SJC-12932

COMMONWEALTH vs. BRAULIO CALIZ.

Hampden. December 4, 2020. - February 23, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Imprisonment, Credit for time served. Practice, Criminal, Sentence.

Indictments found and returned in the Superior Court Department on August 1, 2017.

Motions for a new trial and to receive jail credit, filed on April 1, 2019, were considered by Constance M. Sweeney, J., and a motion for reconsideration was also considered by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Molly Ryan Strehorn for the defendant.

John A. Wendel, Assistant District Attorney, for the Commonwealth.

Chauncey B. Wood, Anthony D. Mirenda, Caroline S. Donovan, Christopher E. Hart, Samuel C. Bauer, Emily J. Nash, & Rachel Davidson, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

LOWY, J. The defendant, Braulio Caliz, argues he is entitled to mandatory credit for time he served on a drug

conviction that was vacated after the now-infamous scandal at the State Laboratory Institute in Amherst at the campus of the University of Massachusetts (Amherst lab) came to light. See generally Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 705-722 (2018). We disagree, concluding that the defendant is not entitled to receive mandatory credit for time served on a prior, wholly unrelated charge. See Commonwealth v. Holmes, 469 Mass. 1010, 1012 n.3 (2014).[1]

Background. This case involves the intersection of the defendant's convictions with one of the biggest scandals in the Commonwealth's justice system in decades. To begin, the defendant pleaded guilty in the Superior Court on October 23, 2012, to one count of possession with intent to distribute a class A substance (G. L. c. 94C, § 32), one count of possession with intent to distribute a class B substance (G. L. c. 94C, § 32A), and one count of distribution of a class A substance (G. L. c. 94C, § 32). He was sentenced to two concurrent sentences of from three to four years in State prison. The substances in the case were analyzed at the Amherst lab on February 15, 2012, and the certificates of drug analysis (drug

[1] We acknowledge the amicus brief submitted by the Massachusetts Association of Criminal Defense Lawyers.

certificates) were signed by chemist Rebecca Pontes (Pontes case).[2]

The following January, chemist Sonja Farak was arrested on charges of tampering with evidence, possession of cocaine, and possession of heroin. An investigation led by Assistant Attorney General Anne Kaczmarek ensued. During 2013 and 2014, Kaczmarek and other officials withheld key information from attorneys representing defendants whose convictions were called into question by Farak's misconduct, as well as from a Superior Court judge assigned to review the matter. In October 2014, key information relating to when Farak's drug use began finally came to light. While interested parties argued over the implications of this revelation, the defendant served the remainder of his sentence on the Pontes case and was released from custody on June 3, 2015.

On June 26, 2017, a different Superior Court judge held that Farak's misconduct "created a problem of systemic magnitude" and that both Kaczmarek and Assistant Attorney

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[2] On April 3, 2013, while serving that sentence, the defendant pleaded guilty to two misdemeanors -- assault and battery (G. L. c. 265, § 13A [a]) and disturbing a correctional institution (G. L. c. 268, § 30) -- and was sentenced to eighteen months in the house of correction on the first charge, and three months on the second charge. Each were concurrent with each other as well as with his sentences in the Pontes case.

General Kris Foster had committed a "fraud upon the court" by withholding material records about Farak's drug use. Commonwealth vs. Cotto, Superior Court No. 0779CR00770 (Hampden County June 26, 2017).[3] However, the judge found only that the accuracy of drug certificates signed by Farak herself were in question. Id.

Soon thereafter, on June 28, 2017, the defendant was arrested for possessing and selling heroin (2017 case).[4] On February 27, 2018, the defendant pleaded guilty to possession with intent to distribute a class A substance (G. L. c. 94C, § 32 [a]) and possession with intent to distribute a class B substance (G. L. c. 94C, § 32A [a]), among other charges.[5] The

[3] After that decision, an unrelated 2012 drug possession case against the defendant in the Holyoke Division of the District Court Department was dismissed with prejudice. In his brief, the defendant identifies the chemist in that case as Farak. For that case, the defendant had been sentenced to sixty days in a house of correction on the possession charge, and thirty days (concurrent) on a trespassing charge.

[4] The defendant has not raised any concerns about the accuracy of the certificates of drug analysis in the 2017 case.

[5] The defendant had been indicted as a subsequent and habitual offender, but pleaded guilty only to so much of the charges as alleged he was a first-time offender. The predicate offenses for the subsequent and habitual offender indictments were the Pontes case, as well as a 2005 case in the Superior Court where the defendant was convicted of unlawful distribution of a class A substance.

judge sentenced him to from five to seven years in State prison on each charge, to be served concurrently.[6]

On October 11, 2018, we decided Committee for Pub. Counsel Servs., 480 Mass. at 729, ordering the vacatur and dismissal with prejudice of thousands of drug convictions that relied on substances tested at the Amherst lab -- not only by Farak herself, but also by other chemists -- during certain periods of Farak's employment. The egregious misconduct by both Farak and the assistant attorneys general warranted the "very strong medicine" of dismissal with prejudice of all convictions tainted by governmental wrongdoing. Id. at 725. On December 13, 2018, the Pontes case against the defendant was consequently dismissed with prejudice.

[6] The defendant also pleaded guilty to resisting arrest, (G. L. c. 268, § 32B) and disorderly conduct (G. L. c. 272, § 53); he received a thirty-day sentence for each misdemeanor, to be served concurrently with each other and with his sentences on the drug charges.

Fewer than four months later, on April 1, 2019, the defendant filed a motion for jail credit in his 2017 case.[7],[8] He argued that equitable principles and basic notions of fairness required credit for the time he served on the now-vacated Pontes case, and he contended that the level of governmental misconduct at the Amherst lab was an "equally compelling" circumstance to actual innocence. See Holmes, 469 Mass. at 1012 n.3. The judge denied the defendant's motion, finding that the defendant was not entitled to credit because government misconduct at a drug laboratory was not equally compelling to actual innocence.

After timely notice of appeal, the case was entered in the Appeals Court. We transferred the case to this court sua sponte.

Discussion. If a defendant is held in custody before trial, G. L. c. 279, § 33A, and G. L. c. 127, § 129B, mandate

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[7] The defendant initially requested 1,013 days of jail credit, but later recalculated it to 717 days after the Commonwealth disputed the number. In a motion to reconsider, the defendant provided documentation from the Department of Correction indicating he had served a total of 1,262 days for the Pontes case. Of that number, 545 days also went toward concurrent sentences for still-valid convictions for two 2013 misdemeanors. See note 2, supra. The Commonwealth does not dispute the recalculated number of 717 days.

[8] On that date, the defendant also filed a motion for a new trial, which was subsequently denied. The defendant later included the denial of the motion for a new trial in his notice of appeal, but he did not mention it in his brief. The issue is therefore waived.

that he or she be credited with those days spent incarcerated toward the sentence eventually received. Where there is no controlling statute, we have looked to "considerations of fairness" to determine whether a defendant is owed credit toward a conviction. Holmes, 469 Mass. at 1011.

In determining whether credit is due, we have weighed the competing concerns of "dead time" and "banked time." Holmes, 469 Mass. at 1011. "Dead time" refers to "time spent in confinement for which no day-to-day credit is given against any sentence." Commonwealth v. Milton, 427 Mass. 18, 21 n.4 (1998). "Familiar equitable principles" of justice and fairness weigh heavily against "a prisoner having served bad or dead time for which no credit is given." Manning v. Superintendent, Mass. Correctional Inst., Norfolk, 372 Mass. 387, 396 (1977). "Banked time" refers to using time already served on an earlier conviction toward a new, unrelated conviction. Holmes, supra. A defendant generally cannot "bank time" toward a future conviction that is not substantively or temporally connected to the prior offense. See id. at 1012; Manning, supra at 395.[9] Animating this prohibition is the concern that mandatory "banked

[9] Concerns of "banked time" are not implicated if the two sentences are continuous. See Manning, 372 Mass. at 395 (defendant entitled to credit where valid sentence was from and after vacated sentence). See also Holmes, 469 Mass. at 1012 n.2 (distinguishing Manning because from and after sentences were "related").

time" is considered akin to authorizing "a line of credit for future crimes," effectively "grant[ing] prisoners license to commit future criminal acts with immunity" (citation omitted). Holmes, supra.

In Holmes, 469 Mass. at 1013, we balanced the competing concerns of "dead time" and "banked time," and held that when the two convictions were unrelated and separated by a period of liberty, "the need to prevent abuses associated with banking time outweigh[ed] any concern about unfairness arising from dead time." We left open, though, "the possibility of allowing credit for time served on a completed sentence for an unrelated crime where there is actual innocence or some other equally compelling circumstance." Id. at 1012 n.3. We have not yet found any circumstances as compelling as actual innocence.

The defendant argues that the misconduct by people in the Attorney General's office delayed his access to justice, and thus is as compelling as actual innocence. He notes that if those in the Attorney General's office had initially conducted an adequate investigation of Farak, the extent of her misconduct would have come to light within the first three months of his sentence on the Pontes case. Moreover, if the Attorney General had conceded error when the fraud first came to light and informed potential defendants of the implications, he might have

been spared eight months of incarceration. Instead, he served the full sentence before it was eventually vacated.

We have previously recognized the egregiousness of misconduct at multiple levels of government in connection with the Amherst lab scandal. See Committee for Pub. Counsel Servs., 480 Mass. at 723. We do not, however, accept the defendant's invitation to equate the government misconduct here with actual innocence.[10] Instead, as we have previously cautioned, "[r]emedies for prosecutorial misconduct should be tailored to the injury suffered and should not unnecessarily infringe on competing interests." Id. at 725, quoting Commonwealth v. Cronk, 396 Mass. 194, 199 (1985). We have already taken into account the prosecutorial misconduct when crafting the appropriate remedy. Compare Bridgeman v. District Attorney for the Suffolk Dist., 476 Mass. 298, 300 (2017) (case-by-case adjudication after misconduct by chemist at drug laboratory), with Committee for Pub. Counsel Servs., supra at 725 (harsher

[10] It is important to note that the certificates of drug analysis in the Pontes case were not signed by Farak herself, and the drugs were analyzed before summer 2012, the time by when it was clear that Farak had stolen from her colleagues' samples. Nevertheless, we vacated and dismissed the case with prejudice in order to protect the integrity of the criminal justice system, because the extent of Farak's misuse of other chemists' standards was not entirely clear. But the veracity of the certificates in the Pontes case was less in doubt than in other of the vacated cases.

sanctions than those in Bridgeman warranted where prosecutorial misconduct accompanied misconduct by chemist). In crafting this remedy, we did not infringe on the balance between dead time and bank time struck by Holmes, 469 Mass. at 1012-1013. Thus, we hold the defendant is not entitled to mandatory credit in this case.[11]

Conclusion. We affirm the Superior Court's order denying the defendant's motion for credit.

So ordered.

[11] In circumstances where a defendant has served dead time, he or she may seek to pursue a civil claim for compensation for an erroneous felony conviction under G. L. c. 258D, if the defendant qualifies under that statute.

CYPHER, J. (concurring). Although I concur with the court's decision, I write separately to stress that credit should not be afforded as a result of dead time, even in the case of actual innocence. A person should never feel at liberty to commit a crime with the knowledge that he or she may avoid incarceration as a result of credit for past jail time, irrespective of the source of that credit. See Commonwealth v. Milton, 427 Mass. 18, 25 (1998). See also Commonwealth v. Holmes, 469 Mass. 1010, 1011-1012 (2014). Although the circumstances giving rise to dead time may represent serious injustice inflicted against a defendant, that defendant has other recourses available and should not be afforded an open-ended credit for time served. See Heck v. Humphrey, 512 U.S. 477, 480 (1994) (establishing 42 U.S.C. § 1983 as recourse for unconstitutional conviction). See also Guzman v. Commonwealth, 458 Mass. 354, 355-357 (2010) (establishing G. L. c. 258D as State recourse for wrongfully incarcerated people); 28 U.S.C. §§ 1495, 2513 (granting compensation for wrongful incarceration). I would close the escape hatches left open in Holmes completely and put to rest the idea that a person can ever be credited jail time to be used to mitigate a future sentence for an unrelated crime.

The court in Holmes strongly foreclosed the use of banked time[1] in most cases. Holmes, 469 Mass. at 1011-1013. However, it declined to decide whether an earlier conviction vacated on the ground of actual innocence or another "equally compelling circumstance" may justify the use of banked time to offset a sentence for a future, unrelated crime. Id. at 1012 n.3. The court did not explain why it felt such an escape hatch could be appropriate, but I suspect it did so out of respect for the significant weight carried by such an injustice as incarceration despite actual innocence. I share the court's respect for that weight, but I do not believe it outweighs the strong public interest in the threat of incarceration acting as a consistent deterrent against crime.

There are a few, limited circumstances in which the application of dead time against a different sentence is appropriate. See Miller v. Cox, 443 F.2d 1019, 1020-1021 (4th Cir. 1971). For example, a defendant who has one sentence from a string of consecutive sentences vacated may apply his or her time served for the overturned sentence against his or her remaining sentences. To allow so does not interfere with the

[1] "Banked time" and "dead time" are defined slightly differently, but are closely related. Dead time is the time a person spends incarcerated that cannot be attributed to any sentence. Banked time is the application of dead time against a different future sentence. See Holmes, 469 Mass. at 1011. The two refer to different concepts but largely are inseparable.

sentencing scheme and does not additionally punish the defendant. Id. at 1020. Similarly, a defendant whose sentence is overturned but who is immediately resentenced for the same crime may apply time served during the overturned sentence to the new sentence because such a procedure is essentially just an administrative modification of the original sentence. Id. at 1020-1021. These exceptions are appropriate because they are restricted to situations where the defendant is serving a sentence for the same or a related crime for which he or she served the dead time. Id.

The application of dead time in this case would be entirely different because it involves a credit for a future crime that is unrelated to the sentence for which the time was initially served. See Miller, 443 F.2d at 1021-1022. See also Manning v. Superintendent, Mass. Correctional Inst., Norfolk, 372 Mass. 387, 395-396 (1977). Allowing such a credit is inappropriate because it would give anyone who held it license to commit potentially serious crimes without fear of significant repercussion. See id. at 395; Miller, supra at 1021.

Defendants who actually are innocent but who serve dead time for crimes they did not commit are the victims of injustice and are deserving of recourse. However, a jail credit for future use is not appropriate, as it defeats the purposes of sentencing and creates a public safety risk. See Miller,

Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 414 (1992) (defining traditional purposes of sentencing as retribution, deterrence, incapacitation, and rehabilitation). As noted above, alternatives are available. The availability of these remedies precludes the need for banked time to be available as sought in this case, or even in the case of actual innocence.