

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH DERRICK TYRPIN,

Defendant-Appellant.

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FOR PUBLICATION

October 11, 2005

9:00 a.m.

No. 254010

Oakland Circuit Court

LC No. 2001-180118-FH

Before: Fitzgerald, P.J., and Cooper and Kelly, J.J.

PER CURIAM.

Defendant appeals of right the trial court's failure, on resentencing, to award him good-time credit, MCL 51.282(1)-(2), earned on his original sentence that was later determined to be illegal. *People v Tyrpin*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 2003 (Docket No. 243603). We affirm and hold that good-time credit earned in conjunction with an illegal sentence cannot be applied to his sentence on resentencing.

I. Pertinent Facts

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (sexual penetration with a person between the ages of thirteen and sixteen), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(a) (sexual contact with a person between the ages of thirteen and sixteen). Defendant was originally sentenced to one year in jail for his third-degree CSC conviction, and two years' probation with the first year in jail for the fourth-degree CSC conviction, to be served concurrently, with credit for seventy-one days served. In defendant's prior appeal of his original sentence, this Court concluded that the trial court's original one-year jail term violated the indeterminate sentencing act, MCL 769.8(1), which requires the sentencing court to set both a minimum and maximum term of imprisonment. *Id.* This Court also concluded that the trial court erred by departing downward from the sentencing guidelines range of twenty-four to forty months. *Id.* The guidelines range required a prison sentence, and did not permit imposition of an intermediate sanction. MCL 769.34(4).

On remand, the trial court resentenced defendant to a term of thirty months to fifteen years' imprisonment for the third-degree CSC conviction, to be served concurrently to a term of sixteen months to two years' imprisonment for the fourth-degree CSC conviction. At the time of resentencing, defendant had actually been in jail for a total of 528 days, from June 12, 2002 to March 22, 2003 (the date of his pretrial incarceration to the date of his release before this Court

vacated his sentence), and from May 8, 2003 to January 5, 2004 (the date his bond was revoked to the day before his resentencing hearing).

The parties disputed the number of days of sentence credit defendant should receive for time served. Despite originally being sentenced to one year in jail, defendant actually spent only 284 days in jail after being sentenced because he was awarded sixty-one days of good-time credit pursuant to MCL 52.282(1)-(2).<sup>1</sup> At the resentencing hearing, defendant argued that he should receive credit for these sixty-one days, in addition to the 528 days he actually served in jail. The prosecutor disagreed, arguing that the good-time credit was received in connection with an illegal sentence. The trial court ordered credit for the 528 days actually served. Defendant now appeals, asserting that he is entitled to an additional sixty-one days of sentence credit.

## II. Analysis

Defendant contends that the trial court, in resentencing defendant, violated his due process rights when it refused to apply the sixty-one days of good-time credit that were earned as a result of his original sentence. We disagree. The trial court correctly determined that defendant should not benefit from sentence credit that would not have been granted but for an error of law in defendant's original sentencing.

Michigan law formerly awarded prisoners a "good-time allowance," but this scheme was subsequently replaced with a less generous scheme that allowed "disciplinary credits" for only some categories of offenders. MCL 800.33(5); see *People v Fleming*, 428 Mich 408, 422 n 16; 410 NW2d 266 (1987). Under the current scheme, if defendant had been properly sentenced to a prison term, he would not have been eligible for disciplinary credits. MCL 791.233b(w) provides that a prisoner is not eligible for disciplinary credits if he is "a prisoner subject to disciplinary time." MCL 791.233c incorporates the definition of "prisoner subject to disciplinary time" from MCL 800.34. MCL 800.34(5)(a)(iii) defines "prisoner subject to disciplinary time" to include prisoners sentenced to an indeterminate term of imprisonment for several enumerated crimes, including third-degree CSC, committed on or after December 15, 1998. Accordingly, defendant would not have been eligible for disciplinary credit if he had been properly sentenced to a prison term.

In support of his position that the trial court should have applied his sixty-one days of good-time credit to his sentence on resentencing, defendant relies on MCL 769.11a and 769.11b. MCL 769.11a provides:

Whenever any person has been heretofore or hereafter convicted of any crime within this state and has served any time upon a void sentence, the trial court, in imposing sentence upon conviction or acceptance of a plea of guilty based upon facts arising out of the earlier void conviction, shall in imposing the sentence *specifically grant or allow the defendant credit against and by reduction of the statutory maximum by the time already served by such defendant* on the

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<sup>1</sup> We note that the sum of 284 days and 61 days is 345 days, which is twenty days less than one year. The lower court record does not explain this discrepancy.

sentence imposed for the prior erroneous conviction. Failure of the corrections commission to carry out the terms of said sentence shall be cause for the issuance of a writ of habeas corpus to have the prisoner brought before the court for the taking of such further action as the court may again determine. [Emphasis added.]

MCL 769.11b provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence *shall specifically grant credit against the sentence for such time served in jail prior to sentencing.* [Emphasis added.]

However, contrary to defendant's argument, the trial court did comply with these statutes by giving defendant full credit for all days actually served.

Defendant also relies on *People v Resler*, 210 Mich App 24; 532 NW2d 907 (1995). The defendant in *Resler* was convicted of embezzlement and properly sentenced to five years' probation with the first year in jail. *Id.* at 25. He was awarded sixty days of good-time credit by the sheriff. *Id.* After he was released, he violated his probation, and was sentenced to five to ten years' imprisonment. *Id.* The trial court allowed him credit only for the time he actually served in jail. *Id.* This Court held that Double Jeopardy Clauses of the United States and Michigan Constitutions, US Const, Am V; Const 1963, art 1, § 15, prohibited the revocation of the good-time credit:

While the Double Jeopardy Clause does not prohibit revocation of good-time credit per se, it does restrict a court's authority to impose punishment in excess of the intent of the Legislature. The basic inquiry is whether the total punishment imposed exceeds that authorized by the Legislature. . . . In this case, the Legislature has not provided for the revocation of good-time credit in the context of conditional probation, as it has done in the parole context. There is no statutory provision evidencing a legislative intent to allow such revocation. The trial court therefore exceeded its authority under the Double Jeopardy Clause to take away what was already given to defendant. Defendant is entitled to keep what he has earned. [*Id.* at 26-27.]

However, the Legislature did not authorize the award of good-time credits to a person in defendant's situation. On the contrary, the Legislature precluded such credit to persons, like defendant, convicted of third-degree CSC. We conclude that the trial court correctly determined that defendant cannot benefit from sentence credit that would not exist but for an error of law in defendant's original sentencing. Accordingly, defendant is not entitled to application of that credit to his sentence on resentencing.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly

I concur in result only.

/s/ Jessica R. Cooper