STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2194

State of Minnesota,
Respondent,

vs.

Aintario Larone Moses,
Appellant.

Filed September 15, 2009
Affirmed
Larkin, Judge

Olmsted County District Court
File No. 55-K3-03-003936

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, 151 Fourth Street SE, Rochester, MN 55904 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's order revoking his probation and executing his stayed prison sentence and its refusal to award jail credit for time served in connection with his federal sentence. Because the district court did not abuse its discretion by revoking appellant's probation and because the district court did not err by denying appellant's request for jail credit, we affirm.

FACTS

Appellant Aintario Larone Moses was sentenced on May 6, 2004, following his plea of guilty to controlled-substance crime in the first degree. The presumptive guidelines sentence was an 86-month prison commitment. But the district court granted Moses a downward dispositional departure. The district court committed Moses to the custody of the Minnesota Commissioner of Corrections for 81 months and stayed execution of the sentence for 30 years.

On June 8, Moses robbed a bank in Rochester and was indicted on federal charges as a result. On July 9, Moses was apprehended and taken into federal custody. In August, the state filed a probation-violation report alleging that Moses had tested positive for THC and had pending federal charges for aggravated bank robbery. A warrant issued for Moses's arrest. Moses was subsequently convicted in federal court and served a federal prison sentence.

In December 2004, Moses wrote to the district court requesting a hearing to address his probation violation. The state opposed Moses's request. In June 2005,

Moses filed a motion requesting that his sentence be executed to run concurrently with his federal sentence. The state opposed this request as well. The district court did not act on either of Moses's requests. In July, federal authorities contacted the prosecuting attorney regarding disposition of Moses's detainer under the Interstate Agreement on Detainers Act (IADA). The state responded that its detainer was not subject to disposition under the IADA.

In March 2008, defense counsel filed a motion to address the probation violation on Moses's behalf and requested that Moses be allowed to appear by phone at a probation-revocation hearing to resolve the pending violation. The district court denied this request.

In September 2008, Moses was released from federal custody to state custody. On September 17, Moses appeared before the district court for a probation-violation hearing. At the time of the hearing, Moses had served 1,517 days in federal custody. After hearing testimony from Moses and probation officer Joe Vogel, who recommended that Moses's sentence not be executed, the district court found that Moses violated probation by committing a new crime approximately 30 days after receiving a downward departure and absconding from probation, that the violations were intentional or inexcusable, and that the policies favoring probation were outweighed by the need for incarceration. The district court revoked Moses's probation and executed his 81-month sentence. The district court also denied Moses's request for jail credit for time served in connection with his federal sentence. This appeal follows.

D E C I S I O N

I

"The trial court has broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980); *see also State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005). Before a district court may revoke a defendant's probation and execute a stayed sentence, the district court "must 1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that the need for confinement outweighs the policies favoring probation." *Modtland*, 695 N.W.2d at 606 (quoting *Austin*, 295 N.W.2d at 250).

"When determining if revocation is appropriate, courts must balance the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety, and base their decisions on sound judgment and not just their will." *Id.* at 606-07 (quotations omitted). The decision to revoke cannot be "a reflexive reaction to an accumulation of technical violations" but, rather, requires a showing that the "offender's behavior demonstrates that he or she cannot be counted on to avoid antisocial activity." *Austin*, 295 N.W.2d at 251 (quotations omitted). To accomplish this task, a district court should consider whether: "(i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it

would unduly depreciate the seriousness of the violation if probation were not revoked." *Id*. District courts are instructed to make "fact-specific records setting forth their reasons for revoking probation." *Modtland*, 695 N.W.2d at 608.

Moses argues that the district court abused its discretion by concluding that the need for his confinement outweighs the policies favoring probation. The district court concluded:

> With respect to the Third *Austin* Factor, Mr. Moses committed a very serious felony offense immediately after being sentenced on this case and immediately after being given a downward departure in order to show that he could be and would be amenable to probation, would remain law-abiding and a productive citizen. Within approximately 30 days of being sentenced he committed the aggravated robbery or the bank robbery; was then on run and out of—and absconding from probation for about 30 days before he was arrested. And based on that and the previous finding that the violation was intentional or inexcusable, I cannot find that the policies favoring probation outweigh the need for incarceration and I'm going to revoke the stay of execution previously granted . . . .

The district court further stated:

> Mr. Moses, . . . you made similar—similar arguments to me back in 2004 and I gave you a chance and, you know, basically, you—you turned it back on me and you said, "I don't care you gave me a chance, Judge." I mean within 30 days you robbed a bank. You know, you had a lot of stuff going for you before that. You were doing some positive things that convinced me that you could be a success in the community and you turn right around within 30 days and you said, "No, Judge, you were wrong about me." And that—that plays a big part in my thinking today in deciding what to do.

The district court's explanation implicitly recognized that it would unduly depreciate the seriousness of the violation if probation were not revoked. It was not an

abuse of discretion for the district court to conclude that a defendant who robs a bank after being on probation for one month is not amenable to probation. We recognize that Moses had served approximately four years in federal prison between the time of his violation and the revocation hearing and that he completed rehabilitative programming in federal prison. However, we cannot say that the district court abused its broad discretion by determining that the need for Moses's incarceration outweighs the policies favoring probation.

II

"[T]he defendant carries the burden of establishing that he is entitled to jail credit . . . ." *State v. Willis*, 376 N.W.2d 427, 428 n.1 (Minn. 1985). "'Awards of jail credit are governed by principles of fairness and equity and must be determined on a case-by-case basis.'" *State v. Arend*, 648 N.W.2d 746, 748 (Minn. App. 2002) (quoting *State v. Bradley*, 629 N.W.2d 462, 464 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001)). The decision to grant jail credit is not discretionary with the trial court. *State v. Doyle*, 386 N.W.2d 352, 354 (Minn. App. 1986). A reviewing court applies a clear-error standard to factual findings underlying jail-credit determinations. *See Asfaha v. State*, 665 N.W.2d 523, 528 (Minn. 2003) (applying clear-error standard to district court's findings on "functional equivalency"). Questions of law, however, are subject to de novo review. *See id*. at 525-28 (reviewing de novo legal question of whether to grant jail credit for confinement in juvenile facility).

The general intra-jurisdictional rule is that a defendant is entitled to jail credit for all time spent in custody between his arrest on the charge in the proceedings in which

credit is sought and his sentencing for that offense. *State v. Goar*, 453 N.W.2d 28, 29-30 (Minn. 1990). If time is spent in the custody of another jurisdiction, the test is whether the jail time was spent "solely" in connection with the Minnesota offense. *State v. Brown*, 348 N.W.2d 743, 748 (Minn. 1984). The test for time spent in custody in Minnesota focuses on principles of fairness and equity, with regard for whether the denial of 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*, 665 N.W.2d at 527-28 (regarding fairness and equity considerations); *see also Goar*, 453 N.W.2d at 29 (regarding other considerations).

The state claims that Moses should be denied credit under *Willis*. Moses claims that he is entitled to credit under *State v. Bauman*, 388 N.W.2d 795 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986) and *State v. Jennings*, 448 N.W.2d 374 (Minn. App. 1989). Based on our review of the relevant caselaw, we hold that the district court correctly determined that Moses is not entitled to jail credit for time served in connection with his federal sentence.

In *Willis*, the supreme court held that jail credit is awarded against a Minnesota sentence for time served in another state only if the Minnesota offense was the "sole reason" for the out-of-state incarceration. 376 N.W.2d at 429. Thus the *Willis* defendant's award of jail credit was limited to that period of time during which he was incarcerated in Illinois solely in connection with his pending Minnesota offense. *Id.* at 428-29. The defendant did not receive credit for the time during which both his Illinois and Minnesota offenses were pending. *Id.*

In *State v. Bauman*, the defendant was arrested on a Minnesota charge and turned over to federal authorities on a separate federal matter. 388 N.W.2d at 795-96. The defendant pleaded guilty to the federal charge and was committed to a federal correctional facility. *Id.* at 796. Approximately two years later, defendant pleaded guilty to the Minnesota charge, which had been filed while defendant was in federal custody. *Id.* The district court imposed a sentence to run concurrent with defendant's federal sentence, but denied defendant's request for jail credit for his federal-custody time. *Id.* On appeal, we recognized that the defendant was in custody "partly" because of the federal charge and "partly" because of the state charge. *Id.* at 797. We nonetheless held that defendant was entitled to jail credit, without referencing *Willis* or the "solely-in-connection" rule. *Id.* We relied on other cases concerning multiple concurrent Minnesota sentences and reasoned that the failure to award credit turned the defendant's concurrent sentence into a de facto consecutive sentence. *Id.* The holding implicitly indicated a departure from strict application of the solely-in-connection rule, seemingly approving an exception to the rule when the relevant sentences are concurrent. However, *Bauman* is factually distinguishable from the instant case because Moses's state and federal sentences are not deemed concurrent. Moses's argument that *Bauman* supports an award of jail credit is therefore not persuasive.

Moses also relies on *Jennings*, 448 N.W.2d at 374. In *Jennings*, the defendant received a stay of execution for a Minnesota offense. *Id.* The defendant then committed and was sentenced for a California offense. *Id.* Under the *Willis* rule, the defendant would not have been entitled to credit against his Minnesota sentence for time served in

California. But the defendant demanded execution of his Minnesota sentence while serving his California sentence so the sentences would, in effect, run concurrently; and he would, in effect, receive credit for his California custody. *Id.* The district court twice denied his demands for execution. *Id.* We held that a defendant serving a felony sentence imposed by another state has the right to demand execution of a sentence previously imposed by a Minnesota court. *Id.* at 375. Our holding was based entirely on the preference for concurrent sentencing. *Id.* We noted that Minnesota, California, and the ABA Standards all expressed a preference for concurrent sentencing. *Id.* We stated that defendant's right to demand execution of his probationary sentence upon subsequent imprisonment was not altered by the fact that the subsequent imprisonment was in another state. *Id.*

Relying on *Jennings*, Moses contends that the district court erred by denying his demand for execution of his state sentence. Two Minnesota Supreme Court cases, both cited in *Jennings*, are relevant to our review of this contention. The first is *State v. Petersen*, in which the defendant received a state sentence, followed by a federal sentence. 305 Minn. 478, 479, 235 N.W.2d 801, 802 (1975). At sentencing, the district court judge recognized the defendant's upcoming federal sentencing hearing and stated, "It will be up to the federal court to determine whether or not their sentence will be concurrent or consecutive with this one." *Id.* at 479, 235 N.W.2d at 802. But the federal sentence made no mention of the state sentence, and the federal judge expressed no opinion regarding whether the federal sentence should run concurrently or consecutively

to the state sentence. *Id.* The defendant asked the district court to correct or vacate his state sentence, and the district court denied this request. *Id.* at 480, 235 N.W.2d 802-03.

On appeal, defendant argued that his state sentence should be interpreted as concurrent with the federal sentence. *Id*. The Minnesota Supreme Court rejected this argument, noting that it was up to the federal judge to make the federal sentence concurrent or consecutive to the state sentence and that in the absence of any clear direction to the contrary, "[f]ederal sentences are to run consecutive to state sentences." *Id.* at 485, 235 N.W.2d at 805. This holding is consistent with federal sentencing principles. *See* United States Sentencing Guidelines Manual § 5G1.3 (2002) ("If the instant offense was committed . . . after sentencing for, but before commencing service of, [a] term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment."); *see also id.* at n.6 (explaining that if a defendant is on state probation at the time of the offense, "and has had such probation . . . revoked," the sentence should run consecutively).

The second relevant case is *State v. Wakefield*, in which the defendant received a federal sentence followed by a state sentence. 263 N.W.2d 76, 77 (Minn. 1978). Focusing on the order of sentencing, the supreme court distinguished the circumstances from those in *Petersen* and held that when a state sentence follows a federal sentence, and the district court made no specific determination whether the state sentence was to be concurrent or consecutive, the state sentence must be presumed to be concurrent with the federal sentence. *Id.* at 77-78. The supreme court deemed the defendant's sentences to be concurrent, relying on the philosophy underlying Minnesota Statute section 609.15

and ABA Standards articulating a desire that multiple sentences of imprisonment imposed by different courts be served at one time and under one correctional authority. *Wakefield*, 263 N.W.2d at 77 (citing Minn. Stat. § 609.15, subd. 1 (1976)). The supreme court distinguished *Petersen* factually but did not overrule it. *Wakefield*, 263 N.W.2d at 77-78.

Whether sentences are concurrent or consecutive is determined by the terms of the second sentence. *Jennings*, 448 N.W.2d at 375. State law presumes concurrent sentencing and that presumption applies when a state sentence follows a federal sentence, absent an express determination to the contrary. *Id.* Federal law presumes consecutive sentencing, and that presumption applies when a federal sentence follows a state sentence, absent an express determination to the contrary. *Id.*

The concurrent-verses-consecutive-sentencing determination is dispositive in this case. Under *Jennings*, if Moses's sentences are concurrent, he was entitled to demand execution of his state probationary sentence while serving his federal sentence. *See id.* And Moses would thereby obtain jail credit for his federal incarceration even though it was not served solely in connection with his Minnesota offense. But *Jennings* clearly states that a defendant's right to demand execution of a stayed sentence when imprisoned on a subsequent offense is based on the preference for concurrent sentencing and that in the absence of any clear direction to the contrary, a federal sentence is presumed to run consecutively to a previously imposed Minnesota sentence. *Id.*; *see also Petersen*, 305 Minn. at 485, 235 N.W.2d at 805 (stating that in the absence of clear direction to the contrary, "[f]ederal sentences are to run consecutive to state sentences"). Unless Moses

can show "clear direction to the contrary," his federal sentence is presumed to be consecutive. *See Jennings*, 448 N.W.2d at 375.

Moses repeatedly asserts that his state and federal sentences are concurrent, without citing the record or legal authority. Moses had the burden of establishing that he is entitled to jail credit for time served in federal custody. *See Willis*, 376 N.W.2d at 428 n.1 (holding that burden of establishing entitlement to jail credit rests with the defendant). And in order to prevail on his demand-for-execution claim, Moses was required to demonstrate that his federal and state sentences were concurrent. Yet, Moses introduced no evidence regarding the terms of his federal sentence; there is no information in the record regarding the terms of Moses's federal sentence. And the federal sentence is not presumed to be concurrent as Moses argues. Because Moses presents no evidence to rebut the presumption that his sentences are consecutive, we presume they are consecutive under *Petersen* and conclude that Moses was therefore not entitled to demand execution of his Minnesota sentence under *Jennings*. *Jennings*, 448 N.W.2d at 375.

Because Moses's sentences are deemed consecutive, the solely-in-connection rule applies, and the district court correctly determined that Moses is not entitled to jail credit for time served in connection with his federal sentence because the time was not served solely in connection with his Minnesota offense. *See Willis*, 376 N.W.2d at 428-29. Moses argues that the "solely-in-connection" rule is no longer applicable and that *Willis* and similar cases are "old" cases that are no longer controlling. This argument is unavailing. The "solely-in-connection" rule was reiterated in *State v. Hadgu*, 681

N.W.2d 30, 33 (Minn. App. 2004) ("If time is spent in custody of another jurisdiction, the test is whether the jail time was spent "solely" in connection with the Minnesota offense.) (citing *State v. Brown*, 348 N.W.2d 743, 748 (Minn. 1984)). And appellant's reliance on *Asfaha*, 665 N.W.2d at 523 and *State v. Dulski*, 363 N.W.2d 307 (Minn. 1985), for the proposition that "fairness and equity" are the primary focuses when determining an award of jail credit, is misplaced. Neither case involved a request for jail credit based on time served in another jurisdiction related to that jurisdiction's charge or consecutive sentences. *See Asfaha*, 665 N.W.2d at 524 (addressing whether time spent in confinement in a treatment facility as a condition of probation was the functional equivalent of a jail, workhouse, or regional correctional facility); *Dulski*, 363 N.W.2d at 309-10 (explaining that in a case dealing with jail credit against concurrent sentences where the State of Minnesota is a party to both charges, the district court should ensure that the withholding of jail credit does not result in a de facto departure with respect to consecutive service).

In summary, Moses did not meet his burden of establishing that he is entitled to jail credit for time served in connection with his federal sentence, and the district court did not err by denying his request for credit. We therefore affirm the district court's denial of Moses's request for jail credit.

Affirmed.

Dated:

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Judge Michelle A. Larkin