**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-2069**

State of Minnesota,
Respondent,

vs.

Matthew Vincent Serbus,
Appellant.

**Filed October 3, 2011**
**Affirmed**
**Wright, Judge**

St. Louis County District Court
File No. 69DU-CR-09-4817

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Leslie E. Beiers, Assistant St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Shumaker, Judge; and Larkin, Judge.

## U N P U B L I S H E D  O P I N I O N

**WRIGHT**, Judge

Appellant challenges the district court's denial of custody credit for time served in Wisconsin on a Wisconsin offense. Because the time appellant served in Wisconsin was not "solely in connection with" the Minnesota offense, we affirm.

## FACTS

On January 20, 2009, a homeowner in Proctor, Minnesota discovered a broken window and several items missing from the residence. Police investigators subsequently learned that appellant Matthew Vincent Serbus had pawned some of the stolen items in Duluth on February 5, 2009. The police also learned that a person identifying himself as "C.L." had opened a bank account at Moose Lake Bank. A subsequent analysis of the thumb print that this individual provided to the bank when opening the account indicated that the thumb print belonged to Serbus, not to C.L., whose wallet had been stolen. Between January 20 and January 22, 2009, checks stolen from the Proctor residence and made payable to C.L. were cashed at several Carlton County and Pine County banks. Surveillance tapes from several of the banks showed Serbus cashing checks.

On February 18, 2009, a Proctor police officer interviewed Serbus in Superior, Wisconsin. Serbus initially denied any involvement in the offenses. But when confronted with the evidence gathered by the police, Serbus became upset and stated that he wanted to "work out a deal." Serbus began to serve a 12-month prison sentence in Wisconsin on an unrelated matter on April 20, 2009.

The Proctor police did not refer the case to the St. Louis County Attorney's office for charging until September 25, 2009. Serbus was charged by complaint on October 14, 2009 with one count of receiving stolen property in violation of Minn. Stat. § 609.53, subd. 1 (2008). The complaint indicated that Serbus was scheduled to go to prison in Wisconsin. But the summons was sent to his last known residential address. When he failed to appear in court on the Minnesota charge, a warrant was issued for Serbus's arrest.

Because he was incarcerated in Wisconsin, Serbus did not learn of the charges against him until March 2010. He moved for disposition of the Minnesota case under the Interstate Agreement on Detainers (IAD) on March 25, 2010. Serbus completed his Wisconsin sentence and made his first appearance in Minnesota on April 14, 2010.

Serbus pleaded guilty to the Minnesota offense on June 2, 2010. On August 2, 2010, the district court sentenced Serbus to 21 months' imprisonment, with custody credit for the 112 days between the date of his first appearance in Minnesota and the date of sentencing. The district court denied Serbus's request for additional custody credit of approximately 359 days served between the date he began his sentence in Wisconsin and his first appearance in Minnesota. This appeal followed.

**D E C I S I O N**

A defendant has the burden of establishing that he is entitled to custody credit. *State v. Willis*, 376 N.W.2d 427, 428 n.1 (Minn. 1985). The decision to grant custody credit is not discretionary with the district court. *State v. Parr*, 414 N.W.2d 776, 778 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). Whether a defendant is entitled

to custody credit presents a mixed question of fact and law. *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008). The district court must first determine the circumstances of the custody for which the defendant seeks credit and then apply the law governing custody credit to those circumstances. *Id.* We review the district court's factual findings as to custody credit for clear error and its application of the law de novo. *See id.*

Interjurisdictional custody credit is awarded only if the incarceration in the other state was "*solely* in connection with" the Minnesota offense. *Willis*, 376 N.W.2d at 428; *State v. Brown*, 348 N.W.2d 743, 748 (Minn. 1984), *abrogated on other grounds by State v. Ramey*, 721 N.W.2d 294 (Minn. 2006); *State v. Hadgu*, 681 N.W.2d 30, 32-33 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004). Here, Serbus's incarceration solely in connection with the Minnesota offense began on April 14, 2010, when he made his first appearance in Minnesota after his release from Wisconsin custody.

Serbus's arguments and the cases on which he relies involve intrajurisdictional custody credit and, therefore, are distinguishable from this case. In general, a defendant is entitled to custody credit for time spent in custody "in connection with the offense or behavioral incident for which sentence is imposed." Minn. R. Crim. P. 27.03, subd. 4(B). Intrajurisdictional cases also focus on principles of fairness and equity, with regard for whether the denial of custody credit would result in a de facto consecutive sentence or would make the total time served turn on irrelevancies or matters subject to manipulation by the prosecutor. *See Asfaha v. State*, 665 N.W.2d 523, 527-28 (Minn. 2003) (discussing fairness and equity); *State v. Goar*, 453 N.W.2d 28, 29-30 (Minn. 1990) (discussing other considerations).

Serbus "acknowledges that there is a body of case law in Minnesota that differentiates between time spent in custody within Minnesota and time spent in out-of-state jurisdictions." But he asserts that "[t]hese old decisions do not take into account the primary focus of fairness and equity, and the distinction in these old decisions make[s] little sense in a case like [Serbus's] where the state delayed filing a complaint, and deprived Serbus of the ability to request speedy disposition under [the] Interstate Agreement on Detainers Act (IAD)." Serbus also challenges the district court's decision here as contrary to the purpose of the IAD and as a denial of the constitutional right to equal protection. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 2.

The Minnesota Supreme Court has maintained a distinction between intrajurisdictional and interjurisdictional custody credit. *See State ex rel. Linehan v. Wood*, 397 N.W.2d 341, 342 (Minn. 1986) (reversing court of appeals decision on custody credit in interjurisdictional case because court of appeals erroneously relied on intrajurisdictional caselaw). Granting Serbus the relief he seeks would require us to disregard governing legal precedent, which we are without authority to do. *See Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) ("This court, as an error correcting court, is without authority to change the law."), *review denied* (Minn. June 17, 1998).

We acknowledge that Serbus's claims regarding the state's delay in filing the complaint are troublesome. From his claims, one might infer that there was a delay in referring the matter to the prosecutor and that the prosecutor sent the summons to Serbus's last known residential address, rather than to the Wisconsin prison where Serbus

was incarcerated. Serbus implies that this was done so that he would not know that a complaint had been filed against him until his Wisconsin sentence was almost complete. But there is no factual support as to the motives Serbus attributes to the police and the prosecutor.

The rules allow a summons to be served on a criminal defendant by "mailing it to the defendant's last known address." Minn. R. Crim. P. 3.03, subd. 3. In this case, the summons appears to have been mailed to the address that Serbus provided to the investigating officer. Serbus failed to inquire about the status of the investigation until March 2010. *See State v. McCollor*, 359 N.W.2d 641, 643 (Minn. App. 1984) (concluding that defendant's constitutional rights were not violated when summons and complaint were mailed to address he provided to authorities rather than to address he provided to court). Any purported intentional failure by the state to locate Serbus in October 2009 when the complaint was filed is without factual support.

Even if Serbus had requested disposition of his Minnesota charge prior to the expiration of his Wisconsin sentence, he would have remained in the custody of Wisconsin authorities and only been in the "temporary custody" of Minnesota authorities. *See* Minn. Stat. § 629.294, subd. 1, Art. V(e), (f), (g) (2010); *see also State v. Lawrence*, 675 N.E.2d 569, 570-71 (Ohio App. 1996) (affirming denial of credit against Ohio sentence for time spent in custody awaiting disposition of pending charges, when defendant remained in custody of and subject to jurisdiction of sending state, Indiana, under IAD and was entitled only to receive credit on his Indiana sentence for all time spent in Ohio); *Carroll v. Johnson*, 685 S.E.2d 647, 654-55 (Va. 2009) (concluding that

under IAD and Virginia law, defendant was not entitled to credit for time spent in temporary custody of Virginia because he was still serving his New Jersey sentence and in Virginia's temporary custody only for the limited purpose of trial on his pending Virginia charges).[1] Serbus's incarceration was not "solely in connection with" his Minnesota offense until his Wisconsin sentence expired. Thus, on this record, we cannot conclude that Serbus's IAD rights were violated or that he is somehow entitled to custody credit based on his claim that he was not aware that a complaint had been filed against him in Minnesota.

Because the time Serbus spent in Wisconsin was not "solely in connection with" the Minnesota offense, the district court properly denied his request for custody credit for time spent in Wisconsin after April 20, 2009, when he claims that Minnesota authorities had probable cause to charge him. Serbus's alternative claims for relief (that he receive custody credit from October 14, 2009, when the complaint was filed, or from March 25, 2010, when he filed the Request for Disposition of Charges) must be rejected for the same reason: none of the time that Serbus spent in custody in Wisconsin was "solely in connection with" his Minnesota offense; and Minnesota cases have repeatedly rejected

[1] "The IAD is a congressionally sanctioned interstate compact, and thus is a federal law subject to federal construction." *State v. Dickerson*, 777 N.W.2d 529, 532 (Minn. App. 2010), *review denied* (Minn. 30, 2010). Minnesota courts look to federal decisions as well as decisions from other state courts that interpret and apply provisions of the IAD. *See State v. Wells*, 638 N.W.2d 456, 459 (Minn. App. 2002) (observing that federal law governs construction of IAD), *review denied* (Minn. Mar. 19, 2002); *State v. Burks*, 631 N.W.2d 411, 413 (Minn. App. 2001) (observing that IAD is subject to construction by federal court as well as by various state courts); *see also* Minn. Stat. § 645.22 (2010) ("Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.").

arguments urging application of a different analysis. *See Willis*, 376 N.W.2d at 428 (discussing various periods of incarceration and denying custody credit against Minnesota sentence when time spent incarcerated in Illinois was not "solely in connection with" Minnesota offense until defendant was acquitted and Illinois hold was terminated).

Finally, Serbus argues for the first time on appeal that his constitutional rights to equal protection have been violated. *See* U.S. Const. amend. XIV, § 1 (no state shall "deny to any person within its jurisdiction the equal protection of the laws"); Minn. Const. art. I, § 2 ("No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."). Because this issue is raised for the first time on appeal and was not presented to or addressed by the district court, we decline to address it. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that reviewing court generally will not consider matters raised for first time on appeal).

**Affirmed.**