prison on the breaking and entering counts,<sup>2</sup> and received 733 days of jail credit for the time he was held awaiting trial.<sup>3</sup> Following a subsequent jury trial in the Middlesex case, the defendant was convicted of two counts of breaking and entering in the daytime with intent to commit a felony, two counts of larceny over \$250, four counts of identity fraud, four counts of improper use of a credit card, and one count of witness intimidation. After an ensuing jury-waived trial in the Superior Court, he was convicted as a habitual offender on one count of breaking and entering, on two counts of larceny over \$250, and on the count of intimidation of a witness. He received a ten-year State prison sentence on the count of breaking and entering as a habitual offender, and a concurrent ten-year State prison sentence on the count of intimidation of a witness as a habitual

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<sup>2</sup> The sentences on the breaking and entering counts were concurrent. The sentences on the remaining convictions in the Norfolk case are not at issue in this appeal.

<sup>3</sup> The 733 days of jail credit applied to the time from the defendant's initial arrest on February 9, 2012, until he started serving a committed sentence on an unrelated case out of Essex County in February, 2014.

offender.<sup>4</sup> The defendant's sentences in the Middlesex case were to run concurrently with his sentences in the Norfolk case.

4. Motion to correct mittimus. On April 10, 2015, the defendant moved to correct the mittimus on the Middlesex case, seeking to have the jail credit on the Norfolk case apply to the subsequent Middlesex case. A Superior Court judge denied the motion. Nearly two years later, the defendant filed a motion for reconsideration, which the same judge also denied.

Discussion. Pursuant to G. L. c. 279, § 33A:

"The court on imposing a sentence of commitment to a correctional institution of the commonwealth, a house of correction, or a jail, shall order that the prisoner be deemed to have served a portion of said sentence, such portion to be the number of days spent by the prisoner in confinement prior to such sentence awaiting and during trial."

Under this statute, a defendant is entitled to credit for time spent awaiting trial on an offense. However, a defendant is not entitled to jail credit for time spent awaiting trial if he is already serving a committed sentence for unrelated offenses. See Commonwealth v. Barton, 74 Mass. App. Ct. 912, 913 (2009); Commonwealth v. Blaikie, 21 Mass. App. Ct. 956, 957 (1986). A defendant in custody awaiting trial on multiple unrelated cases is entitled to apply the jail credit to only one case; however, a judge has discretion to award jail credit to multiple cases

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<sup>4</sup> The sentences on the remaining convictions in the Middlesex case are not at issue in this appeal.

upon a timely request. See Commonwealth v. Ridge, 470 Mass. 1024, 1025 (2015). Compare Commonwealth v. Carter, 10 Mass. App. Ct. 618, 620 (1980) (defendant should be awarded credit exclusively for time spent in presentence confinement "which relates to the criminal episode for which the prisoner is sentenced"). The key consideration in this analysis is fairness to the defendant. See Blaikie, 21 Mass. App. Ct. at 957. But see Ridge, 470 Mass. at 1025, quoting Barton, 74 Mass. App. Ct. at 915 (where "the time previously credited to the defendant is 'wholly inclusive of the period the defendant claims as credit on' a later-imposed sentence, 'there is no special consideration of fairness that supports the credit that the defendant seeks'").

The defendant contends that the Norfolk and Middlesex cases were related because they stemmed from a "crime spree" that involved a common scheme, and thus he was entitled, as a matter of law, to have the jail credits applied to the Middlesex case, too.<sup>5</sup> As the defendant acknowledged at oral argument, this case hinges on whether the Norfolk and Middlesex cases are related

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<sup>5</sup> The defendant acknowledged at oral argument that his conviction of intimidation of a witness is not related for purposes of the jail credit analysis. This alone provided an appropriate basis for the judge to deny the defendant's motion.

for purposes of applying jail credits.<sup>6</sup> If they are not related, then the defendant's argument is unavailing.

The term "related" is not found in G. L. c. 279, § 33A. Rather, in Carter, 10 Mass. App. Ct. at 620, we stated that the "prisoner is to receive credit for all jail time . . . served before sentencing which relates to the criminal episode for which the prisoner is sentenced." Prior to Carter, in Commonwealth v. Grant, 366 Mass. 272, 276 (1974), the Supreme Judicial Court explained that "any time spent in jail prior to sentencing by a defendant charged with the offense for which he is ultimately convicted, or with an offense which arises out of the same occurrence and of which he is acquitted, given a significant State interest and involvement in the confinement, should be credited." In that case, the defendant was arrested by both Boston police and the Federal Bureau of Investigation in connection with a single incident, where a government witness in

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<sup>6</sup> The critical issue in the present case is not whether the judge could have awarded jail credits. See Ridge, 470 Mass. at 1025 ("had the defendant requested credit for his pretrial detention at the time of the [Middlesex] County sentencing, the sentencing judge plainly would have had the power to accede to or to deny the request"). Rather, as discussed herein, the present appeal turns on whether the defendant is entitled, as a matter of law, to receive jail credits on the Middlesex case. As the defendant argues, to answer this question we must determine whether the Middlesex and Norfolk cases were related. The defendant argues that "[b]ecause the cases were related, [he] was entitled to have the time spent awaiting trial on these cases applied to the harshest sentence he received").

certain Federal prosecutions was assaulted and robbed. Id. at 273. The defendant spent time in confinement in lieu of bail on a Federal charge of intimidation of a witness while awaiting trial on both State and Federal charges. Id. The defendant was acquitted of the Federal charge prior to his conviction on a State charge of assault and battery by means of a dangerous weapon. Id. The Supreme Judicial Court awarded the defendant credit on his State sentence for the time he served awaiting trial on the Federal charge, noting that "the Federal charge was related to, and arose out of, the same occurrence as that on which the Commonwealth based its charges." Id. at 275.

The present case is readily distinguishable from Grant. Here, the convictions did not involve a single occurrence or arise out of the same incident. Instead, the defendant's conduct involved discrete burglaries on different days, at different homes, in different cities and towns, and with different victims. See Barton, 74 Mass. App. Ct. at 913, quoting Commonwealth v. Foley, 15 Mass. App. Ct. 965, 966 (1983) ("statutory purpose was not to allow deductions for time served under sentence for another crime").<sup>7</sup> Furthermore, the defendant

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<sup>7</sup> It is conceivable that crimes committed on different days or involving separate victims could be related if connected by something more than an overall plan. In the context of G. L. c. 279, § 33A, the analysis is fact-specific. See, e.g., Barton, 74 Mass. App. Ct. at 914 (engaging in fact-specific analysis); Commonwealth v. Harvey, 66 Mass. App. Ct. 297, 299-



cites no authority for the proposition that the house breaks and thefts were related for purposes of awarding jail credits because they involved a similar scheme and occurred over a two-week period.<sup>8</sup> Compare Grant, 366 Mass. at 275 ("Federal charge was related to, and arose out of, the same occurrence as that on which the Commonwealth based its charges. The defendant in essence had been guilty of one wrong for which he suffered confinement prior to any conviction"); Barton, 74 Mass. App. Ct. at 914 (no entitlement to jail credits under G. L. c. 279, § 33A, where "multiple concurrent sentences are ordered on different dates, on account of different offenses that arise from different criminal episodes"). Thus, the claim is unavailing.

In short, the numerous house breaks in the present case involved multiple and discrete crimes that did not arise from

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301 (2006) (same). Here, the crimes were unrelated for the above-stated reasons.

<sup>8</sup> We are not persuaded by the defendant's contention at oral argument that we should apply the standard for joinder under Mass. R. Crim. P. 9, 378 Mass. 859 (1979), to the jail credits analysis. That contention was not raised in his appellate brief and, in any event, finds no support in our case law. Compare Commonwealth v. Silva, 93 Mass. App. Ct. 609, 617 (2018) (purpose of rule 9 "is to promote judicial economy and efficiency, and to avoid multiple similar trials and their concomitant burdens on witnesses and the courts"), with Commonwealth v. Morasse, 446 Mass. 113, 117 (2006) ("purpose [of G. L. c. 279, § 33A] was to give sentencing credit for time spent in a jail or correctional institution while awaiting trial").

the same occurrence. Under Massachusetts law, the Norfolk and Middlesex cases were not related for purposes of applying jail credits. See Barton, 74 Mass. App. Ct. at 914. See also Blaikie, 21 Mass. App. Ct. at 957 ("We perceive no special consideration of fairness which requires crediting the Suffolk sentences with time spent in confinement awaiting sentence on the unrelated Middlesex offenses"). The judge did not abuse his discretion in denying the defendant's motion. Therefore, the order denying the defendant's motion to correct the mittimus is affirmed.

So ordered.