FILED
08/03/2021
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: OP 20-0583

OP 20-0583

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 196

BRANDON JAMES KILLAM,

Petitioner,

v.

JIM SALMONSEN, Acting Warden,
MONTANA STATE PRISON,

Respondent.

ORIGINAL PROCEEDING: Petition for Writ of Habeas Corpus
In and For the County of Cascade, Cause No. CDC-19-331
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Petitioner:

Chad Wright, Appellate Defender, Deborah S. Smith (argued), Assistant Appellate Defender, Helena, Montana

For Respondent:

Colleen Elizabeth Ambrose, Department of Corrections, Helena, Montana

Austin Knudsen, Montana Attorney General, Bree Gee (argued), Assistant Attorney General, Helena, Montana

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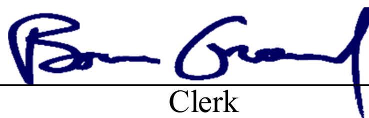
Argued and Submitted: June 16, 2021

Decided: August 3, 2021

Filed:



Clerk

Justice Ingrid Gustafson delivered the Opinion and Order of the Court.

¶1 Representing himself, Brandon James Killam has filed Petition for Writ of Habeas Corpus, indicating he is entitled to more credit for time served. In compliance with a December 15, 2020 Order, the Attorney General for the State of Montana responds that Killam is not due any more credit and that his Petition should be denied. Killam has since moved this Court to grant him habeas corpus relief. We ordered counsel to be appointed for Killam, and this matter was consolidated with *State v. Mendoza*, No. DA 19-0587, for purposes of conducting oral argument. Oral argument was held before this Court on June 16, 2021.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Killam was convicted of felony aggravated assault and sentenced in November 2004. He was granted parole on June 17, 2013.

¶3 On May 22, 2019, while released on parole associated with the prior felony, Killam was arrested for felony criminal endangerment in Cascade County. Law enforcement searched Killam's apartment after his arrest and found a loaded firearm, a crossbow, and a compound bow; pursuant to his conditions of parole, Killam was prohibited from possessing these weapons. Following the search, also on May 22, 2019, Killam's Probation and Parole Officer provided the Cascade County Sheriff's Office with a warrant to arrest parolee Killam. This warrant authorized the Sheriff's Office to hold Killam at the Cascade County Detention Center (CCDC) on behalf of the Department of Corrections (DOC). The warrant stated: "**OFFENDER IS NOT ENTITLED TO BOND**." (Emphasis in original.)

¶4 The DOC's Location Term Listing indicates Killam was placed on a Parole Hold on May 22, 2019, presumably based on the DOC warrant provided to CCDC indicating Killam was not entitled to bond. The Location Term Listing indicates the Parole Hold ended May 23, 2019.[1]

¶5 On May 23, 2019, Killam made his initial appearance on the criminal endangerment charge before the District Court, at which time the court set bond at $25,000. Killam never posted bond, and he remained at CCDC through sentencing.

¶6 On June 30, 2020, Killam entered a plea of guilty to the felony criminal endangerment charge pursuant to a plea agreement. In August 2020, Adult Probation and Parole filed a pre-sentence investigative report in which the authoring officer indicated Killam was arrested on the criminal endangerment offense on May 22, 2019, and he had not been released. Although Killam remained at CCDC from his arrest through the time of this report, the authoring officer did not credit Killam with having served any jail time asserting, "The Defendant was on parole status during this time period and is not eligible for Jail Credit." On August 28, 2020, the Board of Pardons and Parole (Board) revoked Killam's parole.

¶7 On September 22, 2020, the District Court sentenced Killam on the criminal endangerment charge to the DOC for eight years with four years suspended to run

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[1] It is unclear from the record how the parole hold was lifted as the record does not contain a written notice to CCDC of the hold being lifted or no longer in effect, but on May 23, 2019, Killam's parole officer filed a request for secure placement, which the Board of Pardons and Parole approved May 30.

concurrently with any prior sentence. The District Court orally advised Killam that, because of his parole status, he was not entitled to credit for the time he spent in jail and then stated in the written sentencing order that Killam "is not entitled to credit for time served because he was on parole at the time of this offense."

¶8 Killam challenges the legality of his sentence on the criminal endangerment charge, asserting § 46-18-403(1), MCA, required the District Court to credit him with the 489 days he spent incarcerated on the criminal endangerment offense prior to sentencing, and the resulting sentence is an illegal sentence because the District Court failed to do so. Killam contends the final sentencing judgment also is in error because it lists two prior violent felonies.

¶9 At oral argument, Killam asserted this Court's application of § 46-18-403(1), MCA, in *State v. Kime*, 2002 MT 38, 308 Mont. 341, 43 P.3d 290, and *State v. Pavey*, 2010 MT 104, 356 Mont. 248, 231 P.3d 1104, violated the plain language of the statute and should be overruled. Killam further points to the enactment of § 46-18-201(9), MCA, in 2017, which provides that a sentencing court must give credit for pre-trial or pre-sentencing incarceration regardless of whether the defendant was also held in relation to another criminal matter. Killam maintains that § 46-18-201(9), MCA (2017), either solidifies the existing law or, alternatively, newly mandates that sentencing courts must provide credit for time served before trial or sentencing.

¶10 Prior to oral argument, the State contended Killam knew he would not receive credit for time served prior to sentencing in the District Court, pointing to the September 22, 2020 sentencing hearing, where the District Court specifically stated: "Because you were on

parole, you don't get credit for time served for this." The State asserted, based on *Kime* and *Pavey*, Killam is not entitled to credit for his incarceration prior to his sentencing on the criminal endangerment charge as we have held that § 46-18-403(1), MCA, does not apply in situations where a defendant would not have been released from custody had s/he been able to post bail as a result of being held on a sentence related to an earlier offense. The State argued Killam is not entitled to this credit because he was in DOC custody for a parole violation during his presentence incarceration for the criminal endangerment offense. At argument, the State continued to assert that Killam should not be given credit for pre-sentencing incarceration as his new criminal endangerment offense could not be considered a "bailable offense" because even if he had posted the bond set on the criminal endangerment matter, he would not have been released as he was in DOC custody related to his prior conviction.

¶11 The issue in this habeas corpus proceeding is restated as follows:

> *Whether Killam's sentence on his criminal endangerment charge is illegal due to the District Court's failure to credit him for each day of incarceration from the date of arrest through the date of the court's imposition of sentence.*

STANDARD OF REVIEW

¶12 Section 46-22-101(1), MCA, allows a person imprisoned or otherwise restrained from liberty to apply for a "writ of habeas corpus to inquire into the cause of the imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint." The very purpose of habeas corpus is to remedy illegal imprisonment, including remedying a sentence which exceeds statutory or constitutional limits. *Lott v. State*, 2006 MT 279, ¶ 20, 334 Mont. 270, 150 P.3d 337. Confinement beyond the expiration of a

sentence is an unlawful imprisonment or restraint, and habeas corpus actions are a proper means of challenging the proper crediting for time served. *Johnston v. Kirkegard*, No. OP 12-0741, 2013 Mont. LEXIS 74, *6-*7 (Feb. 5, 2013).

DISCUSSION

¶13 Section 46-18-403(1), MCA (2017), titled Credit for Incarceration Prior to Conviction, provides: "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, except that the time allowed as a credit may not exceed the term of the prison sentence rendered." By its plain language, § 46-18-403(1), MCA, leaves no discretion to the sentencing court to determine whether a defendant incarcerated on a bailable offense[2] receives credit for incarceration time prior to or after conviction.

¶14 Some version of this statute has existed since 1947. R.C.M. § 95-2215 (1947). However, as is apparent from this Court's case law regarding the statute's application, determining whether a defendant is "incarcerated on a bailable offense" has proven confusing and difficult for sentencing courts. Generally, courts do not have DOC or prior offense records available at the time of sentencing or are unsure as to how the Board or DOC may respond when a defendant is on probation or parole when arrested on new charges. Thus, courts have been inconsistent in how they determine a defendant is

[2] Section 46-9-102(1), MCA (2017), provides in pertinent part: "All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof [of the potentially death invoking offense] is evident or the presumption great that the person is guilty of the offense charged." All statutes referenced herein are the 2017 version.

"incarcerated on a bailable offense"—some relying on their understanding of other proceedings[3] and some relying only on the record of the case in which the defendant is being sentenced.[4] Likewise, we have sometimes affirmed and sometimes reversed determinations sentencing courts made in reliance on other legal proceedings as well as those made in reliance only on the record in the cause for which the defendant was being sentenced. *State v. Lodge*, No. 97-171, 1998 MT 253N, ¶¶ 33-34, 1998 Mont. LEXIS 237 (reversing trial court's denial of credit for time concurrently served on a felony offense to the misdemeanor offenses for which the court had given credit for time served as all the charges defendant faced were bailable offenses);[5] *State v. Price*, 2002 MT 150, ¶¶ 25-30, 310 Mont. 320, 50 P.3d 530 (affirming the district court's denial of credit for time served to both the felony and misdemeanor offenses relying on Hawaii and other jurisdictions' caselaw that credit for time served is properly granted only against the aggregate of the consecutive sentences); *Kime*, ¶ 16 (affirming trial court's determination that defendant was only entitled to credit for days from arrest to date of transfer to Montana State Prison to serve revoked sentence because Kime was no longer being held on a "bailable offense" even though bond was set and never posted on the offense for which he was sentenced); *State v. Erickson*, 2008 MT 50, ¶¶ 23-24, 341 Mont. 426, 177 P.3d 1043 (affirming trial

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[3] Such as *Kime* and *Pavey*.

[4] Such as *Erickson* and *Allison*.

[5] Lodge was a non-cite opinion, presumably based on well-settled law, which we note here not for precedential value but rather to illustrate the inconsistency courts have experienced in determining whether a defendant is "incarcerated on a bailable offense."

court's determination that defendant, sentenced for two separate offenses at one hearing, was entitled to 457 days on one sentence and 267 on the other where defendant bonded out between the offenses, his bond on the initial charge was not revoked on arrest for subsequent offense, and therefore his latter incarceration was not related to the offense on which he bonded out); *Pavey*, ¶¶ 21, 22, 25 (affirming trial court's denial of credit for time served where subsequent to revocation on a prior offense defendant was charged with new bailable offenses after he was revoked and placed at Montana State Prison to serve his revoked sentence); *State v. Allison*, 2008 MT 305, ¶¶ 12, 15, 346 Mont. 6, 192 P.3d 1135 (affirming district court's award of credit for time served where defendant was also serving a sentence in Oregon during the time defendant received credit); and *State v. Hornstein*, 2010 MT 75, ¶¶ 17-18, 356 Mont. 14, 229 P.3d 1206 (reversing district court's denial of credit for time served because district court's assumption that the Board would give defendant credit on his revoked sentence was unwarranted as discretionary actions of the Board with regard to parole time do not preempt the statutory requirement that credit be granted for time served which is directly related to a newly imposed sentence).

¶15 Given the variable application of § 46-18-403(1), MCA, to the circumstances of different offenders, it is understandable that defendants—and defendants' counsel—do not understand if or how they will be credited with time served when they have been arrested on an offense, bail has been set on the offense and not posted, yet it is determined the offender is not being held on the "bailable" offense—seemingly allowing courts to ignore

the clear documentation existing in the record on the offense or cause[6] for which they are being sentenced. Killam argues this confusion has been resolved by the Legislature with the enactment of § 46-18-201(9), MCA, by eliminating sentencing courts' need to determine whether a defendant is incarcerated on a "bailable offense." We agree.

¶16 Section 46-18-201(9), MCA, provides:

> When imposing a sentence under this section that includes incarceration in a detention facility or the state prison, . . . the court shall provide credit for the time served by the offender before trial or sentencing."

The language of § 46-18-201(9), MCA, is clear and unambiguous and makes the determination of credit for time served straight-forward. Title 46, Chapter 18, Part 2, MCA, addresses the "Form of Sentence." Section 46-18-201, MCA, sets forth "Sentences that may be imposed" and applies when a court is imposing an incarceration sentence on a defendant for an offense for which the defendant has been found guilty upon a verdict of guilty, a plea of guilty, or a nolo contender plea. Subsection (9) requires the court, when imposing a sentence on such an offense, to provide credit for time served by the defendant before the defendant's trial or sentencing. Under § 46-18-201(9), MCA, the determination is based solely on the record of the offense for which the defendant is being sentenced and does not require determination by the court as to whether defendant is also being held on another matter and, if so, which hold is primary.[7] Section 46-18-201(9), MCA, does not

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[6] As a practical matter if a defendant is charged with several offenses under the same cause, frequently bond is set in an aggregate amount applicable to each offense charged in the cause.

[7] For example, if a defendant is arrested and bond is set and then posted, if the defendant's bond is not revoked prior to sentencing, the defendant must receive credit for any days spent incarcerated from arrest to release with posting of the bond. Similarly, if a defendant is incarcerated on another

reference "incarcerat[ion] on a bailable offense" or separate revocation matters in relation to credit for time served,[8] and does not require the court to rely on its understanding of other proceedings to determine if the defendant would have otherwise been released from custody on a pre-trial basis had the defendant been able to post bond. Instead, § 46-18-201(9), MCA, provides that upon sentencing, the court *shall* provide credit for time served by the defendant before trial or sentencing *even if* the defendant would *not* have been released from custody pre-trial/sentencing had s/he been able to post bond. Under this statute, the court must determine the amount of time to credit based on the record relating to the offense for which the defendant is being sentenced on without considering other criminal proceedings or DOC incarcerations or holds.

¶17 Section 46-18-201(9), MCA, is consistent with legislative sentencing policy which provides courts discretion to determine length of sentence and whether sentences should be imposed concurrently or consecutively while simplifying the sentencing court's determination of the credit for time served, requiring it to only refer to the record of the case for which it is imposing sentence to determine the time which must be credited against the defendant's sentence. From that record, the court can determine whether a warrant for arrest was served, what bond, if any, was set or posted and then provide credit for each day

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matter or within another jurisdiction and an arrest warrant on a different charge is served on the defendant and bond set on the different charge is never posted, the defendant must receive credit for time served at sentencing for the different charge from service of the arrest warrant to sentencing, even if the defendant may also have been incarcerated on another matter.

[8] The prior version of § 46-18-201, MCA (1995), in subsection (4), provided that upon violation of a sentencing restriction or condition, the court was required to provide credit for jail or home arrest time already served.

the defendant was incarcerated on the offense for which he is being sentenced from the day of arrest to the warrant being quashed; from day of arrest to bond posting or own recognizance release ordered; or from the day of arrest to sentencing. The court continues to have discretion to impose sentences to run concurrently or consecutively and to determine the appropriate length of sentence within the statutory parameters of the offense for which the defendant is being sentenced.[9]

¶18 We now apply § 46-18-201(9), MCA, to Killam's case. Although in this case the State argues that Killam knew the District Court would not give him credit for time served on his felony criminal endangerment conviction, and while the District Court may have advised Killam he would not receive credit for time served as he was on parole when the new offense was committed, such an advisement does not override the mandate of § 46-18-201(9), MCA. Section 46-18-201(9), MCA, mandates sentencing courts to give credit for time served by the offender before sentencing and therefore credit must be given. "Pre-conviction jail time credit toward a sentence granted by statute is a 'matter of right.'" *Hornstein*, ¶ 12 (citing *Murphy v. State*, 181 Mont. 157, 160-61, 592 P.2d 935, 937 (1979) (other citations omitted)). This Court concludes Killam's sentence on his criminal endangerment offense from the Cascade County District Court did not correctly calculate Killam's time served as required by § 46-18-201(9), MCA, because he was denied credit for each day he was held on his criminal endangerment charge. While the Board may not

[9] With this straight-forward means of determining credit for time served, prosecutors continue to retain discretion on how to charge offenses and, like defendants, are free to argue bail amounts and conditions for each offense charged.

be mandated to award credit for time served, the District Court is, pursuant to the plain language of § 46-18-201(9), MCA. Here, the record clearly demonstrates Killam was arrested on May 22, 2019, and bond was set at $25,000. Killam never posted bond and remained incarcerated until sentencing. All of Killam's presentencing incarceration occurred after the effective date of § 46-18-201(9), MCA. Accordingly, Killam is entitled to credit for time served from the date of his arrest on May 22, 2019, to sentencing on September 22, 2020, or 489 days.[10]

¶19 We are not persuaded by the State's arguments to the contrary. We disagree with the State's position that Killam is not entitled to credit because "the State was holding Killam on a no-bail parole violation warrant." First, the State's position is not consistent with the clear directive of § 46-18-201(9), MCA. Second, even under § 46-18-403(1), MCA, the State's position is inconsistent with DOC's Location Term Listing, which notes only a parole hold of one day—from May 22, 2019 to May 23, 2019—and then notes "Pending Charges – Other Agency Hold" commencing May 23, 2019, the date Killam was arraigned on the felony criminal endangerment charge.[11]

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[10] This Court is cognizant of § 46-23-1024(6), MCA, which states that "[t]he provisions of Title 46, chapter 9, regarding release on bail of a person charged with a crime are not applicable to a parolee ordered to be held in a county detention center or other facility under this section." While this statute applies to Killam as a parolee, there is no legal authority for a DOC hold to vitiate any credit for time served while awaiting adjudication of new charges, pursuant to § 46-18-201(9), MCA.

[11] Although the Location Term Listing indicates a one day "Parole Hold," nothing in the record before us suggests DOC provided CCDC any written notification that the DOC hold had been released and, from this record, it is unknown if or how the DOC hold was lifted.

¶20 Finally, we point out Killam's other claim in his Petition—that the final, sentencing judgment is also in error regarding its listing of violent offenses—is without merit because Killam has 2004 convictions of aggravated assault and use of a weapon. His final judgment, however, is in error because Killam is entitled to an additional 489 days of credit for time served applied to his recent sentence. Section 46-22-101(1), MCA.

¶21 Having concluded that the offending portion of the sentence affects the sentence as a whole, we remand to the District Court for amendment of Killam's sentence to provide credit for time served between his arrest and sentencing. *State v. Heafner*, 2010 MT 87, ¶¶ 11-12, 356 Mont. 128, 231 P.3d 1087.

ORDER

¶22 IT IS ORDERED that Killam's Petition for Writ of Habeas Corpus is GRANTED in part and this matter is REMANDED to the Eighth Judicial District Court, Cascade County, to amend the October 5, 2020 Sentence, Order Exonerating Bond, and Order to Close File, to include credit for time served from May 22, 2019 through his sentencing on September 22, 2020, which appears to be 489 days.

The Clerk is directed to provide a copy of this Order to the Honorable John A. Kutzman, Eighth Judicial District Court; to Tina Henry, Clerk of District Court, Cascade County, under Cause No. CDC-19-331; to counsel of record; and to Brandon James Killam personally.

DATED this 3rd day of August, 2021.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JIM RICE