FILED

01/29/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 16-0650

DA 16-0650

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 26N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JACOB CODY CLELAND,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADC 16-16
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Koan Mercer, Assistant Appellate Defender, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Roy Brown, Assistant Attorney General, Helena, Montana

Leo J. Gallagher, Lewis and Clark County Attorney, Melissa Broch, Deputy County Attorney, Helena, Montana

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Submitted on Briefs: December 19, 2018

Decided: January 29, 2019

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Defendant Jacob Cody Cleland appeals from the Judgment and Commitment of the First Judicial District Court, Lewis and Clark County, sentencing him to the Montana State Prison (MSP) for Sexual Intercourse Without Consent (SIWC). We remand for a determination of credit for time served (CTS) on his sentence.

¶3 On December 17, 2015, Cleland was arrested for SIWC, a felony in violation of § 45-5-503, MCA. At the time of his arrest, Cleland was serving a Department of Corrections (DOC) sentence on an unrelated charge. The DOC sentence was entirely suspended, and Cleland was placed at the Helena Prerelease Center and START[1] Center under DOC supervision at the time of the instant (SIWC) offense. The record does not indicate whether DOC revoked Cleland's supervised release.

¶4 On January 27, 2016, Cleland pled not guilty to the SIWC charge, and the District Court set his bond for $10,000. On May 23-24, 2016, a jury trial was held, and the jury found Cleland guilty of SIWC. The District Court then ordered a Presentence Investigation Report (PSI). The PSI, dated July 14, 2016, reported that Cleland had been incarcerated

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[1] Sanction Treatment Assessment, Revocation and Transition Center, located in Anaconda.

for 210 days since his December 17, 2015 arrest. It is unclear from the record whether Cleland remained in custody until sentencing.

¶5 On August 19, 2016, the District Court held an initial sentencing hearing. Cleland's counsel was unable to attend, and the District Court continued the sentencing hearing to August 24, 2016. At that time, the District Court orally pronounced a sentence of thirty years in MSP, with twenty years suspended. The District Court did not discuss CTS, and Cleland did not raise it. However, the District Court's written judgment "granted credit for time served prior to sentencing for the time period of December 17, 2015 – December 23, 2015." Cleland appeals.

¶6 This Court reviews for legality sentences beyond one year of incarceration. *State v. Hornstein*, 2010 MT 75, ¶ 9, 356 Mont. 14, 229 P.3d 1206 (citing *State v. Ariegwe*, 2007 MT 204, ¶ 174, 338 Mont. 442, 167 P.3d 815). Whether a sentence is legal is a question of law, which we review de novo for correctness. *Ariegwe*, ¶¶ 174-75. A sentence is legal if it falls within statutory parameters and is constitutional. *State v. Kotwicki*, 2007 MT 17, ¶¶ 13, 19, 335 Mont. 344, 151 P.3d 892; *State v. Hamilton*, 2018 MT 253, ¶ 34, 393 Mont. 102, 428 P.3d 849.

¶7 "A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction . . . ." Section 46-18-403(1), MCA; *State v. McDowell*, 2011 MT 75, ¶ 27, 360 Mont. 83, 253 P.3d 812 (citing § 46-18-403(1), MCA); *Hornstein*, ¶¶ 12-13. Each day of incarceration on a bailable offense must be credited against a defendant's sentence if the incarceration was "'directly related to the offense for which the sentence [was] imposed.'"

Hornstein, ¶¶ 14, 16 (citing *State v. Kime*, 2002 MT 38, ¶ 16, 308 Mont. 341, 43 P.3d 290, *overruled in part on other grounds by State v. Herman*, 2008 MT 187, ¶ 12, 343 Mont. 494, 188 P.3d 978). Conversely, a defendant is not entitled to receive credit for pre-conviction time served on an offense if he is not incarcerated for that particular offense. *State v. Erickson*, 2005 MT 276, ¶ 25, 329 Mont. 192, 124 P.3d 119.

¶8 A defendant serving an existing sentence who has been released on bond or other supervised release is not "incarcerated" and does not earn CTS against his sentence. *See* § 46-18-403(1), MCA; *State v. Gulbranson*, 2003 MT 139, ¶¶ 8, 12-13, 316 Mont. 163, 69 P.3d 1187, *overruled in part on other grounds by Herman*, ¶ 12. Where the existing record is insufficient to establish what CTS is due, the case should be remanded for a determination of the defendant's custody status. *Erickson*, ¶¶ 26, 39.

¶9 In this case, there was no discussion or analysis of Cleland's CTS during his sentencing hearing. Only in the written judgment did the District Court conclude Cleland was entitled to CTS for the period of December 17-23, 2015. Cleland argues the CTS in the written judgment is an unclear and unsupported calculation of the time he should be credited against his SIWC sentence. Cleland argues the record is silent as to whether his prior community release on the DOC conviction was revoked and, regardless of the accuracy, the CTS portion of Cleland's sentence should have been orally pronounced at the sentencing hearing.

¶10 Generally, this Court will not review an issue on appeal if the party failed to object to or raise it before the trial court. *Kotwicki*, ¶ 8. However, an exception is made for a criminal sentence that is alleged to be illegal or in excess of statutory mandates. *State v.*

Lenihan, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979); *Kotwicki*, ¶ 8; *State v. Eaton*, 2004 MT 283, ¶ 16, 323 Mont. 287, 99 P.3d 661. Giving a defendant incarcerated on a bailable offense less CTS than he is entitled to violates statutory mandates and is reviewable for the first time on appeal. *Erickson*, ¶ 27 (citing *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000; § 46-18-403(1), MCA).

¶11 Although Cleland did not raise CTS before the District Court during the sentencing hearing, we review for legality Cleland's SIWC sentence. *See Kotwicki*, ¶ 8; *Erickson*, ¶ 27; *Eaton*, ¶ 16. Cleland was arrested on a bailable offense. *See* § 46-9-102(1), MCA ("[a]ll persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense charged. . . ."); § 45-5-503(3)(a), MCA (2013). According to the PSI, Cleland was arrested on December 17, 2015, and had been in custody for 210 days as of July 14, 2016. The record is unclear as to whether Cleland was incarcerated between the July PSI filing date to the August 2016 sentencing hearing, though nothing in the record suggests that he was released. Although there may well be a basis for the District Court's determination that Cleland was entitled to CTS only from December 17- 23, 2015, the record before us does not establish that basis. Thus, remand is necessary for a determination as to what CTS Cleland may be entitled. *See Erickson*, ¶¶ 26-27, 39.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of

applicable standards of review. We remand this case to the District Court for a determination of the correct amount of credit to be given for time served.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ BETH BAKER