

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**DOUGLAS CALVIN,
RESPONDENT,**

v.

**MISSOURI DEPARTMENT OF CORRECTIONS,
APPELLANT.**

WD69157

January 13, 2009

Appeal From:
COLE COUNTY CIRCUIT COURT
THE HONORABLE RICHARD G. CALLAHAN, JUDGE

Appellate Judges:
Division One: Harold L. Lowenstein, P.J., Victor C. Howard and James M. Smart, Jr.,
JJ.

Attorneys:
Ronald S. Ribaud, Asst. Attorney General, Jefferson City, MO, **for appellant.**

Jeannie Willibey, Asst. Appellate Defender, Kansas City, MO, **for respondent.**

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS, WESTERN DISTRICT

DOUGLAS CALVIN, RESPONDENT

v.

MISSOURI DEPARTMENT OF CORRECTIONS, APPELLANT

WD69157

COLE COUNTY CIRCUIT COURT

Before Division One Judges: Harold L. Lowenstein, P.J., Victor C. Howard and James M. Smart, Jr., JJ.

Douglas Calvin pleaded guilty to criminal nonsupport in 1997 and was sentenced to five years in prison. Following a successful 120-day callback, he was placed on probation. In 1998, Calvin pleaded guilty to another charge of criminal nonsupport. The court suspended imposition of sentence and placed him on probation in that case. In 2002, the court revoked his probation, ordered execution of the earlier five-year sentence, and sentenced him to a consecutive two-year term in the 1998 case. In 2006, after finding that there was not a sufficient factual basis for Calvin's 1998 guilty plea, this court reversed the denial of his Rule 24.035 motion and vacated the 1998 felony conviction. At that time, Calvin was in the custody of the Missouri Department of Corrections on both the five-year and the two-year sentences. Four months later, the department notified Calvin that it had recalculated the maximum outdate on his 1996 sentence to be eighteen months later than previously calculated. This was based on the theory that 556 days Calvin had served on the "prison-portion" of his vacated 1998 sentence could be applied *only* to that sentence and *not* to the earlier five-year sentence, in that the 1998 sentence remained valid until the date of the mandate vacating it. Shortly thereafter, Calvin walked away from the halfway house he was assigned to and did not return. Calvin later filed a petition asking the court to declare that he had served every day of his five-year sentence in the 1996 case, that the 1998 sentence must be disregarded, and that the department has no legal authority to maintain custody or control over him or to arrest him on the 1996 sentence. The circuit court granted Calvin's request. The department appeals, claiming that the circuit court improperly credited Calvin with time served on an unrelated sentence that was later vacated.

AFFIRMED.

Division One holds: The Missouri Department of Corrections has no specific authority for its proposition that the trial court erred in ruling that Calvin must receive credit on his 1996 sentence for prison time served under the 1998 sentence, which was later vacated. None of the authorities cited supports the department's theory as to why the time Calvin has served cannot be applied to his 1996 sentence following the vacation of his 1998

sentence. The department may be correct that the 1998 conviction and sentence had *prima facie* validity before they were set aside and were, in that sense, *voidable*. However, common sense and reasonable justice would dictate that once the conviction and sentence were set aside, they must be treated, for maximum release date purposes, as having been *void*. When the 1998 conviction and sentence were vacated for lack of a factual basis, it was a declaration that the sentence was to be regarded as though it had never existed. The trial court was correct in rejecting the department's notion that its hands were tied. The law in no way prohibits the department from granting Calvin any credit on his 1996 sentence for the time actually served in confinement. The judgment is affirmed.

Opinion by: James M. Smart, Jr., Judge

Date: January 13, 2009

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